In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Veseli Defence Appeal Against Decision Concerning Submissions of Corrected Indictment and Request to Amend

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") hereby files this appeal against the Pre-Trial Judge's decision concerning SPO submissions on the corrected indictment and request to amend the indictment ("Impugned Decision").[1]

2. Pursuant to the Pre-Trial Judge's Decision to grant leave to appeal the Impugned Decision,[2] the Court of Appeals Panel is seized of the following issues:

> Whether the Pre-Trial Judge erred by finding that the redacted allegation of personal participation of the Accused, referred to in paragraph 42 of the Amended Indictment does not carry an additional risk of conviction ("Fourth Veseli Issue").
>
> Whether prosecutorial "diligence" must be assessed against the conduct of the SPO, as opposed to the stage of the proceedings; whether the proposed amendments are inconsistent with the right to be tried within a reasonable time; whether the scope of the amendments infringe the right to have adequate time to prepare the defence; and taken together, whether the amendments are prejudicial to, and inconsistent with the rights of the Accused (Sixth Veseli Issue").

II. PROCEDURAL BACKGROUND

3. On 3 September 2021, the Specialist Prosecutor's Office ("SPO") filed its "Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)".[3]

4. On 17 December 2021, following a request by the SPO, the Pre-Trial Judge delayed the disclosure of the identities of certain witnesses related to the

[1] F00635, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021.
[2] F00682, Decision on Defence Applications for Leave to Appeal the Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 8 February 2022.
[3] F00455, Specialist Prosecutor, Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 3 September 2021.

proposed amendments, until 14 days after an ultimate resolution of the Request.[4]

5. On 23 December 2021, the Pre-Trial Judge issued the Impugned Decision, in which he granted to the SPO leave to amend the Confirmed Indictment in relation to the Third Category of the Proposed Amendments.[5]

6. On 17 January 2022, the Defence requested leave to appeal the Impugned Decision.[6]

7. On 8 February 2022, the Pre-Trial Judge granted the Defence leave to appeal its Fourth and Sixth Issues.[7]

III. STANDARD OF REVIEW

8. Article 46(1), which has previously been applied *mutatis mutandis* to interlocutory appeals[8] provides for appellate review in the following circumstances:

a. An error of law that invalidates the decision;

b. An error of fact that occasions a miscarriage of justice.

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[4] F00630, Decision on Specialist Prosecutor's Request for Temporary Extension of Delayed Disclosure of Identity, 17 December 2021.
[5] With regard to the First and Second Category – which were considered as new charges – the Pre-Trial Judge requested from the Defence submissions on the supporting material by 31 January 2022 which were filed on that date – *see* F00666, Thaçi Defence Motion on Whether There is a Well Grounded Suspicion in Relation to the SPO's Request to Amend the Indictment, 31 January 2022; F00668, Veseli Defence Submissions on the Supporting Material Submitted by the SPO in Respect of the First Category and Second Category of Amendments to the Indictment, 31 January 2022; F00669, Krasniqi Defence Submissions Pursuant to Decision KSC-BC-2020-06/F00635, 31 January 2022.
[6] F00645, Thaçi Defence Request for Certification to Appeal the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)", 17 January 2022.
[7] F00682, Decision on Defence Applications for Leave to Appeal the Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 8 February 2022.
[8] KSC-BC-2020-07/IA001/F00007, Appeals Panel, Decision on Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("Gucati and Haradinaj Appeals Decision on Defects"), para. 8; KSC-BC-2020-07/IA001/F00005, Appeals Panel, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("Gucati Appeals Decision"), para. 10.

9. In relation to errors of law, Article 46(4) provides that where the Court of Appeals shall articulate the correct legal standard and apply it to the issue at hand to either sustain or overturn the lower court's decision; or it may remand it to the lower court for resolution under the correct legal standard, where it is available and could more efficiently address the matter.

10. Pursuant to Article 46(5), an error of fact exists where "the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous".

