

**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

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**Public Redacted Version of 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**

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## I. INTRODUCTION

1. On 12 March 2021, the defence for Mr Hashim Thaçi (“Defence”) filed a motion under Rule 97(b) of the Rules<sup>1</sup> alleging that the Indictment filed against him<sup>2</sup> is defective.<sup>3</sup> In a decision dated 22 July 2021, the Pre-Trial Judge (“PTJ”) granted the Defence motion in part and ordered the Specialist Prosecutor’s Office (“SPO”) to file a corrected version of the Indictment by 3 September 2021.<sup>4</sup> On 3 September 2021, the SPO filed a corrected indictment confidentially and *ex parte* (“Corrected Indictment”) purporting to implement the Pre Trial Judges’s orders. The Defence only received the Confidential Redacted version of the same on 8 September 2021.<sup>5</sup>

2. In the same filing, the SPO also requested leave pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules to amend the Indictment to include the following allegations (collectively known as “Proposed Amendments”):

- (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>6</sup>

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

<sup>2</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>3</sup> 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”).

<sup>4</sup> KSC-BC-2020-06/F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021 (“Defects Decision”).

<sup>5</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, 3 September 2021 (“Submission of Corrected Indictment and Request to Amend”).

<sup>6</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.

- (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>7</sup>
- (iii) two incidents of the Accused's personal participation in the crimes charged ("Third Category").<sup>8</sup>

3. First, the Defence submits that some of the Proposed Amendments, namely paragraphs 68, 105, 157, 174, 42-43, 141 of Annex 2 to the Submission of Corrected Indictment and Request to Amend, and presumably the Proposed Amendments in paragraphs 93 and 135,<sup>9</sup> are, contrary to the SPO's assertion,<sup>10</sup> new charges and thus trigger the application of Article 39(8) and the attendant processes, i.e. an initial hearing and arraignment on the new charges.

4. Secondly, and notwithstanding the above, the Defence submits that leave to make the Proposed Amendments should be denied because they are prejudicial and inconsistent with Mr Thaçi's rights as set out below.

5. This Response is filed as confidential because it refers to confidential filings.

## II. APPLICABLE LAW

6. Article 39(8) of the Law and Rule 90(b) of the Rules provide, in similar terms, that after the indictment is confirmed, but before the trial has begun, the SPO may, with the permission of the Pre-Trial Judge having heard the parties, amend the indictment. Rule 90(2) provides that leave to amend the indictment may be granted if

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<sup>7</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.

<sup>8</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>9</sup> See paragraph 14 of this Response below.

<sup>10</sup> Submission of Corrected Indictment and Request to Amend, para. 3.

the Panel is “satisfied that the amendment is not prejudicial or inconsistent with the rights of the Accused.”

7. Article 39(8) of the Law further provides that if the SPO “seeks to add new charges or to substitute more serious charges, the Pre-Trial Judge shall review such charges and hold an initial hearing”. Rule 90(2) stipulates that in such a case, Rule 86(3) and (4) shall apply.

### III. SUBMISSIONS

#### A. THE PROPOSED AMENDMENTS ADD NEW CHARGES

8. The SPO states that the Proposed Amendments “relate to locations and incidents *already included* in the Indictment” and simultaneously that they relate to “two *additional* sites, which are related, and *additional* victims (First and Second Category) and two *additional* instances of the Accused’s personal participation in the crimes (Third Category).<sup>11</sup> Both assertions by the SPO cannot be correct as they stand in contradiction to each other – the locations and incidents are either new *or* already exist in the Indictment - they cannot be both. The Defence submits that the Proposed Amendments are entirely new allegations against Mr Thaçi.

9. The SPO further submits that the Proposed Amendments do not add any new crimes, charges, counts or modes of liability, but provide “additional factual allegations and clarifications supporting the existing charged crimes and modes of liability.”<sup>12</sup> This is incorrect, as whilst they are not new counts or modes of liability they are ‘new charges’. This is because, as set out below, they are entirely new factual scenarios upon which Mr Thaçi may be found guilty. As held by various ICTY and ICTR trial chambers, an amendment adds a ‘new charge’ when it “introduces a basis

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<sup>11</sup> Submission of Corrected Indictment and Request to Amend, para. 11 (emphasis added).

