

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

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Motion Alleging Defects in the Indictment against Mr Hashim Thaçi

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I. INTRODUCTION

1. Pursuant to Rules 90(4) and 97(1)(b) of the Rules,¹ the defence for Mr Hashim Thaçi (“Defence”) submits that the new charges confirmed by the Pre-Trial Judge (“PTJ”) on 22 April 2022 are defective due to a lack of specificity and significant errors in pleading.² The Defence requests that the Specialist Prosecutor’s Office (“SPO”) be ordered to provide greater specificity about the conduct it alleges on the part of Mr Thaçi, failing which, that the SPO be ordered to reduce, narrow or remove the offending charges.

II. PROCEDURAL BACKGROUND

2. On 26 October 2020, the PTJ confirmed an indictment³ against Mr Hashim Thaçi (“Accused”) and his co-accused.⁴ 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.⁵ On 22 July 2021, the PTJ granted the Defence motion in part and ordered the SPO to file a corrected version of the indictment (“Defects Decision”).⁶ On 12 November 2021, with leave of the PTJ, the Defence appealed the Defects Decision.⁷ The Appeals Panel is yet to render its decision.

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

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

³ KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020.

⁴ 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”).

⁵ KSC-BC-2020-06/F00215, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021 (“Thaçi Preliminary Motion on Defects in the Indictment”).

⁶ KSC-BC-2020-06/F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021.

⁷ 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 (Thaçi Defects Appeal).

3. On 3 September 2021, the SPO filed a corrected indictment as ordered in the Defects Decision and requested leave pursuant to Article 39(8) of the Law⁸ and Rule 90(1)(b) of the Rules to amend the indictment to include three categories of allegations (collectively known as the “Proposed Amendments”).⁹

4. On 23 December 2021, the PTJ issued the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)” (First Decision on Request to Amend”).¹⁰ 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.¹¹ Further, 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’” and invited the Defence to file submissions regarding the same should it wish.¹²

5. 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.¹³ On 4 February 2022, the SPO replied to the Thaçi response.¹⁴

⁸ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“the Law”).

⁹ 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”).

¹⁰ 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.

¹¹ First Decision on Request to Amend, paras. 26, 28, 53a.

¹² First Decision on Request to Amend, paras. 28, 48, 53d.

¹³ KSC-BC-2020-06/F00666, Thaci Defence Motion on Whether There is a Well Grounded Suspicion in Relation to the SPO’s Request to Amend the Indictment, 31 January 2022, confidential.

¹⁴ KSC-BC-2020-06/F00680, Prosecution Reply Regarding Request to Amend Pursuant to Rule 90(1)(b), 4 February 2022, confidential.

6. On 22 March 2022, the Court of Appeals denied the Defence appeal on the First Decision on Request to Amend.¹⁵
7. 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.¹⁶ The SPO filed an amended indictment (“Indictment”) and revised Outline on 29 April 2022.¹⁷
8. The Accused was re-arraigned on the new Indictment on 10 May 2022.¹⁸
9. Mr Thaçi is charged with ten counts: persecution, imprisonment, other inhumane acts, torture, murder and enforced disappearance of persons as crimes against humanity and illegal or arbitrary arrest and detention, cruel treatment, torture, and murder as war crimes. The Indictment alleges that he committed these crimes through participation in a joint criminal enterprise (“JCE”) and/or aided and abetted them and/or that he is liable as a superior for their commission.

III. SUBMISSIONS

A. APPLICABLE LAW

10. Article 38(4) of the Law and Rule 86(3) of the Rules require the SPO to set out in the indictment a concise statement of the facts of the case and the crime(s) with which the accused is charged, and in particular, the alleged mode of liability in relation to the crimes charged.

¹⁵ KSC-BC-2020-06/IA018/F00007, Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, 22 March 2022, public (“Appeals Decision on Request to Amend”).

¹⁶ KSC-BC-2020-06/F00777, Confidential Redacted Version of Decision on the Confirmation of the Indictment against Hashim Thaci, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 22 April 2022.

¹⁷ KSC-BC-2020-06/F00789/A05, Public Redacted Version of Amended Indictment, 29 April 2022.

¹⁸ KSC-BC-2020-06, Further Appearance of Hashim Thaçi, 10 May 2022.

11. This obligation must be interpreted in conjunction with the accused's right to a fair and public hearing, pursuant to Articles 21(2), 21(4)(a) and (c) of the Law. These articles provide that, in the determination of any charge against him, the accused is entitled to a fair hearing, to be informed promptly of the nature and cause of the charge against him and to have adequate time and facilities to prepare his defence.

