

In: KSC-BC-2023-12

Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 8 May 2025

Language: English

Classification: Public

Thaçi Defence Motion on Defects in the Indictment

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I. INTRODUCTION

1. This preliminary motion is filed pursuant to Article 39 of Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ("KSC Law"), Rule 97(1) of the Rules of Procedure and Evidence ("Rules") and the Pre-Trial Judge's decision of 14 April 2025 which fixed the deadline for preliminary motions as 8 May 2025.¹ In it the defence of Mr Hashim Thaçi ("Defence") submits that the indictment in the present case² ("Indictment") is defective for lack of specificity regarding the crime of attempted obstruction of public officials.
2. The Indictment's charges relating to attempted obstruction of official persons are vague and offer almost no material facts relevant to the material elements of the offence. In parts the Indictment merely restates elements of the offence, without proving any clarity on which facts are said to establish them. From this Indictment it is impossible for Mr Thaçi to understand the nature of the attempted obstruction charges against him.

II. PROCEDURAL HISTORY

3. On 29 November 2024, an indictment was confirmed by the Pre-Trial Judge.³
4. Following an SPO appeal, on 3 April 2025, an Appeals Panel partly reversed the decision which had confirmed the indictment and remanded the matter to the Pre-Trial Judge.⁴ On 14 April 2025, the Pre-Trial Judge amended her confirmation

¹ KSC-BC-2023-12/F00260, Pre-Trial Judge, [Decision Amending the "Decision on the Confirmation of the Indictment" and Setting a Date for the Submission of Preliminary Motions](#), 14 April 2025, Public.

² KSC-BC-2023-12/F00264/A02, SPO, [Public Redacted Amended Confirmed Indictment](#), 16 April 2025, Public.

³ KSC-BC-2023-12/F00036, Pre-Trial Judge, [Public Redacted Version of the Decision on the Confirmation of the Indictment](#), 29 November 2024 (public redacted version issued on 12 February 2025), Public.

⁴ KSC-BC-2023-12/IA002/F00012/RED, Appeals Panel, [Public Redacted Version of Decision on the Specialist Prosecutor's Office's Appeal Against the Decision on the Confirmation of the Indictment](#), 3 April 2025, Public.

decision,⁵ and on 16 April 2025 the SPO submitted the amended Indictment. It is the basis of the present case (also referred to as “Case 12”).⁶

III. APPLICABLE LAW

5. Article 21(4)(a) of the KSC Law requires that an accused shall be informed promptly and in detail of the nature and cause of the charge against him. Article 38(4) and Rule 86(3) of the Rules require that the SPO’s indictment contain a concise statement of the facts and the crime(s) charged.
6. An indictment will be defective if “it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence’s ability to prepare.”⁷
7. More specifically, as well established in international jurisprudence, an indictment will be defective when it fails to plead a “material fact”:

“in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon 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.”⁸

⁵ KSC-BC-2023-12/F00260, Pre-Trial Judge, [Decision Amending the “Decision on the Confirmation of the Indictment” and Setting a Date for the Submission of Preliminary Motions](#), 14 April 2025, Public.

⁶ KSC-BC-2023-12/F00264/A02, SPO, [Public Redacted Amended Confirmed Indictment](#), 16 April 2025, Public.

⁷ KSC, *Prosecutor v Thaçi, Veseli, Selimi, and Krasniqi*, KSC-BC-2020-06/F00413/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment](#), 22 July 2021, Public, para. 40; KSC, *Prosecutor v Januzi, Bahtijari and Shala*, KSC-BC-2023-10/F00433/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Preliminary Motions and Related Requests](#), 12 August 2024, Public, para. 41; See also KSC, *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA004/F00007, Appeals Panel, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, Public, para. 36.

⁸ ICTY, *Prosecutor v Kupreškić*, IT-95-16-A, Appeals Chamber, [Appeal Judgement](#), 23 October 2001, para. 88. See also KSC, *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/IA004/F00007, Appeals Panel,

8. Precisely which facts are material, and the level of detail in which they must be pleaded will depend on the case. Key considerations are the scale of the criminality and the how directly involved the accused is said to have been.⁹ If it is “impractical or impossible” to provide full details, prosecutors must give their “best understanding of the case against the accused”.¹⁰

IV. SUBMISSIONS

9. Counts 1 to 3 of the Indictment charge Mr Thaçi with attempted obstruction of official persons in performing official duties, by participating in the common action of a group, pursuant to Articles 401(2).¹¹ In respect of this offence the Indictment also charges aggravating factors under Articles 401(3) and (5) of the Kosovo Criminal Code (“KCC”).¹²
10. In the Outline submitted pursuant to Rule 86(3)(b), the SPO identified the material elements of Article 401(2) as:
- “Participation in a group, which by common action”;¹³
 - “Obstructs or attempts to obstruct an official person in performing official duties”.¹⁴

Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, Public, para. 36.