<sup>12</sup> Submission of Corrected Indictment and Request to Amend, para. 3; *see also* para. 11.

for conviction that is factually and/or legally distinct from any already alleged in the indictment.”<sup>13</sup>

10. In respect of the allegations in the First Category, the SPO applies for leave to add [REDACTED] new crime sites, being detention sites “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”. While the [REDACTED] municipality was previously included in the Indictment as a municipality where there were detention sites, the specific locations of [REDACTED], which the SPO now seeks to add, were not.

11. The alleged victims within the First Category are also, as far as the Defence is aware, ‘new’. [REDACTED]. [REDACTED]. [REDACTED]. Moreover, rather than amend existing paragraphs of the Indictment to cover these allegations, the SPO has had to add completely new paragraphs (paragraphs 68, 105 and 157 in Annex 2, Submission of Corrected Indictment and Request to Amend), because Mr Thaçi is being charged with new crimes. Accordingly these are ‘new charges’ because they

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<sup>13</sup> ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, (Decision on Proposed Amended Indictment) at para. 54. In this case, see para. 55, the Chamber held that the inclusion of “three entirely new factual situations... in support of the existing Counts resulted in the inclusion of new charges forming a new basis for conviction.” See also, ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91PT, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009, (Decision on Motion for Leave to Amend the Indictment) para. 14; ICTY, *Prosecutor v. Lukić et al*, IT-98-32/1-PT, Decision Granting Prosecution’s Motion to Amend Indictment and Scheduling Further Appearance, 1 February 2006, at para. 17: “Given that the destruction of houses is a newly-alleged act upon which an accused might be found guilty of the crime of Persecutions, the Accused must have an opportunity to plead to this alleged crime”; see also para. 18: “Given the fact that the Accused could be convicted of Count Eleven or Count Twelve, or both, if found to have committed the newly-alleged acts above, he must have the chance to enter pleas.”

introduce a basis for conviction that is factually distinct from any already alleged in the Indictment.<sup>14</sup>

12. In respect of the allegations in the Second Category, the [REDACTED] detention site was previously included in the Indictment as a location. Indeed, the amendment proposed in paragraphs 93 and 135 of Annex 2, Submission of Corrected Indictment and Request to Amend, purports to be simply an amendment to the time frame of an existing allegation. However, [REDACTED]<sup>15</sup> [REDACTED]. [REDACTED]. As such this constitutes a new charge. [REDACTED].

13. The Defence submits that the allegations in paragraph 174 of Annex 2, Submission of Corrected Indictment and Request to Amend amount to a 'new' charge, since they relate to 'new' incidents of persecution and murder allegedly perpetrated against two new victims that are not currently in the Indictment. They are thus bases for conviction that are factually/legally distinct from any already alleged in the Indictment. Indeed, the SPO has had to introduce a completely new paragraph to deal with them, rather than amend an existing one.

14. In respect of the Third Category, the Defence is unable to make any comment on whether the allegations set out in the new paragraph 42 and added to paragraph 141 of Annex 2, Submission of Corrected Indictment and Request to Amend, are 'new' as they are redacted. The information is presumably new, otherwise the SPO would not have considered it necessary to redact it. While the identities of some witnesses and/or victims may remain redacted in the Indictment until their disclosure to the Defence, in accordance with the protective measures ordered by the PTJ, redactions should be as limited as possible given that they are prejudicial to the Accused's knowledge of the case against him. The redactions of entire paragraphs of the

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<sup>14</sup> See authorities cited in footnote 13 above.

<sup>15</sup> [REDACTED].

