

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: 19 August 2022

Language: English

Classification: Public

**Thaçi Defence Request for Certification to Appeal the “Decision on Motion Alleging
Defects in the Form of the Amended Indictment”**

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. On 31 May 2022, the defence for Mr Hashim Thaçi (“Defence”) filed a motion pursuant to Rules 90(4) and 97(1)(b) of the Rules,¹ alleging that new charges confirmed by the Pre-Trial Judge (“PTJ”) on 22 April 2022² are defective due to a lack of specificity and significant errors in pleading.³ The Defence sought an order requiring the Specialist Prosecutor’s Office (“SPO”) to amend the Indictment⁴ to provide greater specificity about the conduct it alleges on the part of Mr Hashim Thaçi (“Accused”), failing which, that the SPO be ordered to reduce, narrow or remove the offending charges.
2. In a decision dated 22 July 2022, the PTJ granted the Defence Motion in part and ordered the SPO to file a corrected version of the Indictment as ordered in paragraphs 49(b), (c), and (d) of the Impugned Decision, by 30 September 2022.⁵ The PTJ rejected the remainder of the Defence challenges.⁶
3. In accordance with Rule 77 of the Rules and Article 45 of the Law,⁷ the Defence applies for leave to appeal from the Impugned Decision on four issues detailed below.

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

² KSC-BC-2020-06/F00777/CONF/RED2, PTJ, Confidential Redacted Version of Decision on the Confirmation of the Indictment against Hashim Thaci, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 22 April 2022 (“Second Confirmation Decision”).

³ KSC-BC-2020-06/F00824, Thaçi Defence Motion Alleging Defects in the Indictment against Mr HashimThaçi, 31 May 2022 (“Motion”).

⁴ KSC-BC-2020-06/F00789/A02, Annex 2 to Submission of amended Indictment and related documents - Confidential Redacted Version of Amended Indictment, 29 April 2022 (“Indictment”).

⁵ KSC-BC-2020-06/F00895, PTJ, Decision on Motion Alleging Defects in the Form of the Amended Indictment, 22 July 2022 (“Impugned Decision”), paras. 47, 49.

⁶ Impugned Decision, para. 47.

⁷ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

II. PROCDEURAL HISTORY

4. On 26 October 2020, the PTJ confirmed an indictment⁸ against Mr Thaçi and his co-accused.⁹ On 12 March 2021, the Defence filed a preliminary motion alleging that the indictment was defective due to a lack of specificity and significant errors in pleading.¹⁰ On 22 July 2021, the PTJ granted the Defence motion in part and ordered the SPO to file a corrected version of the indictment (“First Defects Decision”).¹¹ On 12 November 2021, with leave of the PTJ, the Defence appealed the First Defects Decision.¹² The Appeals Panel is yet to render its decision.

5. On 3 September 2021, the SPO filed a corrected indictment, as ordered in the First Defects Decision, and requested leave pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules to amend the indictment to include three categories of allegations (collectively known as “Proposed Amendments”).¹³

6. On 23 December 2021, the PTJ issued the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)”.¹⁴ In this decision, the PTJ granted the SPO’s motion to amend the indictment in relation to the Third Category of Proposed Amendments which he held were not new charges.¹⁵ Further, he found that the First and Second Categories of Proposed Amendments were new charges and therefore must

⁸ KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020.

⁹ KSC-BC-2020-06/F00026/CONF/RED, PTJ, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 20 October 2020.

¹⁰ KSC-BC-2020-06/F00215, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021.

¹¹ KSC-BC-2020-06/F00413, PTJ, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, para. 179.

¹² KSC-BC-2020-06/IA012/F00006, Thaçi Defence Appeal with Leave Against the “Decision on Defence Motions Alleging Defects in the Form of the Indictment”, 12 November 2021.

¹³ 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.

¹⁴ KSC-BC-2020-06/F00635/CONF, PTJ, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021 (“First Decision on Request to Amend”).

¹⁵ First Decision on Request to Amend, paras. 26, 28, 53a.

be assessed “against the requisite evidentiary threshold of ‘well-grounded suspicion’”, and invited the Defence to file submissions regarding the same should it wish.¹⁶

7. On 31 January 2022, the Defence filed its response, submitting that a well-grounded suspicion had not been established in relation to the First and Second Categories of Amendments.¹⁷ On 4 February 2022, the SPO replied to the Thaçi response.¹⁸

8. On 22 March 2022, the Court of Appeals denied the Defence appeal on the First Decision on Request to Amend.¹⁹

9. On 22 April 2022, the PTJ issued a decision confirming the First and Second Categories of Amendments to the indictment and ordered the SPO to file an amended indictment and revised outline.²⁰ The SPO filed the Indictment and revised Outline on 29 April 2022.²¹

10. The Accused was re-arraigned on the new Indictment on 10 May 2022.²²

11. On 31 May 2022, the Defence filed the Motion, alleging defects in the Indictment. On 10 June 2022, the SPO responded to the Motion.²³

12. On 22 July 2022, the PTJ granted the Defence Motion in part and ordered the SPO to file a corrected version of the Indictment by 30 September 2022.²⁴

¹⁶ First Decision on Request to Amend, paras. 28, 48, 53d.

¹⁷ KSC-BC-2020-06/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, paras. 4, 43.

¹⁸ KSC-BC-2020-06/F00680, Prosecution Reply Regarding Request to Amend Pursuant to Rule 90(1)(b), 4 February 2022.

¹⁹ KSC-BC-2020-06/IA018/F00007, Appeals Panel, Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, 22 March 2022.

²⁰ Second Confirmation Decision, para. 185.

²¹ KSC-BC-2020-06/F00789, Submission of amended Indictment and related documents, with strictly confidential and ex parte Annex 1, confidential Annexes 2-4, and public Annexes 5-7, 29 April 2022.

