



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 18 October 2021

Language: English

Classification: Public

**Decision on Defence Applications for Leave to Appeal the Decision on Defence
Motions Alleging Defects in the Form of the Indictment**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 30 October 2020, further to the Pre-Trial Judge's decision confirming the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli, Rexhep Selimi ("Mr Selimi") and Jakup Krasniqi ("Mr Krasniqi" and collectively "Accused"),² the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed ("Confirmed Indictment"), with redactions as authorised by the Pre-Trial Judge.³
2. On 22 July 2021, the Pre-Trial Judge issued the "Decision on Defence Motions Alleging Defects in the Form of the Indictment" ("Impugned Decision").⁴
3. On 27 August 2021, the Defence for Mr Selimi ("Selimi Defence"), the Defence for Mr Krasniqi ("Krasniqi Defence") and the Defence for Mr Thaçi ("Thaçi Defence" and

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

³ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, strictly confidential and *ex parte* (F00045/A01), with confidential redacted (F00045/A02) and public redacted (F00045/A03) versions. A lesser confidential redacted version was submitted on 11 December 2021 (F00134). A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED) and public redacted (F00455/RED) versions.

⁴ KSC-BC-2020-06, F00413, Pre-Trial Judge, *Decision on Defence Motions Alleging Defects in the Form of the Indictment ("Impugned Decision")*, 22 July 2021, confidential. A public redacted version was issued the same day, F00413/RED.

collectively the “Defence”) requested leave to appeal the Impugned Decision (collectively “Defence Requests”).⁵

4. On 30 September 2021, the SPO responded to the Defence Requests.⁶

5. On 8 October 2021, the Krasniqi Defence and the Thaçi Defence replied to the SPO’s responses.⁷ The Selimi Defence did not file a reply.

6. On 11 October 2021, the Pre-Trial Judge varied the 7-day time limit prescribed by Rule 77(3) of the Rules for the issuance of the present decision with respect to the Selimi Defence.⁸

II. SUBMISSIONS

A. SELIMI DEFENCE

7. The Selimi Defence requests leave to appeal the Impugned Decision on the following seven issues:

⁵ KSC-BC-2020-06, F00445, Selimi Defence, *Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“Selimi Request”), 27 August 2021, public; F00446, Krasniqi Defence, *Krasniqi Defence Request for Certification to Appeal the “Decision on Defence Motions Alleging Defects in the Form of the Indictment”* (“Krasniqi Request”), 27 August 2021, public; F00447, Thaçi Defence, *Thaçi Defence Request for Certification to Appeal the “Decision on Defence Motions Alleging Defects in the Form of the Indictment”* (“Thaçi Request”), 27 August 2021, public.

⁶ KSC-BC-2020-06, F00500, Specialist Prosecutor, *Prosecution Response to Jakup Krasniqi’s Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“SPO Response to Krasniqi Request”), 30 September 2021, public; F00502, Specialist Prosecutor, *Prosecution Response to Rexhep Selimi’s Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“SPO Response to Selimi Request”), 30 September 2021, public; F00503, Specialist Prosecutor, *Prosecution Response to Hashim Thaçi’s Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“SPO Response to Thaçi Request”), 30 September 2021, public.

⁷ KSC-BC-2020-06, F00511, Krasniqi Defence, *Krasniqi Defence Reply to the Prosecution Response to Jakup Krasniqi’s Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* (“Krasniqi Reply”), 8 October 2021, public; F00512, Thaçi Defence, *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”* (“Thaçi Reply”), 8 October 2021, public.

⁸ KSC-BC-2020-06, F00517, Pre-Trial Judge, *Decision Varying the Time Limit for a Decision on the Selimi Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment*, 11 October 2021, public.

- (1) Whether the alleged common criminal purpose at the heart of an alleged [joint criminal enterprise (“JCE”)] includes the means alleged to have achieved that purpose (“First Selimi Issue”);
- (2) 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 Selimi Issue”);
- (3) 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 Selimi Issue”);
- (4) 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 Selimi Issue”);
- (5) 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 Selimi Issue”);
- (6) 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 Selimi Issue”); and
- (7) Whether the Rule 86(3)(b) Outline can be used to provide the Defence with additional underlying particulars (“Seventh Selimi Issue”).⁹

