

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

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Thaçi Defence reply to SPO response to Preliminary Motion on Defects in the Indictment

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SUBMISSIONS

1. In its Motion on Defects in the Indictment (“Defence Motion”),¹ the Defence of Mr Hashim Thaçi (“Defence”) submitted that the indictment in this case (“Indictment”)² lacks essential particulars concerning the crime of attempted obstruction of public officials.
2. The SPO Response³ contests the Defence Motion, but is unable to conjure material facts which simply do not exist in the Indictment. Instead the SPO Response repeatedly uses two strategies. One is to reference large portions of the Indictment in a way that provide no further clarity as to where within the cited portion clear particulars might be found if they do indeed exist.⁴
3. Secondly, the SPO Response simply submits explanations or definitions of the (argued) elements of the crimes. Thus, in response to the Defence submission that the Indictment fails to identify *which* official person(s) are the victims of the alleged attempted obstruction, the SPO provides a definition of “official person”.⁵ In response to the Defence submission that the Indictment fails to identify *which* official duties would have been affected by the alleged attempted obstruction, the SPO provides a definition of “official duties”.⁶ In response to the Defence submission that the Indictment fails to articulate *how* influencing witnesses would have caused the obstruction of a public official, the SPO provides a definition of “obstruction”.⁷ In response to the Defence argument that the alleged common

¹ KSC-BC-2023-12/F00288, Thaçi Defence Motion on Defects in the Indictment, 8 May 2025.

² KSC-BC-2023-12/F00264/A02, Annex 2 to Submission of Amended Confirmed Indictment, 16 April 2025.

³ KSC-BC-2023-12/F00313, Consolidated Prosecution response to preliminary motions alleging defects in the form of the indictment, 29 May 2025 (“SPO Response”).

⁴ SPO Response, footnotes 10, 12, 18, 21, 24.

⁵ SPO Response, para. 8.

⁶ SPO Response, para. 9.

⁷ SPO Response, para. 10.

action is insufficiently pleaded, the SPO provides a meaning for “common action”.⁸

4. These SPO submissions entirely miss the point of the Defence Motion, and indeed the point of an indictment. Citing the definition of concepts used in the elements of crimes does not assist. An indictment is required to plead *material facts* which, on the SPO’s case, demonstrate that those elements are made out. An indictment may not simply repeat the elements of a crime: in a charge of murder, the indictment cannot simply allege that “a person” was killed. It must plead *which* person (whether by name or by other particulars). Without that information, the Defence is unable to answer the charge.
5. Several points made in the SPO response are problematic in a more particular way, warranting a specific reply.

Official persons

6. Regarding the identity of the official person who was the victim of the attempted obstruction, the SPO responds that its case “does not relate to one individual official”. However, the SPO does not go on to narrow down which officials the case *does* relate to, and certainly cannot point to any indication of this within the Indictment: Does the case relate to a number of specific individual officials, and if so, which ones? Does it relate to a specific category of officials (such as the Case 06 investigation team)? Or is it the SPO case that *all* KSC officials were potentially obstructed? The Indictment provides no answer to this question.
7. Apparently recognising the Indictment lacks this information, the SPO instead cites the Decision on the Confirmation of the Indictment (“Confirmation Decision”), where the Pre-Trial Judge found that in theory certain conduct could

⁸ SPO Response, para. 11.

affect the work of KSC officials “in particular SPO prosecutors and investigators.”⁹ However, this is not part of the Indictment. Nor would it be sufficiently clear if it was in the indictment, as it fails to make clear whether the SPO case only alleges obstruction of “SPO prosecutors and investigators” (as opposed to other KSC officials and SPO staff), or whether the charge is intended to relate to *all* SPO prosecutors and investigators or only some of them.

8. The SPO also asserts that previous cases undermine the Defence Motion’s arguments on this point.¹⁰ Regarding KSC cases, the SPO refers to the two other KSC cases which involved a charge of obstructing public officials, Case 07 and Case 10.¹¹ It is true that in both those cases, the SPO indictments followed the same vague and defective approach regarding this offence. However, poor SPO practice from previous cases does not constitute an authority. In those prior cases, the accused persons did not raise the issues which the Defence are now arguing. The decisions from those cases cited by the SPO therefore provide no indication of how any other panel of the KSC would have decided these questions had they been litigated. Mr Thaçi was not a party in those other cases, and should not suffer detriment as a result of the failure of others to challenge SPO errors.
9. The only other case referred to by the SPO is the Kosovan Court of Appeals decision in *M.I et al.*¹² The SPO misrepresent this decision, saying that it “broadly refers to UN police officers and KFOR soldiers, *vis-à-vis* obstruction, without naming any individuals”.¹³ Regardless of whether the victims were “named” in that decision (it uses pseudonyms), they are certainly identified. The case concerned events at the Mitrovicë Court House in March 2008. On 14 March a violent mob occupied the courthouse, and on 17 March a group of UN police and

⁹ SPO Response, para. 8.

¹⁰ SPO Response, para. 7.

¹¹ SPO Response, footnote 13.

¹² *M.I. et al*, PAKR 513/2013, Judgment, 28 May 2014. Referenced in SPO Response, footnote 13.

¹³ SPO Response, footnote 13.

