



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-05

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 28 February 2020

Language: English

Classification: Strictly Confidential and *Ex Parte*

ORDER

to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules

Specialist Prosecutor
Jack Smith

THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 86(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following order.

I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor submitted for confirmation a strictly confidential and *ex parte* indictment ("Indictment") together with evidentiary material in support of the factual allegations and a detailed outline linking each item of evidentiary material to each allegation.²

II. SUBMISSIONS

2. In the Indictment, the Specialist Prosecutor's Office ("SPO") charges Salih Mustafa ("Mr Mustafa") with war crimes under Article 14(1)(c) of the Law, namely, arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4).³

3. According to the SPO, Mr Mustafa incurs individual criminal responsibility under Article 16(1)(a) of the Law for having committed, through a joint criminal enterprise (in its basic form), and/or having instigated, ordered, aided and abetted the crimes under Count 1-3, and for having committed, through a joint criminal enterprise (in its extended form) the crime under Count 4.⁴ In the alternative, the

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00002, Specialist Prosecutor, *Submission of Indictment for confirmation and related requests*, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1 ("Indictment"), 2 ("Outline") and 3 ("Newspaper article"), strictly confidential and *ex parte*.

³ Indictment, para. 26.

⁴ Indictment, paras 11-14, 25, 29.

SPO alleges that Mr Mustafa is individually criminally responsible for the crimes under Count 1-4 as a superior pursuant to Article 16(1)(c) of the Law.⁵

4. The SPO requests, *inter alia*, that the Pre-Trial Judge confirm the Indictment and issue an arrest warrant and order for transfer for Mr Mustafa.⁶

III. APPLICABLE LAW

5. Pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment shall contain the name and particulars of the suspect, a concise statement of the facts of the case and of the crimes with which the suspect is charged, in particular the alleged mode of liability under Article 16 of the Law in relation to the crimes charged.

6. Pursuant to Article 39(1) of the Law and Rule 86(4) of the Rules, the Pre-Trial Judge has the power to review the indictment. During such an examination, pursuant to Rule 86(4)(b) of the Rules, the Pre-Trial Judge may request the Specialist Prosecutor to review the indictment with the aim to provide more specificity on any or all charges, and the specific conduct of the suspect, or to ensure legal accuracy or greater clarity in the presentation of the charges.

7. Pursuant to Article 21(4)(a) of the Law, the accused has the right to be informed promptly and in detail of the nature and cause of the charges against him. Pursuant to Article 21(4)(c) of the Law, the accused enjoys the right to have adequate time and facilities for the preparation of his or her defence. Pursuant to Article 21(4)(d) of the Law, the accused has the right to be tried within a reasonable time.

⁵ Indictment, paras 15-18, 26, 29.

⁶ Indictment, paras 1, 4, 21.

IV. DISCUSSION

8. The indictment is the assertion of the prosecutor that he intends to bring the accused to trial for the conduct described therein. In accordance with Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment shall contain: (i) the name and particulars of the suspect; (ii) a concise statement of the facts of the case, *i.e.* all facts underpinning the charges; and (iii) a concise statement of the crimes with which the suspect is charged, *i.e.* the legal characterisation of the described facts. These requirements reflect the essential components of the indictment.

9. If confirmed, the indictment shall provide the accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or her with a view to preparing an adequate defence.⁷ Moreover, the adequacy of the information allows that the accused is tried within a reasonable time. For that reason, when assessing whether the requirements under Article 38(4) of the Law and Rule 86(3) of the Rules have been met, the Pre-Trial Judge must give due regard to the aforementioned rights of the accused set out in Article 21(4) of the Law.⁸

⁷ ECtHR, *Mattoccia v. Italy*, no. 23969/94, Judgment, 25 July 2000, para. 60; *See also*, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-143-tENG, Pre-Trial Chamber I, Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, 5 October 2018, para. 30; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-199, Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”, Pre-Trial Chamber II, 15 May 2019, paras 41-42; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Pre-Trial Judge, 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; ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 22; *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, Trial Chamber, 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, para. 1, p. 2; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, para. 88.

