

**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 Fadil Fazliu

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**Language:** English

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### Fazliu Defence Challenge to the Form of the Indictment

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## I. INTRODUCTION

1. Pursuant to Article 39(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office (*'Law'*) and Rule 97(1) of the Rules of Procedure and Evidence (*'Rules'*), the Defence for Mr. Fadil Fazliu (*'Fazliu Defence'*) respectfully files the following submissions challenging the form of the Indictment against Mr. Fazliu.
2. The Indictment fails to sufficiently particularise the charges against Mr. Fazliu and the material facts underpinning them. Key aspects of the charges remain vague. This is unjustifiable as the alleged offences concern a narrow timeframe, involve few incidents, and are of limited criminal nature. As such, Mr. Fazliu is unable to effectively or efficiently prepare a defence. The Indictment must be amended to prevent his fair trial rights from being prejudiced at the outset of these proceedings.

## II. PROCEDURAL BACKGROUND

3. On 29 November 2024, the Pre-Trial Judge confirmed the indictment against Messrs Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, and Hajredin Kuçi (*'Confirmation Decision'*).<sup>1</sup>
4. On 14 April 2025, the Pre-Trial Judge issued the decision amending the Confirmation Decision and ordered the parties to submit any preliminary motions by 8 May 2025.<sup>2</sup>
5. On 16 April 2025, the Specialist Prosecutor's Office (*'SPO'*) filed an Amended

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<sup>1</sup> KSC-BC-2023-12, F00036, Decision on the Confirmation of Indictment, 29 November 2024, confidential (*'Confirmation Decision'*). Public redacted version dated 12 February 2025.

<sup>2</sup> KSC-BC-2023-12, F00260, Decision Amending the *'Decision on the Confirmation of the Indictment'* and Setting a Date for the Submission of Preliminary Motions, 14 April 2025, public.

Confirmed Indictment ('Indictment').<sup>3</sup>

### III. APPLICABLE LAW

6. Pursuant to Rule 86(3) of the *Rules* and Article 38(4) of the *Law*, an indictment must contain a concise statement of the facts of the case and the crimes with which an accused is charged. This must be read in conjunction with Rule 157 safeguarding an accused's right to be informed promptly and in detail of the nature and the cause of the charges against him, and to have adequate time and facilities to prepare his defence.<sup>4</sup>
7. Where an indictment failed in this regard, the Defence may allege defects in its form under Rule 97(1)(b). The Pre-Trial Judge has the power to review and rule on any alleged defects in the form of the indictment so as to ensure the case is prepared properly.<sup>5</sup>

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<sup>3</sup> KSC-BC-2023-12, F00264/A01, Amended Confirmed Indictment, 16 April 2025, confidential ('Indictment'). Public redacted version filed simultaneously as F00264/A02.

<sup>4</sup> See, e.g., KSC-BC-2020-07, F00147/RED, Public Redacted Version of Decision on Defence Preliminary Motions, 8 March 2021, public, para. 38; KSC-BC-2020-06, F00010, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 2 July 2020, public, paras 9 and 11. See also *Delić*, IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Orders on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 6; *Mattoccia v. Italy*, no. 23969/94, Judgment, 25 July 2000, para. 60; *Nsengiyumva*, ICTR-96-12-I, Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, 12 May 2000, p. 6, para. 1; *Kupreškić et al.*, IT-95-16-A, Judgment, 23 October 2001, para. 88; *Ntagerura et al.*, ICTR-99-46-A, Judgment, 7 July 2006, para. 22; *Ayyash et al.*, STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011, para. 27; *Al Hassan*, Decision on the Defence Request Concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, ICC-01/12-01/18-143-tENG, 5 October 2018, para. 30; *Yekatom & Ngaïssona*, Decision on the 'Prosecution's Request to Postpone the Confirmation Hearing and All Related Disclosure Deadlines', ICC-01/14-01/18-199, 15 May 2019, paras 41-42.

<sup>5</sup> *Law*, Article 39(1).

#### IV. SUBMISSION

8. A specific, precise, clear, and unambiguous indictment is an essential prerequisite for a fair and expeditious trial, and assists the prosecution in focusing its case, thereby ensuring effective use of court time.<sup>6</sup> This is particularly important in cases concerning the administration of justice where both the trial and any prospective sentence are comparatively limited in length. Vague indictments inevitably engender protracted litigation and consequent delays, and can be basis for appellant quashing of convictions.<sup>7</sup>

##### Material Facts

9. Proper identification of criminal acts in an exhaustive manner is crucial both to allow a trial panel to manage the proceedings and to allow the accused to prepare a meaningful defence.<sup>8</sup> The specificity of the notice required is proportional to the alleged proximity to the offence.<sup>9</sup> Whereas Mr. Fazliu appears to be accused of being

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<sup>6</sup> *Zigiranyitrazo*, ICTR-2001-73-1, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004, para. 28.