⁹ ICTY, *Prosecutor v Kupreškić*, IT-95-16-A, Appeals Chamber, [Appeal Judgement](#), 23 October 2001, paras 89-90; ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#), 28 February 2005, para. 30; ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-3121-Red, Appeals Chamber, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, paras 122-123.

¹⁰ ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#), 28 February 2005, para. 30;

¹¹ KSC-BC-2023-12/F00264/A02, SPO, [Public Redacted Amended Confirmed Indictment](#), 16 April 2025, Public, para. 46.

¹² *Ibid.*

¹³ KSC-BC-2023-12/F00028/A02/RED, SPO, [Public redacted version of ‘ANNEX 2’ to Submission of Further Amended Indictment for confirmation](#), 12 November 2024 (public redacted version filed 4 February 2025), Public, p. 1

¹⁴ *Ibid.*, p. 23.

11. The Defence reserves its position regarding the correctness and completeness of these elements, recognising that the Single Judge has previously held that arguments about the elements of a crime or their interpretation are matters to be raised at trial rather than in preliminary motions.¹⁵
12. However, even assuming that these are the correct elements of the offence, the Indictment is vague and lacks particulars regarding material facts alleged by the SPO.

1. The Indictment lacks particulars regarding the identity of the official(s)

13. The SPO's own formulation of the crime refers to at least one "*official person*" who was performing official duties. Specifically, article 401(2) requires the obstruction of an *official*. It does not refer to the obstruction of a public institution but to the obstruction of one or more of its officials. Reference to the KSC/SPO in general is therefore inadequate. In cases decided by the Kosovo courts involving article 401 (or the two materially equivalent offences which preceded it¹⁶), there is an individual official identified as having been obstructed in the performance of a duty.¹⁷ It is this official person who is the victim of the offence.
14. Ordinarily the victim of an offence will be a material fact which must be pleaded in an indictment. An indictment will be defective if victims are "only generally

¹⁵ KSC, *Prosecutor v. Sabit Januzi, Bahtijari and Shala*, KSC-BC-2023-10/F00433/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Preliminary Motions and Related Requests](#), 12 August 2024, Public, para. 43.

¹⁶ [Criminal Code of the Republic of Kosovo](#), Code No. 04/L-082, 13 July 2012, Article 409; [Provisional Criminal Code of Kosovo](#), UNMIK/REG/2003/25, 6 July 2003, Article 316.

¹⁷ See for example: *People v Z.V.*, P. No. 933/2013, Basic Court of Mitrovica/Mitrovicë, Judgment, 10 July 2014, in which the injured parties are identified as two uniformed police officers, "A.T. and F.S."; *People v SS and others*, P. No. 122/2014, Basic Court of Mitrovica/Mitrovicë, Judgment, 23 October 2015, in which the obstruction was directed at specific individual officials who had been travelling in a specific identified official vehicle

identified.”¹⁸ They must be identified “to the greatest degree of specificity possible in the circumstances.”¹⁹

15. And yet, the Indictment nowhere particularises the identity or identities of the official person or official persons whom Thaçi and others are said to have attempted to obstruct in the performance of duties. At paragraph 23, the Indictment only alleges that these persons were “a judge, a prosecutor, an official of a court, prosecution officer or a person authorised by the court and prosecution office”. This is merely a reference to some of the categories of victims which establish an aggravated form of the offence under Article 401(5). In other words, the SPO has merely pleaded the elements of Article 401(2) and (5). It has not pleaded any *facts*.
16. Yet the identity of the public officials must be a material fact. This is an element of the offence. If the Defence does not know which official or officials Mr Thaçi is said to have obstructed, it cannot answer the charge.
17. Moreover, in the present case, this is something which must be within the knowledge of the SPO. This is not a case involving mass crimes, where details cannot be provided because of their “sheer scale”.²⁰ Neither is it a case where the information is unknowable in details due to the “fallibility of witness recollection”.²¹ To the contrary, the SPO appears to have in mind “public officials”

¹⁸ ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#), 28 February 2005, para. 31; see also ICTR, *Renzaho v Prosecutor*, ICTR-97-31-A, Appeals Chamber, [Judgement](#), 1 April 2011, para. 128.

¹⁹ ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-3121-Red, Appeals Chamber, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, para. 123; also *Prosecutor v Kvočka et al.*, IT-98-30/1, Trial Chamber, [Decision on Defence Preliminary Motions on the Form of the Indictment](#), 12 April 1999, para. 23.

