



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist 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 Prosecutor

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Prosecution response to Veseli Defence request for reconsideration and leave to appeal the Decision on Confirmation of Amendments to the Indictment

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I. INTRODUCTION

1. The Request¹ is inadmissible because it has no legal basis. Challenges to the Second Amendment Decision² are limited to preliminary motions under Rule 97 of the Rules.³ Even if considered on its merits, the Request should be dismissed, as it fails to meet the strict and high threshold required for reconsideration under Rule 79 and/or certification under Article 45 of the Law⁴ and Rule 77.

II. SUBMISSIONS

A. THE REQUEST IS INADMISSIBLE

2. The procedural avenue for and limits to challenges against the Second Amendment Decision are clearly set out in the Rules. In respect of new charges, Rule 86(3)-(4) shall apply *mutatis mutandis*.⁵ In turn, the Pre-Trial Judge shall determine whether a well-grounded suspicion has been established in respect of each new charge and Defence challenges to any resulting decision are limited to those under Rule 97.⁶

¹ Veseli Defence Request for Reconsideration and Leave to Appeal Decision on Confirmation of Amendments to the Indictment, KSC-BC-2020-06/F00796, 2 May 2022 ('Request'). *See also, in relation to the deadline for this response*, Decision on Taçi Defence Request for an Extension of Time for Request for Certification to Appeal and Order for Further Submissions, KSC-BC-2020-06/F00795, 2 May 2022, para.9; Transcript, 10 May 2022, pp.1187-1188; Transcript, 20 May 2022, p.1223.

² Decision on the Confirmation of Amendments to the Indictment, KSC-BC-2020-06/F00777, 22 April 2022 ('Second Amendment Decision').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁵ Rule 90(2).

⁶ Rules 86(7), 90(4). Despite the fact that the Rules of Procedure and Evidence ('RPE') of the *ad hoc* tribunals and the SCSL on the procedure for review and amendment an indictment are virtually identical to the KSC Rules, the KSC Rules differ on this specific point. The KSC Rules contain an additional provision explicitly limiting the legal avenue available to the Defence when seeking to challenge a decision on the indictment (*compare* ICTY RPE, IT/32/Rev.50, Rule 47(H); ICTR RPE, Rule 47(H); SCSL RPE, Rule 47(H) *with* Rules 86(7), 90(4)). Language similar to Rule 86(7) was first introduced at the Special Tribunal for Lebanon in 2009 (Rules of Procedure and Evidence, STL/BD/2009/01, Rule 68(I)). The incorporation of a similar sub-provision within the KSC Rules signals the clear intention of the drafters to streamline proceedings, while still providing an effective legal

3. Unlike the First Amendment Decision,⁷ the Second Amendment Decision exclusively concerned proposed amendments that the Pre-Trial Judge considered to be new charges. Therefore, the *lex specialis* applicable to decisions on new charges under Rules 86(3)-(4) and 90(2) unequivocally bars Defence applications for reconsideration under Rule 79 or certification under Rule 77. Notably, only the VESELI Defence has chosen to attempt submissions under Rules 77 and 79 challenging the Second Amendment Decision.⁸

4. The Request is procedurally flawed and should be dismissed.

B. THE REQUEST IS WITHOUT MERIT

5. Even if considered on its merits, the Request does not meet the threshold required for reconsideration or leave to appeal.

1. Reconsideration is not warranted

6. The Request fails to demonstrate, as required by Rule 79, exceptional circumstances, a clear error of reasoning, or that reconsideration is necessary to avoid injustice.⁹ Indeed, the Request amounts to nothing more than an improper and

recourse to the Defence, which reflects the stage of proceedings and the applicable standard and scope of review.

⁷ The Pre-Trial Judge issued a first decision concerning the Rule 90(1)(b) request of the Specialist Prosecutor's Office ('SPO') on 23 December 2021 (*see* Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00635, 23 December 2021 ('First Amendment Decision')). The First Amendment Decision could be challenged on appeal because it fell outside the scope of Rules 86(7) and 90(4). *See* Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, KSC-BC-2020-06/IA018/F00007, 22 March 2022.