12. These requirements have been elaborated upon by the Appeals Chambers of the international *ad hoc* tribunals and the International Criminal Court,¹⁹ which have consistently held that the "charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide clear notice to the accused."²⁰ It is well established that "whether an indictment is pleaded with sufficient particularity is dependent on whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence."²¹ The Prosecution "is expected to know its case before proceeding to trial and cannot mould

¹⁹ See Public Redacted Confirmation Decision, para. 22: "In determining customary international law at the time the crimes were committed, a Judge may be assisted by sources of law including the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court, and other criminal courts".

²⁰ 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, ("*Uwinkindi* Appeals Decision on Defects"), para. 5; ICTR, *Prosecutor v Muvunyi*, ICTR-2000-55A-A, Appeals Chamber, Judgment, 29 August 2008, ("*Muvunyi* Appeal Judgment"), para. 18 (citing ICTR, *Prosecutor v Seromba*, ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, paras. 27, 100; ICTR, *Prosecutor v Simba*, ICTR-01-76, Appeals Chamber, Judgment, 27 November 2007, para. 63; ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-A, Appeals Chamber, Judgment, 21 May 2007, paras. 76, 167, 195; ICTR, *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 49; ICTR, *Prosecutor v Ndindabahizi*, ICTR-01-71-A, Appeals Chamber, Judgment, 16 January 2007, para. 16. See also, ICTY, *Prosecutor v Kupreskic et al.*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, ("*Kupreskic et al.*, Appeal Judgement"), para. 88; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Chamber, Judgment, 21 March 2016, ("*Bemba* Trial Judgement"), para. 31.

²¹ *Kupreskic et al.*, Appeal Judgment, para. 88. See also ICC, *Prosecutor v Ongwen*, ICC-02/04-01/15 OA4, Appeals Chamber, Judgment on the Appeal of Dominic Ongwen Against Trial Chamber IX's Decision on Defence Motions Alleging Defects in the Confirmation Decision, 17 July 2019, para. 69.

the case against the accused in the course of the trial depending on how the evidence unfolds.”²²

13. Whether ‘facts’ are material depends on the nature of the Prosecution’s case, *i.e.*, the nature of the charges, the proximity of the accused to the events he is said to be criminally responsible for and the scale of the crimes.²³ Where the “Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.”²⁴ An indictment that does not set out the material facts with sufficient precision is defective.²⁵

14. It is submitted, in line with international jurisprudence, that where defects in the indictment surface at the pre-trial phase, the SPO cannot refrain from amending the indictment by arguing that it will correct all defects through material supporting or filed after the indictment.²⁶

15. Rather, if the SPO knows ‘material facts’ now that it has omitted from pleading in this Indictment, it should be required to amend the Indictment to include them. It

²² *Muvunyi* Appeal Judgment, para 18 (citing ICTR, *Prosecutor v Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, (“*Ntagerura et al.*, Appeal Judgment”), para. 27. See also ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005 (*Kvočka et al.*, Appeal Judgment), para. 30; ICTR, *Prosecutor v Niyitegeka*, ICTR-96-14-A, Appeals Chamber, Judgment, 9 July 2004, (*Niyitegeka* Appeal Judgment), para. 194; ICTY, *Kupreškic et al.*, Appeal Judgment, para. 92.)

²³ *Uwinkindi* Appeals Decision on Defects, paras. 4-5; ICTR, *Prosecutor v Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 25 citing *Kupreškic et al.* Appeal Judgment paras. 88-89. See also, *Bemba* Trial Judgment, para. 34.

²⁴ *Kupreškic et al.*, Appeal Judgment, para. 89.

²⁵ *Uwinkindi* Appeals Decision on Defects, para. 114.

²⁶ See *Uwinkindi* Appeals Decision on Defects, para. 13, where the ICTR Appeals Chamber held: “in a case such as the present, where defects in the indictment surface at the pre-trial stage, the Prosecution cannot refrain from amending the indictment by arguing that it will correct existing defects through its Pre-Trial Brief.”; ICTR, *Prosecutor v. Dominique Ntawukulilyayo*, ICTR-05-82-PT, Trial Chamber, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009 (“*Ntawukulilyayo*, Decision on Defects in the Indictment”), para. 13.

is the SPO's responsibility to inform Mr Thaçi of its case in the primary charging instrument. He should not be required to have to work it out by piecing together the heavily redacted Outline, supporting material or pre-trial brief to put it together. This would impermissibly shift the burden onto Mr Thaçi, in breach of his fair trial rights under Article 21 of the Law, Articles 30 and 31 of the Kosovan Constitution and Article 6 of the European Convention on Human Rights. It will also take longer to prepare his defence if he has to piece the case against him together.

