

**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:** 10 February 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Thaçi Defence Request for Certification to Appeal the  
“Decision Concerning Submission of Corrected Indictment and Request to  
Amend Pursuant to Rule 90(1)(b)”**

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## I. INTRODUCTION

1. On 26 October 2020, the Pre-Trial Judge (“PTJ”) confirmed the indictment<sup>1</sup> against Mr Hashim Thaçi (“Accused”) and his co-accused.<sup>2</sup> In a decision dated 22 July 2021, the PTJ ordered the SPO to file a corrected version of the Indictment.<sup>3</sup> On 3 September 2021, the SPO filed a corrected indictment as ordered and requested leave pursuant to Article 39(8) of the Law<sup>4</sup> and Rule 90(1)(b) of the Rules<sup>5</sup> to amend the Indictment to include three categories of allegations (collectively known as “Proposed Amendments”):<sup>6</sup>

- (i) two detention sites at [REDACTED] municipality at or in connection with which KLA members committed acts of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance (“First Category”);<sup>7</sup>
- (ii) two incidents of persecution and murder committed in connection with the [REDACTED] detention site and an amended timeframe for an incident at that site (“Second Category”);<sup>8</sup>

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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/F00026/CONF/RED, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 20 October 2020 (“Confirmation Decision”).

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

<sup>4</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“the Law”).

<sup>5</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

<sup>6</sup> KSC-BC-2020-06/F00455/CONF/RED, Confidential Redacted Version of ‘Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021 with confidential redacted Annexes 1-3, confidential Annex 4, and confidential redacted Annex 5, 8 September 2021 (“Submission of Corrected Indictment and Request to Amend”).

<sup>7</sup> Submission of Corrected Indictment and Request to Amend, para. 1.a. This relates to paragraphs 68, 105 and 157 of Annex 2 to the Submission of Corrected Indictment and Request to Amend.

<sup>8</sup> Submission of Corrected Indictment and Request to Amend, para. 1.b. This relates to paragraphs 93 and 174 of Annex 2 to the Submission of Corrected Indictment and Request to Amend.

- (iii) two incidents of the accused's personal participation in the crimes charged ("Third Category").<sup>9</sup>

2. On 23 December 2021, the PTJ granted the SPO's motion to amend the Indictment in relation to the Proposed Amendments.<sup>10</sup> More specifically, the PTJ found that the Third Category of amendments were not new charges and therefore that Rule 86(3) and (4) does not apply. However, he found that the First and Second Categories of amendments were new charges and therefore must be assessed "against the requisite evidentiary threshold of 'well grounded suspicion', as per Rule 86(4) of the Rules, in light of the evidence submitted, as per Rule 86(3) of the Rules."<sup>11</sup> The PTJ ordered the SPO to provide, if possible, a lesser redacted Indictment, Rule 86(3)(b) Outlines and Request by 17 January 2022. He further requested that the Defence, should it so wish, file submissions in response to the Request, on the supporting material, relating to the First and Second Categories of amendments by 31 January 2022. This should be on whether there was a 'well-grounded suspicion' in relation to the First and Second Categories of amendments.<sup>12</sup>

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

## II. APPLICABLE LAW

4. To appeal the Impugned Decision, certification is required.<sup>13</sup>

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<sup>9</sup> Submission of Corrected Indictment and Request to Amend, para. 1.c. This relates to paragraphs 42-43 and 141 of Annex 2 to the Submission of Corrected Indictment and Request to Amend.

<sup>10</sup> KSC-BC-2020-06/F00635/CONF, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021 ("Impugned Decision").

<sup>11</sup> Impugned Decision, para. 28.

<sup>12</sup> Impugned Decision, para. 53, *see also* paras. 47, 48.

<sup>13</sup> Rule 77(1), Rules; Article 45(2), Law.

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.<sup>14</sup>

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

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<sup>14</sup> KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021 (“Thaçi Decision on Leave to Appeal Defects Decision”), para. 14; 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.

examination, and not merely a question over which there is disagreement or conflicting opinion.”<sup>15</sup> The applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.”<sup>16</sup>

9. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.<sup>17</sup>

### III. THE PROPOSED ISSUES FOR APPEAL

10. Certification is sought to appeal the following four 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 granting leave to amend the Indictment in respect of proposed new paragraph 42 and amended paragraph 141 of Annex 2 of the Submission of Corrected Indictment and Request to Amend (part of the Third Category of allegations) before the Accused has received a lesser redacted version of the Indictment and Outlines, having found that the Defence was able to provide “meaningful challenges to the Proposed Amendments”.<sup>18</sup>

**Issue 2:** Whether the PTJ erred in finding that the Third Category of amendments did not amount to new charges within the meaning of Rule 90(2) of the Rules.<sup>19</sup>

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<sup>15</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

<sup>16</sup> *Ibid.*

<sup>17</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Decision on the Thaçi Defence Application for Leave to Appeal, para. 17.

<sup>18</sup> Impugned Decision, paras. 53a, 47.