⁸ Thaçi Defence Notification in response to Decision Granting an Extension of Time for Request for Certification to Appeal [...], KSC-BC-2020-06/F00799, 12 May 2022, para.3. *See also* Transcript, 20 May 2022, pp.1221-1222.

⁹ Corrected Version of Decision on Request for Certification or Reconsideration of F00541, KSC-BC-2020-07/F00546/COR, 1 February 2022, para.14; Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020, para 14. *See also* ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, ICC-02/04-01/15, Decision on Request for Reconsideration of the order to Disclose Requests for Assistance, 15 June 2016, para.4. This discretionary power to reconsider previous decisions should be 'exercised sparingly' and thus the party seeking reconsideration must meet a high threshold. *See* MICT, *Prosecutor v. Kamuhanda*, MICT-13-33-

unsubstantiated attempt to redress alleged imperfections in the Second Amendment Decision and mere disagreements with its reasoning and outcome.¹⁰ Contrary to Defence submissions, the Pre-Trial Judge (a) properly declined to consider the medical report cited in the Request ('Medical Report') and (b) properly assessed the accounts of W03865 and W01763.¹¹ In this regard, the Defence claims that the Pre-Trial Judge erred by not relying on or by improperly assessing this evidence, but does not explain why such alleged errors mean that the Second Amendment Decision or parts thereof should not stand. On this basis alone, the portion of the Request seeking reconsideration should be summarily dismissed.¹²

(a) Medical Report

7. The Medical Report was not among the supporting materials¹³ and therefore fell outside the scope of the Pre-Trial Judge's review under Rule 86(3)-(4) and 90(2).¹⁴ He therefore properly dismissed submissions on this basis. The VESELI Defence did not previously take issue with the standard of review and scope of permissible Defence submissions set out in the First Amendment Decision.¹⁵ Accordingly, attempts to now seek reconsideration of such standard – which accords with the plain language of the Rules – should be summarily dismissed.¹⁶

AR90/108.1, Decision on Kamuhanda's Appeal of Decision on Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Prosecution Witness Gek, 8 December 2015, para.16.

¹⁰ See Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, KSC-BC-2020-06/F00476, 17 September 2021, para.12.

¹¹ Request, KSC-BC-2020-06/F00796, paras 10-15.

¹² See, similarly, ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ('*Krajišnik Appeal Judgment*'), paras 21, 27.

¹³ The Medical Report was not cited in the relevant evidentiary outline (KSC-BC-2020-06/F00455/A03) and was not included in the package of unredacted supporting materials provided to the Pre-Trial Judge (Disclosure Package 77). See also Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00455, 3 September 2021, Strictly Confidential and *Ex Parte*, para.4, fns 12-13.

¹⁴ Pursuant to Rule 86(4), the Pre-Trial Judge's review is limited to the supporting material in relation to the each of the charges.

¹⁵ First Amendment Decision, KSC-BC-2020-06/F00635, para.46.

¹⁶ See, similarly, Second Amendment Decision, KSC-BC-2020-06/F00777, para.37.

8. Further, even if the Medical Report was among the supporting materials, the Defence cannot claim an error that arises from its own pleading errors. Discussion of the Medical Report without any appropriate reference to the ERN range of that document, its title, or even relevant disclosure package cannot reasonably and in good faith be described by the Defence as providing ‘enough detail to *easily* locate the document’.¹⁷ In fact, this way of pleading is manifestly improper.¹⁸ The Pre-Trial Judge was not required to attempt to remedy the Defence’s pleading errors by embarking on an expedition to search the voluminous case file for the relevant document; rather, summary dismissal was warranted.¹⁹

9. In any case, the Defence’s arguments based on the Medical Report rest entirely on considerations pertaining to the weight of the evidence.²⁰ This exceeds the scope of the submissions authorised for the purpose of Rule 86(4) review because such determination falls within the scope of the Trial Panel’s powers.²¹ *A fortiori*, this type of argument is inadequate to justify a request for reconsideration. Should the VESELI Defence wish to pursue this line of argumentation, the applicable framework provides ample latitude to do so in due course before the Trial Panel.