11. Further, the Defence recalls the Court of Appeals Panel ruling that "as part of their obligation to ensure the fairness of the proceedings pursuant to Article 31 of the Constitution, a Panel, including a Panel consisting of a Pre-Trial Judge, must indicate with sufficient clarity the grounds upon which decisions taken are based".[9]

IV. SUBMISSIONS

A. Fourth Veseli Issue

12. Preliminarily, the Defence notes that the allegation referred to in paragraph 42 of the Amended Indictment, as well as the supporting material in support thereof, remain entirely redacted. The Defence was therefore barred, and continues to be so, from providing any meaningful submission concerning the merits of the Third Category of the Proposed Amendments. While the Defence will refrain from advancing arguments relating to issues not certified by the Pre-Trial Judge, it nevertheless urges the Court of Appeals, in the interest of justice, to pay special attention in exercising its supervisory power towards proceedings of lower courts which are *de facto* conducted on an *ex parte* basis.

[9] KSC-CC-PR-2017-01/F00004, Judgement on the Referral ofthe Rules, 26 April 2017, para. 143; 115. See also, Kosovo Constitutional Court, Cases no. KI99/14 and KI100/14, Judgment, 8 July 2014, para. 86.

The Fourth Issue stems from paragraph 26 of the Impugned Decision, the Pre-Trial Judge found that:

> While the two new incidents are factually distinct from those already pleaded under this heading, they do not amount to new charges. The two additional incidents are material facts underpinning the allegation that the Accused personally participated "in the intimidation, interrogation, mistreatment and detention of Opponents." However, as the intimidation and mistreatment of Opponents as a form of participation in the JCE has already been pleaded in the Confirmed Indictment…the Third Category does not allege a new type of participation in the alleged JCE…[and] does not amount to a new, independent basis for conviction.

13. The Pre-Trial Judge arrived at this conclusion without considering the specificity of incidents alleged, except to the extent that they involved in generic terms the "intimidation, interrogation, mistreatment, or detention of Opponents."[10] This was insufficient. The consequence of this reasoning – should it be upheld - is that the SPO could in principle add countless new alleged instances of personal participation of the Accused, provided that the alleged conduct fits the generic description, and never find that any new "charges" had been added.

14. The critical question for determining whether the Third Category amendments constitute new charges is not whether the new incidents could be subsumed under the existing categories of participation in the JCE, namely "intimidation, interrogation, mistreatment or detention," but whether they could, in and of themselves, support the conclusion that the Accused actually participated in the alleged JCE, thus presenting a new, independent risk of conviction as a JCE I participant. If the answer to this question is affirmative, then the incidents constitute new charges. This issue is not addressed in the Pre-Trial Judge's decision.

[10] Impugned Decision, para. 26.

15. The Pre-Trial Judge supports its own reading of what constitutes a new charge with an uncritical reading of three authorities from the ICTY and ICTR.[11] In *Tolimir*, the Accused was charged for participating, *inter alia*, in a JCE "to forcibly transfer and deport the populations of Srebrenica and Zepa."[12] ICTY Trial Chamber II allowed the OTP to amend the indictment to add an additional detail regarding how the Accused had "made life unbearable" for the inhabitants, one of the means by which he was alleged to have participated in the JCE. There, the addition of the words "he participated in VRS efforts to restrict humanitarian aid supplies and UNPROFOR supplies and leave" was found to give greater precision to the allegation that the Accused "made life unbearable for the inhabitants of the Zepa enclave."[13] This allegation was already particularised; the amendment merely gave it greater precision. Likewise, the addition of the words "and Zepa" in paragraph 60(d)(ii) was not considered as a new charge because it did "not alter the overarching allegation in paragraph 60(d) that the Accused controlled the movement of the Muslim population out of the enclaves."

16. By contrast, the more general allegation in *Thaci* is that the Accused participated, simply, in unlawful intimidation, interrogation, mistreatment or detention of Opponents. Those allegations are not particularised, and are thus more akin to categories of crimes, instantiated by (*inter alia*) the new incidents that the SPO seeks to add.

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[11] Impugned Decision, fn. 72: ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009, para. 41; *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 26; ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 31.

[12] ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-I, Amended Indictment, 12 June 2007, para. 60.

[13] ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009, para. 41.