<sup>19</sup> Impugned Decision, paras. 26, 28.

**Issue 3:** Whether the PTJ erred in finding that the Proposed Amendments were not prejudicial to or inconsistent with the rights of the Accused, in particular to be tried in a reasonable time.<sup>20</sup>

**Issue 4:** Whether the PTJ erred in finding that there was no lack of diligence on the part of the SPO in bringing the Proposed Amendments and thus that the Proposed Amendments were not prejudicial or inconsistent with the rights of the Accused.<sup>21</sup>

#### **IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET**

##### **A. THE ISSUES ARE APPEALABLE ISSUES**

11. The four identified Issues are appealable as they arise from the Impugned Decision and they contest the following specific findings made by the PTJ: i) granting the SPO leave to amend the Confirmed Indictment and Outlines in relation to new paragraph 42 and amended paragraph 141 of Annex 2, Submission of Corrected Indictment and Request to Amend;<sup>22</sup> ii) the Third Category of amendments are not 'new charges';<sup>23</sup> iii) the Proposed Amendments are not prejudicial to or inconsistent with the rights of the Accused, in particular to be tried in a reasonable time;<sup>24</sup> iv) the SPO did not lack diligence in bringing the Proposed Amendments and thus they are not prejudicial to or inconsistent with the rights of the Accused.<sup>25</sup> These are not mere disagreements with the Impugned Decision, nor do they amount to abstract questions or hypothetical concerns; rather, they identify discrete topics, the resolution of which

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<sup>20</sup> Impugned Decision, paras. 35-37.

<sup>21</sup> Impugned Decision, paras. 34, 37.

<sup>22</sup> Impugned Decision, paras. 47, 53a.

<sup>23</sup> Impugned Decision, paras. 26, 28.

<sup>24</sup> Impugned Decision, paras. 35-37.

<sup>25</sup> Impugned Decision, paras. 34, 37.

is essential for the determination of the matters arising in the judicial cause under examination.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT I) 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.<sup>26</sup> Additionally, Issue 2 satisfies the second criteria as it would affect the outcome of the trial.

13. Issue 1 significantly affects the Accused’s fair trial right guaranteed in Article 39(8) of the Law and Rule 90(1)(b) of the Rules to be ‘heard’ *before* the PTJ grants leave for an Indictment to be amended. The Accused could not and was not “heard” in respect of these proposed amendments because he could not read them to make meaningful submissions: new paragraph 42 of the Indictment is entirely redacted and paragraph 141 is partially, but significantly, redacted. Issue 1 also significantly affects his fair trial 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 him. This Issue goes to the heart of a fair trial, namely the ability of the Accused to know and understand the case against him, prepare a defence and to participate in his trial.<sup>27</sup>

14. In respect of Issue 2, if the allegations in the Third Category of amendments are new charges (and the PTJ erred in finding otherwise) this would significantly affect

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<sup>26</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

<sup>27</sup> Gucati and Haradinaj Decision on Leave to Appeal, 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, para. 7.

the outcome of the trial, as it would create separate and new potential bases for conviction.

15. Issues 3 and 4 concern the Accused's fair trial right under Article 21(4)(d) to be tried within a reasonable time. This is a guarantee which significantly affects, and is central to, the fair and expeditious conduct of proceedings.<sup>28</sup> Granting the Proposed Amendments would significantly affect the fair and expeditious conduct of the trial because, as a result of granting the Proposed Amendments, there is a real likelihood of delay to the start of the trial. In respect of the First and Second Categories, this is because the PTJ has found them to be 'new charges' and thus require a new confirmation process, rearraignment and potential preliminary motion litigation. In respect of all three categories, additional time will be needed to investigate, thus causing undue delay.

16. For these reasons these four Issues would thus significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.

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

17. A determination on the Issues by the Court of Appeals Panel may materially advance proceedings, because it would provide legal certainty as to the nature and detail of the charges faced by the Accused; and ensure that the right of the Accused to be tried in a reasonable time has not been violated to date. Such a determination now, at the pre-trial phase, could minimise subsequent delays at trial and on appeal to address claims regarding inadequate notice and undue delay. Therefore, an

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<sup>28</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 27.



immediate resolution by the Appeals Panel in respect of the four Issues may materially advance the proceedings.<sup>29</sup>

18. As previously ruled by the PTJ, it is important to resolve issues related to the adequacy and clarity of the charges early on to enable the Accused to have adequate time and facilities to prepare their defence as guaranteed in Article 21(4)(c) of the Law. Early resolution would also streamline the proceedings in furtherance of the Accused's right to be tried in a reasonable time under Article 21(4)(d) of the Law.<sup>30</sup>

## V. RELIEF SOUGHT

19. 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: 2,221 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**

Thursday, 10 February 2022

At Tampa, United States

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<sup>29</sup> See, Gucati and Haradinaj Decision on Leave to Appeal, para. 32; KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021, para. 18.

<sup>30</sup>*Ibid*, para. 18.