⁸ Article 21(4)(a), (c) and (d) reflect Article 6(1), (3)(a) and (b) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and Article 14(3)(a), (b) and (c) of the International Covenant on Civil and Political Rights. *See also* ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999 [GC], paras 52, 54; *Sejdovic v. Italy*, no. 56581/00, 1 March 2006 [GC], para. 90; Human Rights Committee, *Evelio Ramón Giménez v. Paraguay*, Communication no. 2372/2014, 25 July 2018, para. 7.10; *Arsen Ambaryan v. Kyrgyzstan*, Communication no. 2162/2012, 28 July 2017, para. 9.2.

10. The prosecutor selects and frames the charges.⁹ The Law and the Rules do not prescribe a particular format for the SPO to follow when preparing the indictment and setting out the charges therein.¹⁰ Nonetheless, Article 21(4)(a) of the Law stipulates, as a minimum guarantee, that the accused is to be informed “in detail”, while Article 38(4) of the Law and Rule 86(3) of the Rules require “concise” statements of the facts and crimes. The requirement of being informed “in detail” and “concise[ly]” entails that the information is set out with precision¹¹ and briefly, but comprehensively, without diffusion.¹² Accordingly, a combined reading of these provisions requires *specificity* and *clarity* in stating the facts of the case and the crimes, including the modes of liability charged. Only an indictment meeting these requirements will put the accused formally on notice.

11. As a matter of principle, the indictment shall be a stand-alone document. Notably, the accused should not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges.

12. Rule 86(3)(a) and (b) of the Rules prescribes that the indictment shall be filed together with supporting material, namely: (i) evidentiary material supporting the material facts; and (ii) a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crimes. Both provisions pertain to the requirement of presenting evidence supporting the material facts, which is distinct

⁹ Similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, 23 March 2016, para. 106.

¹⁰ See also ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999 [GC], para. 53.

¹¹ According to the Online Oxford English Dictionary, “in (the) detail” means “item by item; part by part; minutely”, see *OED Online* (Oxford University Press, December 2019), available at <https://www.oed.com/search?searchType=dictionary&q=in+detail&searchBtn=Search> (last accessed 25 February 2020).

¹² According to the Online Oxford English Dictionary, “concise” means “[e]xpressed in few words; brief and comprehensive in statement; not diffuse”, see *OED Online* (Oxford University Press, December 2019), available at <https://www.oed.com/view/Entry/38276?rskey=nQeDwC&result=1#eid> (last accessed 25 February 2020).

from the requirement to present a detailed and concise statement of facts and their legal characterisation.¹³ While the evidentiary material and the detailed outline are designed to support the charges and demonstrate the relevance of each item to each allegation, they should not be seen as a replacement or an extension of the indictment.

A. NAME AND THE PARTICULARS OF THE SUSPECT

13. The name and the particulars of the suspect shall be set out with sufficient detail to allow the unequivocal identification of the relevant individual. This means that alongside the full name of the suspect, including aliases or different spelling of his or her name, information, such as the date of birth, place of birth, identification document number, current address and nationality, if available, should be provided in the Indictment. Furthermore, a recent photograph, if available, should also be submitted together with the Indictment.

B. STATEMENT OF FACTS

14. The statement of facts shall be set forth with sufficient specificity and clarity as to inform the accused of the *cause* of the charge, *i.e.* all facts related to the crimes, including the contextual elements, and the accused's acts and omissions with respect to the individual crimes on which the accusation is based.¹⁴ Accordingly,

¹³ Similarly, *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1547-tENG, Decision on Filing of a Summary of the Charges by the Prosecutor, Trial Chamber II, 21 October 2008, para. 19; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", Appeals Chamber, 8 December 2009, footnote 163.

¹⁴ See ECtHR, *Mattoccia v. Italy*, no. 23969/94, Judgment, 25 July 2000, para. 59; ECtHR, *Penev v. Bulgaria*, no. 20494/04, 7 January 2010, para. 33.

all facts that are necessary to fulfil the constitutive elements of the alleged crimes, including contextual elements, and proposed modes of liability must be set out.¹⁵

15. An indictment must not make vague allegations on the basis that they might be clarified when and if additional evidence is analysed.¹⁶ That being said, different levels of specificity may be required, depending on the nature of the crimes and the circumstances of the case.¹⁷

16. Accordingly, when alleging that the accused personally carried out the acts underlying the crime charged, it is necessary to set out, as far as possible, and with “the greatest precision”:¹⁸ the identity of the victim(s); the place and approximate date of the alleged acts; the manner and means by which they were committed and the related mental element.¹⁹

¹⁵ Similarly, ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 16 December 2013, para. 47.