²² KSC-BC-2020-06, Transcript of Further Appearance of Hashim Thaçi, 10 May 2022.

²³ KSC-BC-2020-06/F00835, Prosecution Response to Thaçi Defence Preliminary Motion on the Form of the Amended Indictment, 10 June 2022.

²⁴ Impugned Decision, para. 49.

III. APPLICABLE LAW

13. To appeal the Impugned Decision, certification is required.²⁵
14. Article 45(2) of the Law provides, in 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.
15. Rule 77(2) of the Rules 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.
16. 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.²⁶
17. 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 examination, and not merely

²⁵ Rule 77(1), Rules; Article 45(2), Law.

²⁶ 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. 14 (“Decision on Leave to Appeal Defects Decision”); 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.

a question over which there is disagreement or conflicting opinion.”²⁷ 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.”²⁸

18. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.²⁹

IV. THE PROPOSED ISSUES FOR APPEAL

19. 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 finding that the pleading of the identity of the joint criminal enterprise members who directly perpetrated the crimes underlying the charges in paragraphs 68, 93 and 174 of the Indictment was sufficiently detailed (and thus not defective),³⁰ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³¹

Issue 2: Whether the PTJ erred in finding that the identity of the victims of crimes charged in paragraph 93 of the Indictment (notwithstanding the amendment ordered at paragraph 37 of the Impugned Decision),³² was pleaded in sufficient detail (and thus not defective), given the obligation on the prosecution to plead the material facts underpinning each of the charges.³³

²⁷ Gucati and Haradinaj Decision on Leave to Appeal, para. 12; Taçi Decision on Leave to Appeal, para. 11.

²⁸ *Ibid.*

²⁹ Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Taçi Decision on Leave to Appeal, para. 17.

³⁰ Impugned Decision, paras. 26, 27, 30, 47.

³¹ ICTY, *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, para. 88; ICTR, *Prosecutor v. Uwinkindi*, ICTR-01-75-AR72 (C), Appeals Chamber, Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 5.

³² Impugned Decision, paras. 35, 37, 47.

³³ *Supra*, fn. 31.

Issue 3: Whether the PTJ erred in finding that the location of the commission of crimes charged in paragraph 157 of the Indictment was pleaded in sufficient detail (and thus not defective),³⁴ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³⁵

Issue 4: Whether the PTJ erred in finding that additional details as regards the accused's alleged link to the crimes charged in paragraphs 68, 93, 105, 157 and 174 of the Indictment were pleaded in sufficient detail (and thus not defective),³⁶ given the obligation on the prosecution to plead the material facts underpinning each of the charges and the Accused's right to be adequately informed about his role in the alleged crimes.³⁷

V. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

20. The four identified Issues are appealable as they arise from the Impugned Decision, and concern the PTJ'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 and the Accused's link to the crimes and the role he allegedly played.³⁸ 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 is essential for the determination of the matters arising in the judicial cause under examination, *i.e.* the specificity and clarity of the Indictment.

³⁴ Impugned Decision, paras. 41, 47.

³⁵ *Supra*, fn. 31.

³⁶ Impugned Decision, paras. 46, 47.

³⁷ *Supra*, fn. 31.

³⁸ Impugned Decision, paras. 26, 27, 30, 35, 37, 41, 46, 47.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

21. 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.³⁹

22. The Issues all concern the specificity and clarity of the charges contained in the Indictment and, as such, relate to the right of the Accused, guaranteed in Article 21(4)(a) of the Law, to be informed promptly and in detail of the nature and the cause of the charges against him. As previously held by the PTJ, these are factors that can significantly affect the fair and expeditious conduct of proceedings and the outcome of trial.⁴⁰ The Issues raised go to the very heart of a fair trial. The adequacy, clarity and timeliness of such notice affects the ability of the Accused to understand the charges and prepare a defence, including carrying out focused investigations. Furthermore, as the Indictment defines the scope and extent of the trial, adequate, clear and timely notice of the charges provides the Accused with a genuine opportunity to challenge the SPO’s case and present his defence, as well as be tried within a reasonable time; guarantees which lie at the heart of, and significantly affect, the fairness and expeditiousness of proceedings.⁴¹ As previously held by the PTJ, 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

³⁹ Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

⁴⁰ Decision on Leave to Appeal Defects Decision, paras. 18, 19, 63.

⁴¹ 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 (“*Uwinkindi* Cert. to Appeal Defects Decision”), para. 7.

proceedings and advance the Accused's right to be tried within a reasonable time, as provided in Article 21(4)(d) of the Law."⁴²

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

23. As previously held by the PTJ, matters regarding the specificity and clarity of an indictment, such as those raised in these Issues, may benefit from an authoritative determination by the Court of Appeals Panel at the earliest opportunity, as it would provide legal certainty about the interpretation and application of the legal standards on specificity and clarity of indictment.⁴³ It would allow any defect to be 'cured' well in advance of the start of the trial. Such a determination now, at the pre-trial phase, would minimise subsequent delays at trial and appeal proceedings to address claims regarding inadequate notice. Therefore an immediate resolution by the Appeals Panel in respect of these Issues would materially advance the proceedings.⁴⁴

VI. RELIEF SOUGHT

24. 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) of the Rules.

⁴² Decision on Leave to Appeal Defects Decision, para. 18.

⁴³ Decision on Leave to Appeal Defects Decision, paras. 64, 20.

⁴⁴ See, Decision on Leave to Appeal Defects Decision, paras. 64, 20; Gucati and Haradinaj Decision on Leave to Appeal, para. 32; *Uwinkindi* Cert. to Appeal Defects Decision, para. 10.

[Word count: 2,560 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

Friday 19 August 2022

At Tampa, United States