Indictment are excessive. The Defence therefore invites the PTJ to review all proposed redactions to ensure that the Defence is disclosed a less redacted version without delay. The Defence thus reserves its position in this regard until such date as the relevant protective measures are lifted. Paragraph 43 of Annex 2, Submission of Corrected Indictment and Request to Amend relates to an incident at a new location - [REDACTED] – which is entirely new. It is a new charge as it introduces a basis for conviction that is factually distinct from any already alleged in the indictment.<sup>16</sup>

15. Consequently, and contrary to the SPO's submissions, these Proposed Amendments (subject to clarification regarding paragraphs 93 & 135 of Annex 2 Submission of Corrected Indictment and Request to Amend) constitute new charges. Article 39(8) of the Law, and Rule 90(2) of the Rules thus apply, and if leave to amend the Indictment is granted, the PTJ will be required to review the new charges and supporting materials pursuant to Rule 86(4) and hold an initial hearing so that Mr Thaçi can be arraigned on them and allow time for the filing of further preliminary motions. This process will cause further delay to the commencement of this trial which, as discussed below in more detail, is inconsistent with Mr Thaçi's right under Article 21(4)(d) to be tried within a reasonable time. Thus, leave to amend should be denied.

B. THE PROPOSED AMENDMENTS ARE PREJUDICIAL AND INCONSISTENT WITH THE RIGHTS OF THE ACCUSED

16. In assessing whether allowing the amendments would be prejudicial and adversely affect the accused's right to be tried within a reasonable time, the case law of the *ad-hoc* Tribunals can assist the Kosovo Specialist Chambers. They establish that the possibility of delay in proceedings as a result of granting leave to amend an

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<sup>16</sup> See authorities cited in footnote 13 above.



indictment must be weighed against the benefits to the accused and the Chamber that any amendment may bring, for example, the simplification of proceedings or a more complete understanding of the Prosecution's case. In assessing whether undue delay would be caused, the PTJ can consider the course of proceedings so far, including the diligence of the prosecutor in advancing the case, the timeliness of the motion and the effect of the amendment on the overall proceedings.<sup>17</sup>

17. The Proposed Amendments will not benefit the Accused. Rather than make the Indictment clearer or more specific, they simply expand the case against him. Set against this is the real likelihood of delay to the start date of the trial if these amendments are granted because they are "new charges", and thus would require a new confirmation process, a re-arraignment and potential preliminary motion litigation.<sup>18</sup> There will then need to be additional time granted for the Defence to investigate these allegations, all of which will cause additional delay to the start of the trial. Finally, as set out below, the SPO has been far from diligent in bringing this motion, which is a factor to be considered by the PTJ when weighing whether to allow these amendments.

18. With regard to the First and Second Categories, the SPO states that "while the investigation had commenced before the confirmation proceedings [...], interviews of key witness - which were necessary to a consideration of the strength and relevance of these additional factual allegations - occurred *thereafter*".<sup>19</sup>

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<sup>17</sup> ICTY, *Prosecutor v. Delić*, Decision on Proposed Amended Indictment, para. 21; ICTY, *Prosecutor v. Stanišić & Župljanin*, Decision on Motion for Leave to Amend the Indictment, para. 13; ICTR, *Prosecutor v. Simba*, ICTR-2001-76-I, Decision on Motion to Amend Indictment, 26 January 2004, para. 9; ICTR, *Prosecutor v. Gatete*, ICTR-2001-61-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 21 April 2005, para. 3.

<sup>18</sup> This is a factor taken into account when deciding whether to grant leave to appeal, see for example ICTY, *Prosecutor v. Stanišić & Župljanin*, Decision on Motion for Leave to Amend the Indictment, para. 14; ICTY, *Prosecutor v. Delić*, Decision on Proposed Amended Indictment, para. 22.

<sup>19</sup> Submission of Corrected Indictment and Request to Amend, para. 10 (emphasis added).