B. KRASNIQI DEFENCE

8. The Krasniqi Defence requests leave to appeal the Impugned Decision on the following 10 issues:

- (1) Whether the Impugned Decision erred in finding that the Indictment defined the JCE members and tools with sufficient specificity and that it is for the Trial Panel to determine with more specificity who was a JCE member, who was a tool and through which JCE member crimes committed by a tool are to be imputed (“First Krasniqi Issue”);
- (2) Whether the Impugned Decision erred in finding that the Indictment pleaded Mr. Krasniqi’s alleged personal participation in the crimes

⁹ Selimi Request, paras 1, 28.

identified in paragraphs 42 and 47 of the Indictment with sufficient specificity (“Second Krasniqi Issue”);

- (3) Whether the Impugned Decision erred in finding that it was impractical for the Indictment to give all specific particulars of Mr. Krasniqi’s alleged contribution in the JCE, that Mr. Krasniqi’s contribution is alleged with sufficient clarity and specificity and that the pleading of contribution is in line with other international tribunals (“Third Krasniqi Issue”);
- (4) Whether the Impugned Decision erred in finding that aiding and abetting was pleaded with sufficient specificity in the absence of any concrete pleading of acts of practical assistance or encouragement or any identification of the effect of the alleged acts and omissions on the perpetration of specific crimes (“Fourth Krasniqi Issue”);
- (5) Whether the Impugned Decision erred in finding that the alleged superior-subordinate relationship and alleged subordinates have been sufficiently identified or pleaded (“Fifth Krasniqi Issue”);
- (6) Whether the Impugned Decision erred in finding that the Indictment was not required to plead the material facts from which Mr. Krasniqi’s state of mind for command responsibility is to be inferred (“Sixth Krasniqi Issue”);
- (7) Whether the Impugned Decision erred in finding that the replacement of the word “illustrative” with the word “demonstrative” and the deletion of the word “including” from paragraph 57 of the Indictment sufficed to cure the ambiguity in relation to the pleading of persecution (“Seventh Krasniqi Issue”);
- (8) Whether the Impugned Decision erred in finding that no further specificity in the Indictment was needed in the light of the nature and scale of the charges, in circumstances where the SPO is able to provide further details (“Eighth Krasniqi Issue”);
- (9) Whether the Impugned Decision erred in finding that the evidentiary facts from which the *mens rea* for enforced disappearance may be inferred are contained in the Indictment (“Ninth Krasniqi Issue”); and
- (10) Whether the Impugned Decision erred in finding that the use of the words “including” or “included” in certain instances in the Indictment was not impermissibly open-ended but legitimately provided non-exhaustive examples of a previously defined category (“Tenth Krasniqi Issue”).¹⁰

¹⁰ Krasniqi Request, paras 2, 14; *see also* Krasniqi Reply, paras 2, 9.

C. THAÇI DEFENCE

9. The Thaçi Defence requests leave to appeal the Impugned Decision on the following 15 issues:

- (1) Whether the [Pre-Trial Judge] erred in finding that Article 241 of the Kosovo Criminal Procedure Code (“KCPC”) does not pertain to the crimes set forth in the Law, and therefore that [Mr Thaçi] has been informed of the legal name of the criminal offence with citation to the applicable legal provision (“First Thaçi Issue”);
- (2) Whether the [Pre-Trial Judge] erred in finding that Article 241, subparagraph 1.5 of the KCPC is inapplicable before the [Kosovo Specialist Chambers] 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”, and Article 241, subparagraph 1.5 of 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 (“Second Thaçi Issue”);
- (3) Whether the [Pre-Trial Judge] erred in finding that redactions of material facts in the Indictment do not render the Indictment defective given [Mr Thaçi’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 (“Third Thaçi Issue”);
- (4) Whether the [Pre-Trial Judge] erred in finding that paragraph 35 of the Indictment was not defective (save amendments ordered at paragraphs 78 and 79 of the Impugned Decision) in the absence of further particulars as to the identity of [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 (“Fourth Thaçi Issue”);
- (5) Whether the [Pre-Trial Judge] 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 [Mr Thaçi’s] contribution to the JCE and his contributions as an aidor and abettor, given the obligation on the prosecution to plead the material facts underpinning each of the charges and [Mr Thaçi’s] right to be adequately informed about his role in the alleged crimes (“Fifth Thaçi Issue”);
- (6) Whether the [Pre-Trial Judge] 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 [Mr Thaçi's] contribution to the JCE including dates, locations, identities of victims, and his role, given the obligation on the prosecution to plead the material facts underpinning each of the charges and [Mr Thaçi's] right to be adequately informed about his role in the alleged crimes ("Sixth Thaçi Issue");