16. As the ICTR Appeals Chamber held, “[i]t is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.”²⁷

B. THE PLEADING OF SPECIFIC CRIMES IS DEFECTIVE

17. As set out below, the Indictment fails to plead with the required level of specificity some of the material facts of the crimes detailed in the new paragraphs of the Indictment which comprised the Category One and Two Amendments: 68, 105, 157, 93 and 174. Specifically, it is largely silent as to the identities of the perpetrators, save generic references to them being “KLA members”, and many of the victims. It is also vague about the location of certain crimes. Finally, it insufficiently details Mr Thaçi's link to the crimes, as well as the role he is accused of playing. The net result is that it is difficult for Mr Thaçi to understand and investigate these allegations to mount a defence.

²⁷ ICTR, *Prosecutor v Muvunyi*, ICTR-0055A-AR73, Appeals Chamber, Decision on Prosecution Interlocutory Appeal, 12 May 2005, (“*Muvunyi* Appeal Decision on Amendment of the Indictment”) para. 22.

18. The Defence has not made submissions about the new Indictment paragraphs 42 and 43 which were in the Category Three Amendments. This is because it understands that Rule 90(4) limits preliminary motions under Rule 97 to ‘new charges’. It is recalled that the Appeals Chamber upheld the PTJ’s determination that these paragraphs were not new charges, contrary to Defence submissions.²⁸ For the avoidance of doubt, the Defence submits that these paragraphs are also defective, not least due to the high level of redactions making it impossible for the Accused to know what he is charged with, a clear violation of his fair trial rights under Article 21 of the Law, Articles 30 and 31 of the Kosovan Constitution and Article 6 of the European Convention on Human Rights. However, it unfortunately does not have standing to make this argument due to Rule 90(4) and thus has not done so.

1. Identity of direct perpetrators is defined overly broadly

19. The pleading of the identity of the JCE members who directly perpetrated the crimes charged in new Indictment paragraphs 68, 105, 157, 93 and 174 is impermissibly vague. Specifically, the perpetrators in each of these paragraphs (save paragraphs 68 and 174) are referred to simply as “KLA member/s” with nothing more.

20. The law is clear that when members are not identified by name as in this case, adequate temporal and geographical references should, if possible, be given.²⁹ For example, in *Munyakazi*, the ICTR Appeals Chamber, reading the indictment as a whole, confirmed that the identity of JCE participants was properly pleaded by reference to *Munyakazi* and the Bugarama Interahamwe killing Tutsi civilians at Shangi and Mblizi parishes, respectively on 29 and 30 April 1994.³⁰

²⁸ Appeals Decision on Request to Amend, para. 29.

²⁹ ICTR, *Prosecutor v Munyakazi*, ICTR-97-36A-A, Appeals Chamber, Judgement, 28 September 2011, (*Munyakazi* Appeal Judgment) para. 162.

³⁰ *Munyakazi* Appeal Judgment, para. 162.

21. This additional detail has not been provided by the SPO in paragraphs 105, 157 and 93 of the Indictment, and the perpetrators are simply defined as KLA members. Without more, for example what area the KLA members hail from (as opposed to the location of the crime), this is defective. In respect of paragraph 68, the Defence recognises that some further detail has been provided in relation to some of the perpetrators, as they have been defined as KLA members *including* members of Brigade 123 in the Pashtrik Operational Zone. However, it submits that if the SPO has further detail, such as names, this should be provided. In respect of paragraph 174, the Defence notes that no detail at all is provided about who the direct perpetrators are. Overall, this lack of detail about the identity of these direct perpetrators prevents Mr Thaçi from conducting meaningful investigations and mounting a defence, as he does not know whose actions he is said to be liable for, other than that they were members of the KLA.

2. Identity of victims is defective

22. The pleading of the identity of the victims in new Indictment paragraphs 68, 105, and 93 is impermissibly vague. The identity of the victims are material facts that should, if possible, be pleaded in the Indictment “since the identity of the victim is information that is valuable to the preparation of the defence case”.³¹ This is not a case where the so called ‘sheer scale exception’ originating in the *Kupreskić et. al.* case at the ICTY applies, thus alleviating the SPO of a duty to provide a high degree of specificity in matters such as the identity of victims. This is because paragraph 68 (and it is assumed also paragraph 105) refers to “at least twelve” victims and paragraph 93 refers to “at least three persons”, which are not indicative of crimes on such a scale as for it to be impracticable to provide a high degree of specificity in matters such as the

³¹ *Ntakirutimana* Appeals Judgment, para. 25. See also, ICTR: Prosecutor v. Karera, Case No. ICTR-01-7-A, Appeals Judgment, 2 February 2009, para. 365.

identity of victims.³² Therefore, unless the identity of these victims are protected by protective measures, the failure to plead their identities renders this Indictment defective.