17. In *Muvunyi*, the indictment was already structured in the form of a (i) generic statement of facts; and (ii) specific allegations.[14] The Appeals Chamber noted that the proposed amendments[15] did not constitute new charges but expanded from an "initial pleading of ordering the soldiers of the Ngoma Camp to go to the Beneberika Convent and kidnap the refugees at the Convent to include other incidents." Contrary to the Pre-Trial Judges finding, the Appeals Chamber was not concerned with Muvunyi's "form of participation" in the JCE. Instead, the additional incidents were supplementary material facts of an existing charge (incident), which amounted to genocide or complicity in genocide.[16]

18. With regard to *Popovic*, while it is true that the quote referred to at the end of paragraph 26 of the Impugned Decision[17] may be read as confirming the Pre-Trial Judge's reasoning, it should nevertheless be considered in the context of the specific circumstances of the case. As the ICTY Prosecution argued, the decisive factor was that Popovic faced "neither new charges, nor any 'additional' number of victims."[18] In any event, the Defence submits that the *Popovic* Trial Chamber was incorrect in considering that the new passages did not constitute a new charge simply because the form of liability remained unchanged – what matters is whether the new allegation is, in and of itself, capable of underwriting a conviction.

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[14] ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55-I, Indictment, 23 December 2003.
[15] "That 'during the months of April and May 1994, Muvunyi ordered or instigated the abduction of many Tutsi from various communes and took them to the brigade cell or ESO camp,where they were severely tortured'.
[16] ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, paras 30-31.
[17] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 26.
[18] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 13. *See* also, para. 26. ('they do not add a single victim to the total number of deaths for which the Accused were previously said to be liable').

B. Sixth Veseli Issue

19. At paragraph 32 of the Impugned Decision, the Pre-Trial Judge identified the following factors as relevant in determining whether a proposed amendment to the indictment is prejudicial to the Accused:

(i) whether the amended indictment improves the clarity and precision of the case to be met;

(ii) the diligence of the prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and

(iii) any delay or prejudice to the defence from the amendment

20. Considering that the first factor was clearly not met, the Pre-Trial Judge noted that "in light of the more substantive nature and potential impact of these amendments, analysis of the diligence of the SPO in putting forth the Proposed Amendments and the potential prejudice to the Accused is all the more important."[19]

(i) Prosecutorial Diligence

21. With regard to prosecutorial diligence, the Pre-Trial Judge noted the Defence submissions that the proposed Amendments occurred nine months after the last witness interview; and that a number of such interviews occurred before the rendering of the Confirmation Decision.[20] However, the Pre-Trial Judge did not find such conduct as lacking in diligence considering i) the current stage of the proceedings; and ii) the SPO's claim that "many processing steps must follow the witness interview before an amendment to the Confirmed Indictment is proposed." Both arguments are flawed.

[19] Impugned Decision, para. 33.
[20] Impugned Decision, para. 34.

22. Preliminarily, the Defence notes that, albeit related, 'prosecutorial diligence', 'timeliness of the request to amend the indictment' and 'course of the proceedings to date' are each conceptually different notions.[21]

a. 'Prosecutorial diligence' relates to the diligence of the prosecution in investigating their proposed amendments;

b. 'Timeliness of the request' is related to prosecutorial diligence and looks at whether the Prosecution has delayed putting forward the request for leave to amend and whether such delay was justified or sought to gain an undue tactical advantage against the Defence;

c. 'Course of the proceedings to date' looks at avoiding any amendments to the indictment during late-stage pre-trial proceedings. It is not affected by prosecutorial diligence or timeliness of the request.

23. While a lack of prosecutorial diligence will *necessarily* affect the timeliness of the request, the reverse is not necessarily true. A request to amend the indictment may well be submitted at a very late stage of the pre-trial proceedings, even if the prosecution may have acted with due diligence.[22] It is, therefore, self-explanatory that prosecutorial diligence and timeliness of the request relate exclusively to the conduct of the prosecution.