- (7) Whether the [Pre-Trial Judge] 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 [Mr Thaçi] in paragraph 48 of the Indictment (*sic*), given the [Pre-Trial Judge] only considered his findings about paragraphs 41-47 of the Indictment in his determination of the matter ("Seventh Thaçi Issue");
- (8) Whether the [Pre-Trial Judge] erred in finding the criminal conduct of [Mr Thaçi'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 ("Eighth Thaçi Issue");
- (9) Whether the [Pre-Trial Judge] erred in finding that the Indictment was not defective in failing to plead the conduct of [Mr Thaçi] demonstrating his *mens rea* as a material fact with sufficient specificity, given the conflicting authority on this issue ("Ninth Thaçi Issue");
- (10) Whether the [Pre-Trial Judge] erred in finding that the Indictment was not defective in failing to plead the conduct of [Mr Thaçi] demonstrating how he failed to take reasonable and necessary measures to prevent the commission of crimes, and/or punish the perpetrators with sufficient specificity, given the conflicting authority on this issue ("Tenth Thaçi Issue");
- (11) Whether the [Pre-Trial Judge] 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, given the obligation on the prosecution to plead the material facts underpinning each of the charges ("Eleventh Thaçi Issue");
- (12) Whether the [Pre-Trial Judge] 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, given the obligation on the prosecution to plead the material facts underpinning each of the charges ("Twelfth Thaçi Issue");
- (13) Whether the [Pre-Trial Judge] erred in finding that the Indictment was not defective in the absence of further particulars as to the location of

the crimes of imprisonment/arbitrary detention; other inhumane acts/cruel treatment; murder; torture; and enforced disappearance crimes, given the obligation on the prosecution to plead the material facts underpinning each of the charges (“Thirteenth Thaçi Issue”);

- (14) Whether the [Pre-Trial Judge] 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, given the obligation on the prosecution to plead the material facts underpinning each of the charges (“Fourteenth Thaçi Issue”); and
- (15) Whether the [Pre-Trial Judge] erred in finding that the Indictment was not defective in the absence of further particulars about [Mr Thaçi’s] link to the charged crimes and the role he played, given the obligation on the prosecution to plead the material facts underpinning each of the charges and [Mr Thaçi’s] right to be adequately informed about his role in the alleged crimes (“Fifteenth Thaçi Issue”).¹¹

D. SPO

10. The SPO submits that all three Defence Requests should be rejected as they fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.¹²

III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in

¹¹ Thaçi Request, paras 10, 16; *see also* Thaçi Reply, paras 5-11.

¹² SPO Response to Selimi Request, paras 1, 13, 15, 17, 20-24; SPO Response to Krasniqi Request, paras 1, 14, 16-17, 19, 21-22, 24, 26-27, 29-30, 32-33, 35-37; SPO Response to Thaçi Request, paras 1, 15, 17, 19, 21, 23-24, 26, 28-29.

the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further 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 the Court of Appeals Panel may materially advance the proceedings.

IV. DISCUSSION

A. LEGAL TEST

13. A right to appeal arises only if the Pre-Trial Judge is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.¹³ The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.¹⁴

14. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

1. Whether the matter is an “appealable issue”;
2. Whether the issue at hand would significantly affect:
 - (1) The fair and expeditious conduct of the proceedings, or
 - (2) The outcome of the trial; and

¹³ KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9.

¹⁴ *Thaçi Decision on Leave to Appeal*, paras 9-17.

3. Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹⁵

B. ISSUES FOR WHICH LEAVE TO APPEAL IS GRANTED

1. **Third Selimi Issue, Second and Third Krasniqi Issues, Fifth and Sixth Thaçi Issues**

15. *Appealable issues.* The Pre-Trial Judge considers that the Third Selimi Issue, the Second and Third Krasniqi Issues and the Fifth and Sixth Thaçi Issues all arise from the Impugned Decision as they concern the following findings made by the Pre-Trial Judge with regard to the Accused's alleged contributions to the JCE or as aidors and abettors: (i) it is a question of law – and not one of specificity of the charges – whether the contribution to a JCE must be criminal per se or not;¹⁶ (ii) with certain caveats, the Accused's alleged personal participation in the crimes charged is pleaded with sufficient clarity and specificity;¹⁷ and (iii) with certain caveats, the Accused's alleged contributions to the common purpose are pleaded with sufficient clarity and specificity.¹⁸ The Pre-Trial Judge is satisfied that the five issues are not mere disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals Panel.