3. Identity of location of crimes is impermissibly vague

23. The pleading of the location of the commission of the alleged crimes in paragraphs 68, 105, 157 is impermissibly vague. Where exactly in Budakove/Budakovo and Semetishte/Semetiste did the crimes alleged to have taken place in those Indictment paragraphs happen? As stated above, an indictment must plead the material facts of the prosecution case with enough detail to inform a defendant clearly of the clearly of the charges against him so that he may prepare his defence.³³ Whether 'facts' are material depends on the nature of the Prosecution's case.³⁴ The PTJ has previously held that "where an accused is not alleged to have directly carried out the crime or where, by their nature, the crimes are directed against a group or collectivity of people, the accused must be provided with **as much detailed information as possible** regarding: **the places ...** to make out the elements of the offences."³⁵ Simply identifying the relevant village is not "as much information as possible". More information, such as the building/s where the crimes took place should be pleaded, should it be in the possession of the SPO.

³² *Kupreskic et al.* Appeal Judgment, paras. 89-90.

³³ *Kupreskic et al.* Appeal Judgment, para. 88. *See also Ongwen Appeals Judgment*, para. 69.

³⁴ *Uwinkindi Appeals Decision on Defects*, paras. 4-5; *Ntakirutimana Appeals Judgment*, para. 25 citing *Kupreskic et al.* Appeal Judgment paras. 88-89. *See also, Bemba Trial Judgment*, para. 34.

³⁵ *Defects Decision*, para. 32 (emphasis added). *See also, ICC, Situation in the Republic of Mali In the Case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence Request concerning the Time Limit for the Prosecutor to file the Document Containing a Detailed Description of the Charges, ICC-01/12-01/18, 5 October 2018, para. 30.

4. Role of Mr Thaci in the crimes charged is insufficient

24. Paragraphs 68, 105, 157, 93 and 174 are defective as they do not plead the material facts of Mr Thaci's involvement in the crimes charged. Consequently, it is unclear what it is alleged that Mr Thaci's role was in these crimes. The law is clear that an accused must always be "adequately informed" about his role in the alleged crime.³⁶ Moreover,

[a]s the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.³⁷

25. Indeed, the PTJ has previously found that that the Indictment must plead the manner and means by which the accused committed the crime if he personally did so, or if not directly, his *conduct* by which it is alleged he *contributed* to the JCE, was an aidor and abettor, or a superior.³⁸ In other words, his role and link to the crimes he committed through those modes of liability must be pleaded. These paragraphs of the Indictment are defective as they do not have this level of detail.

26. This lack of specificity in pleading his role, and/or link, to the specific crimes detailed in these paragraphs of the Indictment is compounded by the fact that the nature of his personal participation in, or contribution to the JCE, as an aidor and abettor, and a superior itself alleged in paragraphs 41-48, 52-55 of the Indictment is also defectively pleaded (see pending Defects Appeal: Issues 5, 6, 9, 10).³⁹ The net result is that Mr Thaci remains unable to understand what exactly he is said to have

³⁶ *Uwindkindi*, Appeals Decision on Defects, para. 5.

³⁷ ICTY, *Prosecutor v. Galić*, IT-98-29-AR72, Appeals Chamber, Decision on Application by Defence for Leave to Appeal, 30 November 2001, para. 15. See also ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Chamber III, Judgment and Sentence, 25 February 2004, para. 33; ICTY, *Prosecutor v. Brdjanin*, IT-99-36-PT, Trial Chamber, Decision on Objections by Momir Talic to the Form of Amended Indictment, 20 February 2001, paras. 19-20.

³⁸ Defects Decision, paras. 31-32.

³⁹ Thaci Defects Appeal paras. 16-36.

done to participate in the commission of the crimes of imprisonment/illegal or arbitrary arrest and detention; other inhumane acts and cruel treatment; torture; murder; and enforced disappearance alleged in paragraphs 68, 105, 157, 93 and 174.

C. REMEDY SOUGHT

27. For the reasons set out in this filing, the Indictment is defective. The Defence invites the PTJ to:

ORDER the SPO to amend the Indictment in light of the identified defects; and if it cannot, to remove those charges that are defectively pleaded.

Word count: 3,549

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

Tuesday, 31 May 2022

At Tampa, United States