24. The timeliness component was not met, considering that i) most witness statements were prepared prior to the submission of the indictment,[23] that ii) the most recent witness statement was taken nine months prior to the

[21] ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-AR-73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 15; ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-PT, Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Amendment, 7 July 2008, para. 22.
[22] ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009, para. 29. ('The Trial Chamber finds that the Prosecution did act with due diligence in seeking the addition of paragraph 23.1, albeit the amendment objectively comes at a very late stage of the pre-trial process').
[23] *See*, F00478, Thaçi Defence Response to 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, 20 September 2021, paras 19-21.

submission of the request for leave to amend the indictment; and that iii) the SPO decision to "aggregate its proposals" was not justified.[24]

25. As to prosecutorial diligence, the Defence submits that no rational trier of fact would have accepted the blatantly unacceptable excuse that "many processing steps must follow the witness interview before an amendment to the Confirmed Indictment is proposed."[25] First, none of the alleged incidents in the amendments was 'uncovered' recently. To the contrary, the SPO had received all the relevant information from prior UNMIK investigations[26] and had been interviewing witnesses at least since 2015.[27] Second, it was SPO's responsibility to act diligently and interview potential witnesses or suspects as soon as possible. If the SPO was not ready even after five years of investigations, waiting several more months until it was ready, before filing its indictment, would have been the appropriate course of action.[28] Third, it is a well-accepted that a party cannot invoke its own internal bureaucracies to justify failure to perform its obligations.[29] Fourth, any 'processing step' that last more than nine months shows, if not incompetence, an objective lack of diligence in performing investigations. Finally, the Defence notes that a diligent prosecution would typically provide early notification to the parties in show of good faith,[30] which certainly did not occur in the present case. As the Defence previously pointed

[24] Impugned Decision, para. 34.
[25] Impugned Decision, para. 34.
[26] *See*, SITF00185220-00185223.
[27] *See*, 025420-025429 RED.
[28] *See*, F00481, Veseli Defence Response to SPO Submission of Corrected Indictment and Leave to Amend the Indictment (KSC-BC-2020-06/F00455/CONF/RED), 20 September 2021, para. 32.
[29] *See*, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, Article 27.
[30] IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021, para. 13 ('Indeed, the Prosecution's early notification of its intention to amend the Operative Indictment allowed the Defence to avoid filing preliminary challenges to the Operative Indictment and preserve its resources in this regard until a decision on the Proposed Indictment is rendered'); ICTY, IT-05-87/1-PT, *Prosecutor v. Đorđević*, Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Amendment, 7 July 2008, para. 6.

out,[31] the SPO deliberately failed to inform the Pre-Trial Judge and the Defence that it would request leave to amend the indictment.

26. With regard to the phase of the proceedings, the Defence submits that the Pre-Trial Judge erred in considering such criterion in assessing whether the SPO acted diligently in bringing forward its request for leave to amend the indictment. As indicated above, the phase of the proceedings is a separate criterion which needs to be considered in addition to prosecutorial diligence and timeliness of the application. Otherwise, should the Impugned Decision be confirmed, the risk exists that the SPO be allowed not to act diligently as long as the pre-trial proceedings are not at a late phase.

(ii) Right to be Tried within a Reasonable Time

27. At paragraph 35 of the Impugned Decision, the Pre-Trial Judge acknowledged that additional procedural steps require additional time, but could be carried out in parallel with the remaining stages of the pre-trial phase, considering that "preliminary motions remain pending at the appellate level and Rule 102(3) disclosure and Defence investigations are ongoing". The Defence submits that failure to consider the already prolonged pre-trial proceedings caused the Pre-Trial Judge to err in concluding that the additional procedural steps prescribed in Rule 90(3) and (4), "will likely have a more limited impact on the time it takes to proceed to trial," considering that 'preliminary motions remain pending at the appellate level and Rule 102(3) Disclosure and Defence investigations are ongoing'.[32]

28. Mr Veseli has already been in detention since November 2020. While the SPO has only recently submitted its Pre-Trial Brief, (considerably later than

[31] F00481, Veseli Defence Response to SPO Submission of Corrected Indictment and Leave to Amend the Indictment (KSC-BC-2020-06/F00455/CONF/RED), 20 September 2021, paras 25-26.
[32] Impugned Decision, para. 35.