KFOR soldiers retook control of the location, a number of them being attacked and injured in the process and one died. While the Defence does not have access to the indictment from that case, the appeal decision makes clear that the UN police and KFOR soldiers who were the victims of the obstruction charge were specifically identified in the case, principally by reference to their involvement in the operation to retake the courthouse on 17 March, which is described in some detail. One UN police officer (who died as a result of the events) is identified by a pseudonym in the public version of the judgement.¹⁴ In contrast to the Defence, counsel for the accused in *M.I.* were surely aware of which persons their clients were said to have “obstructed”. Notably, the case *did not* concern an allegation of obstructing “KFOR” or “UN police” in general as a whole, as the SPO apparently believes is permissible. Far from assisting the SPO, this decision demonstrates the Defence’s argument.

Official duties

10. Regarding the official duties which would have been affected if the attempted obstruction had succeeded, the SPO asserts that these are identified in the Indictment “both broadly and on a granular level”.¹⁵ It then merely repeats the phrase “ability to effectively investigate and prosecute crimes, including the KSC/SPO’s ability to obtain and secure relevant witness evidence”, which is critiqued in the Defence Motion as patently inadequate and concerned with objectives rather than “duties”. The SPO Response suggests that this is one of several references to the “official duties” in the Indictment (“specifying *inter alia*...”¹⁶) but is unable to cite any other place in the Indictment where this issue is addressed, since none exists. Instead, the SPO unhelpfully provides a footnote reference to paragraphs 6 to 27 of the Indictment.¹⁷

¹⁴ *M.I. et al*, PAKR 513/2013, Judgment, 28 May 2014.

¹⁵ SPO Response, para. 9.

¹⁶ SPO Response, para. 9.

¹⁷ SPO Response, footnote 18.

11. The case of *M.I.* cited by the SPO provides a useful counterpoint, demonstrating the level of specificity that might be expected in identifying the “official duties” in an obstruction charge. In that case, *M.I.* was said to have “hindered the official forces to safely escort a UN convoy with around 50 protestors who had been arrested before in the courthouse and who were meant to be transported to Pristina.”¹⁸ The “duties” in question related to specific tasks which the public officials had to undertake at a given time; they were not framed vaguely in terms of the overarching mandate or goals of the organisation which the officials belonged to. It is this kind of specificity which the Indictment lacks.

Obstruction

12. Regarding particulars as to *how* the SPO claims that the conduct in question would have obstructed the duties of KSC or SPO officials, the SPO response is even less constructive. The SPO first simply repeats the claim that actions were aimed at obstructing investigations and prosecutions. It then says:

As KSC/SPO Officials are inherently involved in KSC Proceedings, efforts to unlawfully influence witness testimony and/or contact SPO witnesses would necessarily have potential to impede, hinder, and/or delay their official duties.¹⁹

13. The logic of this is difficult to follow, but it appears that the SPO takes the position that *any* unlawful contact with witnesses would *necessarily* obstruct investigations and prosecutions, and that it is therefore unnecessary to provide any details in the Indictment.²⁰ This is demonstrably incorrect. For example: an accused could contact a known SPO witness for a personal matter, entirely unrelated to the proceedings. If this breached a court order for non-contact with witnesses it might be unlawful, but it would not obstruct the work of any KSC or SPO official.

¹⁸ *M.I. et al*, PAKR 513/2013, Judgment, 28 May 2014.

¹⁹ SPO Response, article 10.

²⁰ SPO Response, para. 11.

14. Clearly, in some cases, contact with witnesses can have the result of obstructing the work of some KSC or SPO officials, but this might occur in various different ways. Indeed, in the Confirmation Decision, the Pre-Trial Judge gave a list of possible ways that the work of SPO and KSC officials could “in principle” be obstructed.²¹ The difficulty for the Defence is that no detail of this kind is included in the Indictment. The Pre-Trial Judge was forced, in confirming the Indictment, to speculate about the means of obstruction which were *possible*. The Defence cannot be required to speculate in this way. In order to answer the charges, the Defence must know how the SPO says that the alleged conduct in this case would have caused obstruction of SPO or KSC officials.
15. In the absence of these material facts in the Indictment, it will be impossible for the Defence to respond to the charges, or indeed for a Trial Panel to regulate the trial. For example, if the Defence wants to investigate and submit evidence showing that the conduct alleged had no prospect of hindering or delaying the work of the relevant public official(s), or no prospect of impeding their relevant duties, which public officials and duties should the Defence address these efforts to? If the Defence seeks to tender evidence that the alleged conduct had no possible impact on the work of a given KSC official, how will the Trial Panel determine whether the evidence is relevant, when the Indictment does not identify which public officials are the subject of the case?
16. The current unparticularised state of the Indictment makes it impossible for the Defence to understand and therefore to answer the charge of obstruction. If, on the other hand, the SPO’s case is that the alleged obstruction was committed more generally against the administration of justice rather than any particular official,

²¹ KSC-BC-2023-12/F00036/RED, Decision on the Confirmation of the Indictment, 29 November 2024, para. 189.

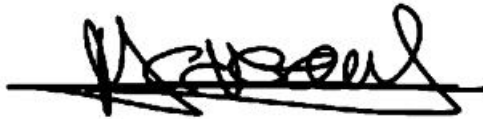
then Mr. Thaci wishes to be heard separately on whether the SPO has brought charges under the wrong provision of the Kosovo Criminal Code.

17. The Defence therefore maintains its request that Pre-Trial Judge:

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: 1947 words]

Respectfully submitted,

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

Sophie Menegon

Counsel for Hashim Thaçi

3 June 2025

Paris, France