19. Dealing with the First Category of allegations, Annex 3 of the Submission of Corrected Indictment and Request to Amend contains the evidential basis for these new allegations. [REDACTED]. The Defence does not know when the SPO received the documentary material it cites. However, the majority of the witness interviews cited all occurred *before* the completion of the confirmation proceedings on 26 October 2020 when the PTJ issued his decision,<sup>20</sup> specifically:

- [REDACTED] - Interview date: 29 January 2020
- [REDACTED]- Interview date: 27 August 2020
- [REDACTED] – interview date: 4 September 2020
- [REDACTED] - Interview date: 15 September 2020

The following interviews took place *after* the completion of the confirmation processes but over 9 months ago:

- [REDACTED] - Interview date: 12 December 2020
- [REDACTED] - Interview date: 15 December 2020
- [REDACTED] - Interview date: 16 December 2020

On any view, waiting until 10 months *after* confirmation to decide that this material supports new allegations and then requesting leave to amend the Indictment reveals a lack of diligence, and constitutes undue delay, breaching Mr Thaçi's rights to a trial in a reasonable time and to be informed promptly of the cause of the charge against him pursuant to Article 21(4)(a) and (d).

20. Turning to the Second Category of allegations, Annex 4 of the Submission of Corrected Indictment and Request to Amend, contains the evidential basis for these new allegations. [REDACTED]. The Defence does not know when the SPO received

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<sup>20</sup> KSC-BC-2020-06/F00026/Red, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaci, Kadri veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020 ("Confirmation Decision").

the documents. However, the witness interviews occurred *before* the completion of the confirmation process as follows:

- [REDACTED]: Interview date: 17 June 2020
- [REDACTED]: Interview date: 7 September 2020
- [REDACTED]: Interview date: 17 September 2020

On any view, waiting over a year after obtaining these interviews to apply to amend the Indictment is unacceptable and constitutes undue delay.

21. Finally, Annex 5 of the Submission of Corrected Indictment and Request to Amend contains the supporting evidence for the allegations in the Third Category. This consists of [REDACTED] witness interview, the date of which is 30 July 2019.<sup>21</sup> This is over a year *before* the completion of the confirmation process. The SPO's argument that it was only following the PTJ's ruling in the Defects Decision that it became aware that it had to apply for an amendment to include this allegation<sup>22</sup> rings hollow as it is trite law that an indictment must specifically plead personal participation in detail.<sup>23</sup> This delay is thus similarly unacceptable and constitutes undue delay.

#### C. THE INTERESTS OF VICTIMS AND JUSTICE

22. The Defence agrees with the SPO that the public and victims have an interest in the effective investigation and prosecution of crimes.<sup>24</sup> However, this does not trump the fair trial rights of an accused and indeed the text of Rule 90(2) refers to the rights of the accused rather than those of the victim/s. The rights of the public and victims cannot be used by the SPO to cure a problem it alone created due to a lack of

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<sup>21</sup> [REDACTED].

<sup>22</sup> Submission of Corrected Indictment and Request to Amend, para. 10.

<sup>23</sup> ICTY, *Prosecutor v. Kupreškić et. al*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, para. 89.

<sup>24</sup> Submission of Corrected Indictment and Request to Amend, para. 6.

diligence. As stated above, the SPO has been in possession of the relevant information needed to charge certain alleged events in the most part for over a year but has not, in that time, applied to amend the Indictment.

#### **IV. RELIEF SOUGHT**

23. For the above reasons, the Defence respectfully requests that the PTJ reject the SPO's request for leave to amend the Indictment by adding new paragraphs 68, 93, 105, 135, 157, 174, 42-43, 141 in Annex 2 of the Submission of Corrected Indictment and Request to Amend.

24. In the alternative, and to the extent that leave is given to amend the Indictment as requested, the Defence requests that paragraphs 68, 93, 105, 135, 157, 174, 42-43, 141 in Annex 2 of the Submission of Corrected Indictment and Request to Amend are recognised as new charges and that the PTJ review such charges and hold an initial hearing as necessary.

25. The SPO should be further ordered to submit a less redacted version of the Indictment and an amended, consolidated Outline, including the new alleged incidents.

**[Word count: 3,002 words]**

Respectfully submitted,



**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Thursday, 10 February 2022

At Tampa, United States