16. Having said that, the Pre-Trial Judge notes that under the Third Krasniqi Issue, the Krasniqi Defence raises one sub-matter which does not qualify as an appealable issue, namely whether “the pleading of [Mr Krasniqi's] contribution is in line with

¹⁵ *Thaçi* Decision on Leave to Appeal, para. 10.

¹⁶ Impugned Decision, para. 108.

¹⁷ Impugned Decision, para. 102; *see also* para. 111.

¹⁸ Impugned Decision, para. 107; *see also* para. 111.

other international tribunals”.¹⁹ Thus, the Pre-Trial Judge reformulates the Third Krasniqi Issue as follows:

Whether the Impugned Decision erred in finding that it was impractical for the Confirmed Indictment to give all specific particulars of Mr Krasniqi’s alleged contribution in the JCE and that Mr Krasniqi’s contribution is alleged with sufficient clarity and specificity.

17. For these reasons, the Pre-Trial Judge finds that the Third Selimi Issue, the Second Krasniqi Issue, the Third Krasniqi Issue – as reformulated – and the Fifth and Sixth Thaçi Issues constitute appealable “issues” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules.

18. *Fairness and expeditiousness.* The Pre-Trial Judge notes that all five issues concern the specificity and clarity of the charges contained in the Confirmed Indictment and, as such, they relate to the Accused’s right under Article 21(4)(a) of the Law to be informed promptly and in detail of the nature and cause of the charges against them. Further, the Pre-Trial Judge considers that it is important to resolve issues related to the specificity and clarity of the charges early on, in order for the Accused to have adequate time and facilities to prepare their defence, as provided in Article 21(4)(c) of the Law. Early resolution of the issues would also streamline the proceedings and advance the Accused’s right to be tried within a reasonable time, as provided in Article 21(4)(d) of the Law.²⁰

19. For these reasons, the Pre-Trial Judge finds that all five issues significantly affect the fair and expeditious conduct of the proceedings, as provide in Article 45(2) of the Law and Rule 77(2) of the Rules.

20. *Materially advance the proceedings.* The Pre-Trial Judge considers that matters regarding the specificity and clarity of an indictment may benefit from an

¹⁹ Krasniqi Request, para. 2(c).

²⁰ See also KSC-BC-2020-07, F00169, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions (“Gucati and Haradinaj Leave to Appeal Decision”)*, 1 April 2021, public, para. 27.

authoritative determination by the Court of Appeals Panel at the earliest opportunity as this would (a) provide legal certainty regarding the interpretation and application of the legal standards on specificity and clarity of the indictment, and (b) minimise delays and the diverting of resources at subsequent stages of the proceeding to address claims regarding inadequate notice of the charges.²¹ Accordingly, the Pre-Trial Judge finds that an immediate resolution by the Court of Appeals Panel of the five issues may materially advance the proceedings.

21. In light of the above, the Pre-Trial Judge grants leave to appeal the Third Selimi Issue, the Second Krasniqi Issue, the Third Krasniqi Issue – as reformulated – and the Fifth and Sixth Thaçi Issues.

2. Fourth Selimi Issue

22. *Appealable issue.* The Pre-Trial Judge considers that the Fourth Selimi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that the SPO was not required to set out specifically which crimes definitely fell within the common purpose and which not when pleading JCE III in the alternative to JCE I.²² The Pre-Trial Judge is satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

23. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue concerns the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that it significantly affects the fair and expeditious conduct of the proceedings.

²¹ *Gucati and Haradinaj* Leave to Appeal Decision, para. 32.

²² Impugned Decision, paras 64-67.

24. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

25. In light of the above, the Pre-Trial Judge grants leave to appeal the Fourth Selimi Issue.

3. Fifth Selimi Issue, First Krasniqi Issue and Fourth Thaçi Issue

26. *Appealable issues.* The Pre-Trial Judge considers that the Fifth Selimi Issue, the First Krasniqi Issue and the Fourth Thaçi Issue all arise from the Impugned Decision as they concern the following findings made by the Pre-Trial Judge with regard to the alleged JCE Members and Tools: (i) the SPO is allowed to plead that all or some of the individuals mentioned in paragraph 35 of the Confirmed Indictment were either JCE Members or Tools, if it pleads so in the alternative;²³ (ii) with certain changes ordered by the Pre-Trial Judge, the identity of the JCE Members and Tools is pleaded with sufficient specificity;²⁴ and (iii) it is a matter for determination at trial through which member of the JCE the crimes are to be imputed.²⁵ The Pre-Trial Judge is satisfied that the three issues are not mere disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals Panel.

27. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issues concern the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that the issues significantly affect the fair and expeditious conduct of the proceedings.

²³ Impugned Decision, para. 82.

²⁴ Impugned Decision, paras 80, 81, 84.

²⁵ Impugned Decision, para. 83.

28. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the three issues may materially advance the proceedings.

29. In light of the above, the Pre-Trial Judge grants leave to appeal the Fifth Selimi Issue, the First Krasniqi Issue and the Fourth Thaçi Issue.

4. Sixth Selimi Issue, Fifth and Sixth Krasniqi Issues, Ninth and Tenth Thaçi Issues

30. *Appealable issues.* The Pre-Trial Judge considers that the Sixth Selimi Issue, the Fifth and Sixth Krasniqi Issues and the Ninth and Tenth Thaçi Issues all arise from the Impugned Decision as they concern the following findings made by the Pre-Trial Judge with regard to the Accused's alleged superior responsibility: (i) the crimes allegedly committed by the subordinates are material facts to be pleaded in an indictment, but the corresponding modes of liability are not;²⁶ (ii) the facts supporting the alleged superior-subordinate relationship and the identity of the subordinates have been sufficiently pleaded in the Confirmed Indictment;²⁷ (iii) the SPO may plead either the state of mind itself, in which case the facts by which the state of mind is established are matters of evidence, or it may plead the facts from which the state of mind is to be inferred;²⁸ and (iv) it was sufficient for the SPO to plead that the Accused did not take any necessary and reasonable measures to prevent or punish the commission of the crimes and did not have to plead the specific particulars which allegedly demonstrate their failure to take such measures.²⁹ The Pre-Trial Judge is satisfied that the five issues are not mere disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals Panel.

²⁶ Impugned Decision, para. 119.

²⁷ Impugned Decision, paras 115-118.

²⁸ Impugned Decision, paras 36-38, 120-122.

²⁹ Impugned Decision, paras 38, 124-126.

31. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issues concern the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that the issues significantly affect the fair and expeditious conduct of the proceedings.

32. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the five issues may materially advance the proceedings.

33. In light of the above, the Pre-Trial Judge grants leave to appeal the Sixth Selimi Issue, the Fifth and Sixth Krasniqi Issues and the Ninth and Tenth Thaçi Issues.

5. Seventh Selimi Issue

34. *Appealable issue.* The Pre-Trial Judge considers that the Seventh Selimi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that it was impracticable for the SPO, due to the nature, scope and duration of the alleged crimes, to include in the Confirmed Indictment all specific particulars concerning the Accused's alleged contributions and that such underlying particulars and evidentiary details may be provided in the Rule 86(3)(b) Outline.³⁰

35. That said, the Pre-Trial Judge notes that the Seventh Selimi Issue as formulated by the Selimi Defence does not reflect in full the findings made by the Pre-Trial Judge. In order to properly reflect the Impugned Decision and the scope of the issue at hand, the Pre-Trial Judge reformulates the Seventh Selimi Issue as follows:

Whether the Rule 86(3)(b) Outline may be used, in this specific instance, to provide the Accused with additional underlying particulars when the factual allegations are provided in the Confirmed Indictment.

³⁰ Impugned Decision, paras 29, 104.

36. The Pre-Trial Judge is satisfied that the issue, as reformulated, constitutes a discrete topic for resolution by the Court of Appeals Panel and is not a mere disagreement with the Impugned Decision.

37. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue relates to the right of the Accused to be informed promptly and in detail of the nature and cause of the charges against them and to have adequate time and facilities to prepare their defence, as provided in Article 21(4)(a) and (c) of the Law. The Pre-Trial Judge is thus satisfied, for the same reasons as provided in paragraph 18 above, that the issue significantly affects the fair and expeditious conduct of the proceedings.

38. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

39. In light of the above, the Pre-Trial Judge grants leave to appeal the Seventh Selimi Issue, as reformulated.

6. Fourth Krasniqi Issue

40. *Appealable issue.* The Pre-Trial Judge considers that the Fourth Krasniqi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's findings that: (i) the mode of liability of aiding and abetting was pleaded with sufficient clarity and specificity in the Confirmed Indictment; and (ii) it is a matter for determination at trial whether the alleged acts and omissions had a substantial effect on the perpetration of the crimes charged.³¹

41. That said, the Pre-Trial Judge observes that the Krasniqi Defence has mischaracterised in part the Impugned Decision in stating that the Pre-Trial Judge found that aiding and abetting was pleaded with sufficient specificity in the absence

³¹ Impugned Decision, paras 111-112.

of any concrete pleading of acts of practical assistance or encouragement.³² The Pre-Trial Judge highlighted in the Impugned Decision that the Confirmed Indictment pleaded adding and abetting through the same acts and omissions set out under JCE liability and recalled that he found these acts and omissions, with certain caveats, to be sufficiently specific.³³ In order to properly reflect the Pre-Trial Judge's determination and the scope of the issue at hand, the Pre-Trial Judge reformulates the Fourth Krasniqi Issue as follows:

Whether the Impugned Decision erred in finding that aiding and abetting was pleaded with sufficient specificity in the absence of any identification of the effect of the alleged acts and omissions on the perpetration of specific crimes.

42. The Pre-Trial Judge is satisfied that the issue, as reformulated, is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

43. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue concerns the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that it significantly affects the fair and expeditious conduct of the proceedings.

44. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

45. In light of the above, the Pre-Trial Judge grants leave to appeal the Fourth Krasniqi Issue, as reformulated.

³² Krasniqi Request, para. 2(d).

³³ Impugned Decision, para. 111.

7. Seventh Krasniqi Issue

46. *Appealable issue.* The Pre-Trial Judge considers that the Seventh Krasniqi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that, when read in conjunction with paragraphs 59-171 of the Confirmed Indictment and in the context of the whole Confirmed Indictment, the charge of persecution was pleaded with sufficient clarity and specificity, save for certain caveats.³⁴ The Pre-Trial Judge is satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

47. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue concerns the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that it significantly affects the fair and expeditious conduct of the proceedings.

48. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

49. In light of the above, the Pre-Trial Judge grants leave to appeal the Seventh Krasniqi Issue.

8. Ninth Krasniqi Issue

50. *Appealable issue.* The Pre-Trial Judge considers that the Ninth Krasniqi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that the evidentiary facts from which the requisite *mens rea* for the crime of enforced disappearance may be deduced are contained in the Confirmed Indictment.³⁵ The

³⁴ Impugned Decision, paras 139-144.

³⁵ Impugned Decision, para. 172.

Pre-Trial Judge is satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

51. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue concerns the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that it significantly affects the fair and expeditious conduct of the proceedings.

52. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

53. In light of the above, the Pre-Trial Judge grants leave to appeal the Ninth Krasniqi Issue.

9. Tenth Krasniqi Issue

54. *Appealable issue.* The Pre-Trial Judge considers that the Tenth Krasniqi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that the use of the words "including" and "included" is permitted when they are not employed as open-ended formulations, but to introduce examples within a defined category and to provide more specificity.³⁶ The Pre-Trial Judge is satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

55. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue concerns the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that it significantly affects the fair and expeditious conduct of the proceedings.

³⁶ Impugned Decision, paras 39, 79, 105, 122, 126, 134, 136, 161-163, 166, and footnotes 137, 158, 164.

56. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

57. In light of the above, the Pre-Trial Judge grants leave to appeal the Tenth Krasniqi Issue.

10. Third Thaçi Issue

58. *Appealable issue.* The Pre-Trial Judge considers that the Third Thaçi Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that the redactions applied to the Confirmed Indictment, in line with judicially granted protective measures, did not affect the specificity of the charges as they would be lifted in due course.³⁷ The Pre-Trial Judge is satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel.

59. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issue relates to the right of the Accused to be informed promptly and in detail of the nature and cause of the charges against them and to have adequate time and facilities to prepare their defence, as provided in Article 21(4)(a) and (c) of the Law. Thus, the Pre-Trial Judge is satisfied, for the same reasons as provided in paragraph 18 above, that the issue significantly affects the fair and expeditious conduct of the proceedings.

60. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the issue may materially advance the proceedings.

61. In light of the above, the Pre-Trial Judge grants leave to appeal the Third Thaçi Issue.

³⁷ Impugned Decision, footnotes 163, 165, 167, 218, 250, 269, 277-281, 285-286.

11. Eleventh to Fifteenth Thaçi Issues

62. *Appealable issues.* The Pre-Trial Judge considers that the Eleventh to Fifteenth Thaçi Issues all arise from the Impugned Decision as they concern the Pre-Trial Judge's findings that the charges of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, murder, torture and enforced disappearance of persons are not defective as concerns the identity of the physical perpetrators, the identity of the victims, the location of commission of the alleged crimes, the dates and duration of the alleged crimes and the Accused's link to the crimes and role allegedly played.³⁸ The Pre-Trial Judge is satisfied that the five issues are not mere disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals Panel.

63. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the issues concern the specificity and clarity of the charges and finds, for the same reasons as provided in paragraph 18 above, that the issues significantly affect the fair and expeditious conduct of the proceedings.

64. *Materially advance the proceedings.* The Pre-Trial Judge considers, for the same reasons as provided in paragraph 20 above, that an immediate resolution by the Court of Appeals Panel of the five issues may materially advance the proceedings.

65. In light of the above, the Pre-Trial Judge grants leave to appeal the Eleventh to Fifteenth Thaçi Issues.

³⁸ Impugned Decision, paras 139, 144-145, 150-167, 170-175.

C. ISSUES FOR WHICH LEAVE TO APPEAL IS NOT GRANTED

1. First and Second Selimi Issues

66. The Pre-Trial Judge notes that the First Selimi Issue concerns the legal definition of the common purpose, namely whether the common purpose must amount to or involve the commission of a crime, or it is sufficient if it contemplates the commission of a crime as a means to achieve its objective. In the Impugned Decision, the Pre-Trial Judge did not rule on this question. Rather, he held that this was a question of law which did not relate to the specificity or clarity of the charges and which the Defence was free to litigate at trial, if it so wished.³⁹ Thus, the First Selimi Issue does not arise from the Impugned Decision.

67. Turning to the Second Selimi Issue, the Pre-Trial Judge is satisfied that the issue arises from the Impugned Decision as it contests the Pre-Trial Judge's finding that "the legal definition of the common purpose [...] is a question of law [which] does not relate to the specificity or clarity of the charges".⁴⁰ The Pre-Trial Judge is also satisfied that the issue is not a mere disagreement with the Impugned Decision, but a discrete topic for resolution by the Court of Appeals Panel. Accordingly, the Pre-Trial Judge finds that the Second Selimi Issue is an appealable "issue" within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules.

68. However, the Pre-Trial Judge is not persuaded that an immediate resolution by the Court of Appeals Panel would materially advance the proceedings. A response by the Court of Appeals Panel that the legal definition of the common purpose is (not) a question of law will not lead to more factual specificity or legal clarity in the charges, as the common purpose, as defined by the SPO, is already pleaded in the Confirmed Indictment. As already held in the Impugned Decision, the Defence will have an opportunity to make submissions on the definition of the common purpose at trial.⁴¹

³⁹ Impugned Decision, para. 62.

⁴⁰ Impugned Decision, para. 62.

⁴¹ Impugned Decision, para. 62.

The Trial Panel, having heard the Parties, will adopt its own interpretation of the law, which the Parties will then have an opportunity to challenge on appeal, if they so wish.

69. For these reasons, the Pre-Trial Judge finds that: (i) the First Selimi Issue does not constitute an appealable “issue” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules; and (ii) an immediate resolution of the Second Selimi Issue by the Court of Appeals Panel would not materially advance the proceedings. Accordingly, the Pre-Trial Judge rejects leave to appeal both issues.

2. Eighth Krasniqi Issue

70. The Pre-Trial Judge observes that the Eighth Krasniqi Issue is framed in very broad terms, essentially claiming that the Pre-Trial Judge committed an error in finding that no further specificity was needed in the Confirmed Indictment. The Pre-Trial Judge recalls that it is generally insufficient to argue that the entirety of the Pre-Trial Judge’s reasoning is erroneous.⁴² The Pre-Trial Judge considers that the Krasniqi Defence has failed to articulate a discrete issue.