10. Finally, the VESELI Defence selectively quotes the Medical Report, failing to acknowledge that the document in question refers to the victims being beaten with rifles and kicked, and suffering bruises, contusions of the head and thorax, stress,

¹⁷ Request, KSC-BC-2020-06/F00796, para.11 (emphasis added). *See* 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, KSC-BC-2020-06/F00668, 31 January 2022, Confidential (‘VESELI Submissions’), para.20.

¹⁸ *See, similarly*, Practice Direction: Files and Filings before the Kosovo Specialist Chamber, KSC-BD-15, 17 May 2019 (‘Practice Direction’), Article 32(2).

¹⁹ *See, similarly*, Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, paras 16-17; *Krajišnik* Appeal Judgement, paras 18, 26.

²⁰ Request, KSC-BC-2020-06/F00796, para.20.

²¹ Second Amendment Decision, KSC-BC-2020-06/F00777, paras 36-37. *See also* Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00635, para.46; Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, para.50.

anxiety, and 'evident fear, trembling and crying'.²² These observations in the Medical Report are consistent with the Pre-Trial Judge's findings in the Second Amendment Decision.²³ In this context, the Defence does not explain how, even if the Medical Report had been part of the supporting materials and considered by the Pre-Trial Judge, it would have impacted the Pre-Trial Judge's findings concerning the seriousness of the harm or injury caused.

11. Reconsideration with respect to the first point is therefore not warranted.

(b) Accounts of W03865 and W01763

12. Concerning the assessment by the Pre-Trial Judge of the accounts of W03865 and W01763 on the detention of one victim, the Defence also fails to demonstrate that reconsideration is exceptionally warranted.²⁴ Disagreement with the Pre-Trial Judge's conclusion that the accounts of W03865 and W01763 'differ to such extent that it is unlikely they are speaking of the same incident'²⁵ does not suffice to justify reconsideration.²⁶ The Pre-Trial Judge's alleged failure to note the relevance of the type of weapons concerned²⁷ is inapposite to demonstrate a clear error, especially when the Defence failed to raise this argument in its previous submissions.²⁸ In addition, the Defence's assertion that the conclusion of the Pre-Trial Judge is unreasonable is unpersuasive as the arguments formulated by the Defence are attempts to re-litigate the matter.²⁹ Importantly, the Pre-Trial Judge rightly explained that his assessment of W03865's and W01763's account was limited to a finding of well-grounded

²² 0188-3935-0188-3937-ET.

²³ See, *inter alia*, Second Amendment Decision, KSC-BC-2020-06/F00777, para.70.

²⁴ Request, KSC-BC-2020-06/F00796, paras 13-15.

²⁵ Request, KSC-BC-2020-06/F00796, paras 13-15.

²⁶ Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, KSC-BC-2020-06/F00476, 17 September 2021, para.12.

²⁷ Request, KSC-BC-2020-06/F00796, para.14.

²⁸ See VESELI Submissions, KSC-BC-2020-06/F00668, paras 19-22.

²⁹ Request, KSC-BC-2020-06/F00796, para.15.

suspicion.³⁰ Consequently, these accounts and related Defence submissions can be explored further at trial.³¹ Reconsideration is thus not warranted.

2. The threshold required for certification is not met

13. Article 45(2) and Rule 77(2) provide the legal requirements applicable to granting a request for leave to appeal when interlocutory appeals are not of right. Due to the exceptional and restrictive nature of interlocutory appeals,³² the following three-prong test needs to be cumulatively satisfied to grant certification, namely:

- a. the matter is an ‘appealable issue’;
- b. the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c. an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.³³

14. Considering this test, the Defence clearly fails to demonstrate that the Rule 77 threshold for certification is met with respect to any of the eleven Issues³⁴ it raises. Indeed, the Issues challenge a wide-range of findings in the Decision, but the Defence fails to demonstrate how any individual Issue satisfies the leave to appeal standard, instead addressing their purported impact on the proceedings altogether and without differentiation.³⁵ This pleading failure alone justifies dismissal.

³⁰ Second Amendment Decision, KSC-BC-2020-06/F00777, para.61

³¹ Second Amendment Decision, KSC-BC-2020-06/F00777, para.61

³² Decision on Defence Application for Reconsideration or Certification for Appeal, KSC-BC-2021-08/RAC001/F00012, 18 May 2022, para.23; Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9.