²⁰ ICTR, *Prosecutor v Muhimana*, ICTR-95-AB-A, Appeals Chamber, [Judgement](#), 21 May 2007, para. 79; SCSL, *Prosecutor v Taylor*, SCSL-03-01-A, Appeals Chamber, [Judgment](#), 26 September 2013, para. 40, highlighting that this concept provides only a “narrow” exception that would permit less detailed pleading.

²¹ ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#), 28 February 2005, para. 30.

who are KSC officials, including members of its own staff. It should therefore be possible for the SPO to detail who these persons are.

18. Not only has the SPO failed to plead which specific individual officials it intends to rely on as having been obstructed in their duties, it does not even make clear which types of official it refers to. Paragraph 6 of the Indictment states that all crimes charged “relate to official proceedings of the Kosovo Specialist Chambers (‘KSC’), including investigations of the Specialist Prosecutor’s Office (‘SPO’)”. Paragraph 25 also refers to the “KSC/SPO”. By reading these paragraphs together with paragraph 23, the Defence infers that the officials referred to are officials of the KSC and SPO. However, beyond this, the Indictment provides no particulars. The list set out in paragraph 23 of the Indictment is broad enough to include any KSC judge, any SPO prosecutor, any staff of the SPO, and any staff of the KSC (including Registry or Chambers).

2. The Indictment lacks particulars regarding the official duties

19. Relatedly, the Indictment does not provide any particulars regarding the “official duties” which it alleges an official was obstructed in doing. Based on its Rule 86(3)(b) Outline, the SPO appears to recognise that it is an element of the offence not only that the victim was an “official person,” but that this person was obstructed “in performing official duties.”
20. Paragraph 25 of the Indictment states that the accused and others attempted “to compromise the KSC/SPO’s “ability to effectively investigate and prosecute crimes, including the KSC/SPO’s ability to obtain and secure relevant witness evidence”. This paragraph merely refers to general objectives or outcomes which the SPO may seek to achieve through its work. It does not detail any specific *duties* which officials were performing when they were obstructed.

3. The Indictment lacks particulars regarding the obstruction

21. The Indictment is equally vague regarding the obstruction which is said to have been attempted. It only states that the Accused “coordinated to influence witnesses”²² but does not explain how influencing witnesses would have caused the obstruction of a public official.
22. In previous KSC decisions, “obstruct” has been held to mean “prevent, impede, hinder, or delay the motion, passage or progress of something.”²³ The Defence reserves its position regarding the correctness of that interpretation, which is a question to be argued at trial.²⁴ Nonetheless, the Indictment does not explain how the SPO alleges that a plan to contact witnesses and “influence” them would “prevent, impede, hinder or delay” KSC or SPO officials in their duties.

4. The Indictment lacks particulars regarding the common action

23. Where obstruction is said to have occurred by a group under article 401(2), the offence requires that there was a “common action” taken by members of that group in order to cause the obstruction (or attempted obstruction).
24. The Indictment identifies three different groups which are said to have been involved in the commission of a crime under article 401(2).²⁵
25. However, the Indictment does not explain what conduct of the Accused, or the three groups, amounted to “common action” by which obstruction was attempted.

²² KSC-BC-2023-12/F00264/A02, SPO, [Public Redacted Amended Confirmed Indictment](#), 16 April 2025, Public, para. 24. See also para. 7.

²³ KSC, *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/F00611/RED, Trial Panel II, [Public Redacted Version of the Trial Judgment](#), 18 May 2022, Public, para. 145; KSC, *Prosecutor v Gucati and Haradinaj*, KSC-BC-2020-07/F00074/RED, Pre-Trial Judge, [Public Redacted Version of the Decision on the Confirmation of the Indictment](#), 11 December 2020, Public, para. 70.

²⁴ See paragraph 11 above.

²⁵ KSC-BC-2023-12/F00264/A02, SPO, [Public Redacted Amended Confirmed Indictment](#), 16 April 2025, Public, para. 23.

V. CONCLUSION

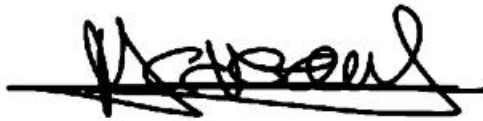
26. The Indictment fails to provide Mr Taçi with the bare minimum information required for him to understand and answer the charges of obstruction of official persons brought against him. These charges are defective.

27. The Defence requests the Pre-Trial Judge to:

ORDER the SPO to amend the Indictment in light of the identified defects; and if it cannot do so, to remove the charges of obstruction of official persons.

[Word count: 2417 words]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Menegon', written over a horizontal line.

Sophie Menegon

Counsel for Hashim Taçi

8 May 2025

Paris, France