<sup>7</sup> See *Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08-3636-Red, paras 109-110 (finding the formulation of the operative indicting document 'too broad to amount to a meaningful "description" of the charges' against the accused and '[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with [the requirement on form of indictment]').

<sup>8</sup> *Bemba*, Separate Opinion of Judge Christin Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, 8 June 2018, para. 29.

<sup>9</sup> *Ntagerura et al.*, ICTR-99-46-A, Judgment, 7 June 2006, para. 23 ('The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.');

*Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 210 ('A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.');

*Nahimana et al.*, ICTR-99-52-A, Judgment, 28 November 2007, para. 324 ('[T]he Prosecutor's characterisation of the alleged criminal conduct and the proximity between the accused and the crime charged are decisive factors in determining the degree of specificity with which the Prosecutor must plead the material facts of his case in the indictment.').

directly involved in the events set out in paragraph 10 of the Indictment, the SPO is obligated to plead the material facts with a high degree of specificity and ‘the greatest precision’.<sup>10</sup>

10. Mr. Fazliu is alleged to have attempted to obstruct the KSC/SPO’s ability to obtain and secure Witness 1’s evidence through his personal actions.<sup>11</sup> Facts pertaining to his alleged interference with Witness 1 are, therefore, material in nature.<sup>12</sup> However, the Indictment is impermissibly vague where the events outside the Detention Centre and involving Witness 1 are concerned. The SPO failed to state clearly: (i) what it alleges Mr. Fazliu to have done during the alleged meeting on 29 June 2023; (ii) whether it alleges that Mr. Fazliu, Mr. Fahri Fazliu, and Witness 1 met on 3 July 2023; and (iii) if yes, what it alleges to Mr. Fazliu to have done during the meeting on 3 July 2023.
11. These facts, particularly points (i) and (iii), are central to the allegation of attempted obstruction and, in turn, Mr. Fazliu’s ability to meaningfully prepare his defence as well as the trial panel’s management of the proceedings.<sup>13</sup> If the SPO does not have the information, the charge should be withdrawn.<sup>14</sup> It may not rely on the

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<sup>10</sup> *Ntagerura et al.*, ICTR-99-46-A, Judgment, 7 June 2006, para. 23 (‘[W]here the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed “with the greatest precision”’); *Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 211.

<sup>11</sup> Indictment, paras. 10 and 25.

<sup>12</sup> *Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 210 (‘[T]he materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case.’).

<sup>13</sup> *Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 212.

<sup>14</sup> *Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 30 (‘[E]ven where it is impractical or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should **only** proceed where the right of the accused to know the case against him and to prepare his defence has been assured.’) (emphasis added); *Kupreškić et al.*, IT-95-16-A, Judgment, 23 October 2001, para. 92 (‘It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the

weaknesses of its own investigation in order to mould the case against Mr. Fazliu as the trial progresses.<sup>15</sup>

### Contour of Common Action

12. The SPO's formulation of charges and material facts in this case revolves around the allegations against Mr. Thaçi. Whilst Mr. Thaçi is alleged to have 'together with Fadil FAZLIU, Bashkim SMAKAJ, Isni KILAJ, and Hajredin KUÇI, coordinated to unlawfully influence the testimony of and/or contact SPO witnesses in the *Thaçi et al.* case',<sup>16</sup> the contour of the 'common action' within the meaning of Article 401(2) of the 2019 Kosovo Criminal Code ('KCC') is blurred where Messrs Fazliu, Smakaj, Kilaj, and Kuçi are concerned.
13. The Defence acknowledges that Messrs Fazliu, Smakaj, Kilaj, and Kuçi are alleged members of their respective 'group'.<sup>17</sup> However, the formulation of the Indictment excerpt reproduced above could be interpreted as they coordinated amongst themselves.<sup>18</sup> This ambiguity is not resolved by the pre-trial discovery.<sup>19</sup>
14. Should the SPO intend to allege coordination between Messrs Fazliu, Smakaj, Kilaj, and Kuçi as forming part of the alleged criminal conduct under Article 401(2), it

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Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.').

<sup>15</sup> *Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 30 ('The Prosecution [...] may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.');

*Kupreškić et al.*, IT-95-16-A, Judgment, 23 October 2001, para. 92 ('It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.');

*Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 71.