³³ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9.

³⁴ The eleven issues (‘Issues’) are set out in para.4 of the Request. This response refers to the Issues as individually defined in the Request.

³⁵ Request, KSC-BC-2020-06/F00796, paras 7-9.

(a) The Issues are not appealable

15. None of the Issues are appealable issues. The First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Issues are mere disagreements with the Pre-Trial Judge's conclusions that the applicable standard of well-grounded suspicion was met based on the supporting materials.³⁶ In this regard, the First, Second, Third, Fourth, and Fifth Issues are framed too broadly; the first three Issues each refer to a whole section of the Decision,³⁷ while the footnote references for the Fourth and Fifth Issues do not identify any discrete finding being challenged.³⁸ The Issues also generally mischaracterise the Pre-Trial Judge's assessment by omitting significant parts of Pre-Trial Judge's reasoning.³⁹

16. Further, by way of appeal, the Defence evidently attempts to relitigate certain matters and merely refers to its previous submissions in footnotes.⁴⁰ In this respect, the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Issues all constitute, at least in part, impermissible attempts to relitigate the standard and scope of review as first set out in the First Amendment Decision.⁴¹ Finally, as also set out above, the Tenth Issue, relating to the Medical Report, arises not from the Second Amendment Decision, but from the Defence's own pleading failures.

(b) The Issues have no significant impact

17. Even if they were appealable, none of the Issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence's contention that the Issues satisfy the second prong of the certification test because they

³⁶ Request, KSC-BC-2020-06/F00796, paras 2, 4-5.

³⁷ Request, KSC-BC-2020-06/F00796, para.2, fns 5-6 (referring to section VI(B) of the Decision).

³⁸ Request, KSC-BC-2020-06/F00796, para.2, fns 2-4 (referring to section VI(D) of the Decision).

³⁹ For example, in relation to the First Issue, the Defence omits the reasoning of the Pre-Trial Judge at paras 173-174, 178-182 of the Second Amendment Decision.

⁴⁰ Request, KSC-BC-2020-06/F00796, para.2, fns 3-6, 8-10.

⁴¹ First Amendment Decision, KSC-BC-2020-06/F00635, para.46. *See also* Second Amendment Decision, KSC-BC-2020-06/F00777, para.37.

are related to the specificity and clarity of the charges is manifestly wrong.⁴² The decision cited by the Defence was issued in the context of preliminary motions relating to challenges to the form of the indictment. As such, contrary to the Defence's argument,⁴³ the cited conclusion is not applicable *mutatis mutandis* to the Issues. Challenges to the form of the indictment with respect to the new charges have not yet been raised pursuant to Rule 97, let alone ruled upon. In other words, the Decision cannot be challenged on appeal on a matter it does not address. This apparent confusion further demonstrates that the Defence is misguided in filing the present Request.⁴⁴

18. The Issues – which primarily concern the reliability and admissibility of the supporting materials – exceed the standard and scope of review required for confirmation of the new charges at issue. The Defence may raise the Issues before the Trial Panel, whose prerogative is to, as necessary and appropriate, resolve them when determining the admissibility and weight of the evidence.⁴⁵ Without explaining why such recourse is inadequate, the Defence fails to demonstrate any significant impact on proceedings or trial outcome.

19. Finally, for the same reasons given above, the Defence also fails to demonstrate how granting leave to appeal on any Issue would materially advance the proceedings.⁴⁶

III. CLASSIFICATION

20. This filing is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

⁴² Request, KSC-BC-2020-06/F00796, paras 7-8, fn 18, *referring to* Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00534, 18 October 2021.

⁴³ Request, KSC-BC-2020-06/F00796, para.8.

⁴⁴ *See also* Section II(A) above.

⁴⁵ First Amendment Decision, KSC-BC-2020-06/F00635, para.46; Second Amendment Decision, KSC-BC-2020-06/F00777, paras 29, 36, 60.

⁴⁶ *Contra* Request, KSC-BC-2020-06/F00796, para.10.

IV. RELIEF REQUESTED

21. For the foregoing reasons, the Pre-Trial Judge should reject the Request.

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Jack Smith

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Monday, 23 May 2022

At The Hague, the Netherlands.