previously anticipated)[33] no target date has been set for trial. Considering the pace of the proceedings and the scope of the SPO case, it is safe to assume that pre-trial proceedings will continue to last for one more year.[34] The fact that Rule 102(3) Disclosure and Defence investigations are ongoing does not affect the fact that the relevant additional procedural steps will require time **in addition** to the ones that must already need to be completed before trial starts. Moreover, the Defence cannot be expected to forego its right to challenge the form of the Indictment, should it consider necessary, pursuant to Rule 90(4) of the Rules. Therefore, even if the Pre-Trial Judge's finding on the 'limited impact' is accepted, it is plain that the overall impact of the proposed amendments will significantly encroach the right of Mr Veseli to be tried within a reasonable time.

(iii) Right to Have Adequate Time and Resources to Prepare the Defence

29. At paragraph 36 of the Impugned Decision, the Pre-Trial Judge concluded that the Accused will not be deprived of their right to have adequate time to prepare their defence considering i) that defence investigations do not need to be fully completed before trial; and that ii) the additions to the charges are 'limited'.

30. It is true that the trial will, necessarily, start without the Defence having fully concluded its investigations. This is because the identity and supporting materials of a significant number of witnesses will be known to the Defence either thirty days before the start of the trial, or thirty days before the testimony of the relevant protected witness. For a significant number of witnesses falling

[33] **Early July 2021**, Second Status conference, 17 December 2020, p. 199; F00191, Prosecution submissions for third status conference, 8 February 2021, para. 14; **Second week of September**, F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, 22 March 2021, para. 7; Fourth Status conference, 24 March 2021, p.363; **Mid-October**, F00314, Prosecution submissions for fifth status conference, 18 May 2021, para. 10; Fifth Status conference, 19 May 2021, p.420; **17 December 2021**, Eight Status Conference, 29 October 202, p.752-752.
[34] *See*, IA014/F00004, Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 3 December 2021, para. 50.

into these categories, the Defence has no choice but to continue its investigations after the start of trial. It is therefore all the most important that the Defence is in a position to fully complete its investigations with regard to all other witnesses and/or other supporting materials, to the extent that is permitted by any redactions thereto.

31. Moreover, the Pre-Trial Judge erred in failing to consider that such additional Defence investigations must be considered in light of the totality of Defence investigations and the unprecedented scope and sheer amount of evidentiary material in the present case, which need to be processed, read and analysed before any investigation even starts. As indicated above, the inescapable result of such exercise will be to delay even further the start of the trial (lest the Defence be obliged to sacrifice the right to adequate time to prepare the defence with the right to be tried within a reasonable time).

32. As for the finding that the additions are '*limited*', the Defence submits that the Pre-Trial Judge erred in considering the scope of the additions against the scope of the case, as opposed to consider them independently and in relation to other comparable cases before the KSC. In this regard, the Defence recalls its prior submission[35] that the scope and volume of the evidentiary material (and in consequence, the relevant Defence investigations) is double the size of other cases litigated before the KSC. Placed in context, the *Mustafa* case, concerns, in total, less than half of the new charges proposed by the SPO – yet, the pre-trial proceedings in that case lasted for almost one year.

33. In conclusion, the Defence submits that the Pre-Trial Judge erred in finding that the amendments are not prejudicial to, and inconsistent with the rights of the Accused. Considered in their totality, the errors of law and fact committed by

[35] F00481, Veseli Defence Response to SPO Submission of Corrected Indictment and Leave to Amend the Indictment (KSC-BC-2020-06/F00455/CONF/RED), 20 September 2021, paras 2, 29.

the Pre-Trial Judge warrant the Court of Appeals Panel to invalidate the Impugned Decision.

V. CONCLUSION

34. For the reasons set out above, the Defence submits that the proposed amendments to the indictment are unduly prejudicial to the Accused and would not serve the interests of justice. Accordingly, the Defence respectfully requests the Court of Appeals Panel find that the Pre-Trial Judge erred in fact and in law; reverse the Impugned Decision; and reject the SPO request to amend the indictment in its entirety.

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