<sup>16</sup> Indictment, para. 7.

<sup>17</sup> Indictment, para. 23.

<sup>18</sup> See also, *infra*, Inter-Group Assistance.

<sup>19</sup> Cf. *Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 33 (finding that defects because of vagueness or ambiguity could be cured 'where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness').

must specify: (i) whether it alleges a broader common action group consisting of all the members of the identified groups, indicted or otherwise; (ii) whether it alleges that Mr. Fazliu was aware of the alleged intent outside the scope of membership of the 'Fazliu Group'; (iii) whether it alleges that Mr. Fazliu was aware of the alleged activities outside the scope activities of the 'Fazliu Group'; (iv) whether it alleges that Mr. Fazliu shared intent with all the co-accused other than Mr. Thaçi as well as the unindicted persons other than Mr. Fahir Fazliu.

### **Attempt**

15. With regard to attempt, the SPO's failure to plead with specificity is particularly egregious.<sup>20</sup> It is unclear which perpetrator is alleged to have begun to execute which material elements, and how the conducts fell short of a full commission. The SPO is expected to know its case before proceeding to trial.<sup>21</sup> Whether Mr. Fazliu is alleged to have failed to adduce false testimony or deter Witness 1 from testifying, for example, entail two distinct lines of defence. Mr. Fazliu should not be expected to engage in guesswork to ascertain the nature and the cause of the charges against him, or to prepare alternative lines of defence because of the SPO's failure – strategic or otherwise – to make its case clear.<sup>22</sup>
16. Relatedly, the Indictment as it stands only cites Article 401(2), which envisages

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<sup>20</sup> Cf. Indictment, para. 36.

<sup>21</sup> *Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 30 ('The Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.');

*Kupreškić et al.*, IT-95-16-A, Judgment, 23 October 2001, para. 92 ('[T]he Prosecution is expected to know its case before it goes to trial.');

*Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 71 ('[T]he Prosecution is expected to know its case before it goes to trial.').

<sup>22</sup> *Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 71 ('An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear.').

attempted obstruction in itself. The applicability of Article 28 of the KCC, governing attempt, is not expressly stated. It is established in the KSC jurisprudence that within the applicable legal framework of the court, attempt is a mode of liability, not an inchoate crime.<sup>23</sup> As such, the SPO should be ordered to change the wording of ‘committed the crime of attempted obstruction of official persons’<sup>24</sup> to ‘attempted, within the meaning of KCC Article 28, the commission of the crime of obstructing official persons’.<sup>25</sup> Referencing Article 28 is not a simple repetition. It dispels the ambiguity around the relevance of provisions and jurisprudence on, for example, Article 28(3) on potential reduction of sentence and, in turn, allows Mr. Fazliu an effective and efficient preparation of his defence both in terms of the evidence and the law.

### **Inter-Group Assistance**

17. With regard to Count 16, the SPO broadly alleges that Mr. Fazliu and the co-accused ‘provided assistance [...] among their respective groups’, referring to the so-called ‘Fazliu Group’, ‘Smakaj Group’, and ‘Kilaj Group’.<sup>26</sup> The SPO states that the underlying acts supporting this characterisation can be found in paragraphs 9-12 and 16-22 of the Indictment.<sup>27</sup>
18. However, the referenced paragraphs do not contain any material facts that indicates communications or activities between the groups. If the SPO intends to allege inter-group assistance, it must be ordered to clearly identify Mr. Fazliu’s particular acts or course of conduct which formed the basis for this charge, including the time, the

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<sup>23</sup> See, e.g., KSC-GC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022, Section III.H.6. See also, Confirmation Decision, Section V.C.6.

<sup>24</sup> Indictment, para. 36.

<sup>25</sup> KSC-BC-2020-07, F00251/A01/RED, Lesser Redacted Indictment, 4 October 2021, para. 38.

<sup>26</sup> Indictment, para. 44.

<sup>27</sup> Indictment, para. 44.



place, and the means by which the inter-group assistance is rendered. If the SPO does not possess this information, this aspect of the charge should be withdrawn.<sup>28</sup>

## V. CONCLUSION AND RELIEF

19. For the reasons above, the Defence respectfully requests that the Pre-Trial Judge order the SPO to amend the Indictment by providing greater specificity, particularity, and clarity in relation to each defect identified above.

**Word count: 2561 words**

Respectfully submitted,



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The Hague, the Netherlands

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<sup>28</sup> *Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 30; *Kupreškić et al.*, IT-95-16-A, Judgment, 23 October 2001, para. 92; *Simić*, IT-95-9-A, Judgment, 28 November 2006, para. 71.