71. For these reasons, the Pre-Trial Judge finds that the Eighth Krasniqi Issue does not constitute an appealable “issue” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules and rejects leave to appeal this issue.

3. First and Second Thaçi Issues

72. Both the First and Second Thaçi Issues relate to the applicability of the KCPC before the Specialist Chambers. Both issues arise from the Impugned Decision as they contest the Pre-Trial Judge’s finding that the KCPC is not applicable before the Specialist Chambers.⁴³ The Pre-Trial Judge is also satisfied that the issues are not mere

⁴² *Thaçi* Decision on Leave to Appeal, para. 11.

⁴³ Impugned Decision, paras 54-56.

disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals Panel. Accordingly, the Pre-Trial Judge finds that the two issues are appealable “issues” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules.

73. However, the Pre-Trial Judge notes that the Court of Appeals Panel has pronounced itself on the matter, albeit in different proceedings, and has confirmed that provisions of Kosovo law which have not been expressly incorporated into the legal framework of the Specialist Chambers are not binding before the Specialist Chambers.⁴⁴ Thus, resolution by the Court of Appeals Panel of the First and Second *Thaçi* Issues is not necessary.

74. For these reasons, the Pre-Trial Judge finds that an immediate resolution of the First and Second *Thaçi* Issues by the Court of Appeals Panel would not materially advance the proceedings. Accordingly, the Pre-Trial Judge rejects leave to appeal both issues.

4. Seventh *Thaçi* Issue

75. The Pre-Trial Judge notes that, in considering the Defence’s arguments on the pleading of aiding and abetting, he observed that the acts and omissions forming the basis of aiding and abetting were the same as those pleaded under JCE liability.⁴⁵ The Pre-Trial Judge then went on to recall that he found “these acts or conduct” – meaning those pleaded under JCE liability – to be sufficiently specific, save for certain caveats.⁴⁶ It is clear from the text of the Impugned Decision that the Pre-Trial Judge considered and referred to *all* acts or conduct pleaded under JCE liability. The Pre-Trial Judge

⁴⁴ KSC-BC-2018-01, IA001/F00005, Court of Appeals Panel, *Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”*, 1 October 2021, public, paras 16-17, 21-22.

⁴⁵ Impugned Decision, para. 111.

⁴⁶ Impugned Decision, para. 111.

considers that the Seventh Thaçi Issue is a mere disagreement with the Impugned Decision.

76. For these reasons, the Pre-Trial Judge finds that the Seventh Thaçi Issue is not an appealable “issue” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules and rejects leave to appeal this issue.

5. Eighth Thaçi Issue

77. The Pre-Trial Judge notes that, in considering the Defence’s arguments on the pleading of superior responsibility, he noted that “the section of the Confirmed Indictment on superior responsibility must be read together with the part setting out the crimes charged”.⁴⁷ The part on the crimes charged to which the Pre-Trial Judge referred is clearly identifiable in the Confirmed Indictment and need not be further identified by reference to specific paragraphs. The Pre-Trial Judge considers that the Eighth Thaçi Issue is a mere disagreement with the Impugned Decision.

78. For these reasons, the Pre-Trial Judge finds that the Eighth Thaçi Issue is not an appealable “issue” within the meaning of Article 45(2) of the Law and Rule 77(2) of the Rules and rejects leave to appeal this issue.

⁴⁷ Impugned Decision, para. 119.

V. DISPOSITION

79. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** leave to appeal:
 - i. the Third to Sixth Selimi Issues, as set out in paragraph 7 above, and the Seventh Selimi Issue, as reformulated in paragraph 35 above;
 - ii. the First, Second, Fifth, Sixth, Seventh, Ninth and Tenth Krasniqi Issues, as set out in paragraph 8 above, and the Third and Fourth Krasniqi Issues, as reformulated respectively in paragraphs 16 and 41 above; and
 - iii. the Third to Sixth Thaçi Issues, and Ninth to Fifteenth Thaçi Issues, as set out in paragraph 9 above; and
- b. the **REJECTS** leave to appeal for the First and Second Selimi Issues, the Eighth Krasniqi Issue and the First, Second, Seventh and Eighth Thaçi Issues.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 18 October 2021

At The Hague, the Netherlands.