¹⁶ Similarly, ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2205, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, paras 90-91; ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Trial Chamber, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 16; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 30; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, Judgment, 3 May 2006, para. 25; ICTR, *Prosecutor v. Karemera et al.*, Trial Chamber, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para. 45; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 41.

¹⁷ Similarly, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-143-tENG, Pre-Trial Chamber I, Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, 5 October 2018, para. 30; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-199, Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”, 15 May 2019, paras 41-42.

¹⁸ Similarly, ICTY, *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 213. See also, SCSL, *Prosecutor v. Brima et al. (AFRC case)*, SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 38.

¹⁹ Similarly, ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 213; ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, paras 122-123 *Prosecutor v.*

17. On the other hand, 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 detailed information regarding: as much as possible, the places, times and approximate number of victims, including the necessary particulars to make out the elements of the crimes; the accused's alleged conduct giving rise to criminal responsibility, including the contours of the common plan, its implementation as well as the accused's contribution thereto; the related mental element; and the identities of any alleged co-perpetrators, if known.²⁰ In any event, open-ended statements of facts in respect of the alleged acts (such as "including but not limited to") are not permitted.²¹

C. STATEMENT OF CRIMES

18. The statement of crimes must follow from the statement of facts and shall be set forth with sufficient specificity and clarity as to inform the accused of the *nature* of the

Al Hassan, ICC-01/12-01/18-143-tENG, Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, Pre-Trial Chamber I, 5 October 2018, para. 30; *Prosecutor v Yekatom and Ngaïssona*, ICC-01/14-01/18-199, Decision on the "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines", Pre-Trial Chamber II, 15 May 2019, paras 41-42.

²⁰ Similarly, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-143-tENG, Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges, Pre-Trial Chamber I, 5 October 2018, para. 30; *Prosecutor v Yekatom and Ngaïssona*, ICC-01/14-01/18-199, Decision on the "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines", Pre-Trial Chamber II, 15 May 2019, paras 41-42; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 123.

²¹ Similarly, ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, paras 82-83; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras 99, 101 and 103; ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 106.

charges, *i.e.* the legal characterisation given to the facts as alleged.²² While interrelated, the statement of crimes should not be conflated with the statement of facts. The latter sets out the alleged facts, the former characterises them in legal terms.

19. The statement of crimes encompasses not only (i) the constitutive elements of the crime in question, *i.e.*, the contextual elements (if applicable) and the individual underlying acts, but also (ii) the mode(s) of liability alleged in relation to each crime. Each constitutive element of the alleged crime and each mode of liability proposed must be based on factual allegations contained in the statement of facts. In particular, an indictment should not plead modes of liability without corresponding factual allegations.²³

D. CONCLUSION

20. In light of the foregoing, the Pre-Trial Judge finds that additional information is necessary for the Indictment to meet the requirements under Article 38(4) of the Law and Rule 86(3) of the Rules. In particular, the Specialist Prosecutor is required to provide more specificity and greater clarity in the presentation of the charges, as identified in the disposition.

²² ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999 [GC], para. 51; *Mattochia v. Italy*, no. 23969/94, Judgment, 25 July 2000, para. 59; *Penev v. Bulgaria*, no. 20494/04, 7 January 2010, paras 33, 42; ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, Pre-Trial Chamber I, 14 December 2012, para. 25; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1547-tENG, Decision on Filing of a Summary of the Charges by the Prosecutor, Trial Chamber II, 21 October 2008, para. 19.

²³ Similarly, ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 41.

V. DISPOSITION

21. Pursuant to Rule 86(4)(b) of the Rules, the Pre-Trial Judge orders the SPO to file by **Wednesday, 18 March 2020**:

- a) A recent photograph of Mr Mustafa, if available;
- b) A revised Indictment, incorporating:
 - i. The particulars and other identifying information of Mr Mustafa, as set out in paragraph 13 above, if available;
 - ii. A statement of facts delineating with more specificity:
 1. the facts demonstrating the existence and duration of an armed conflict and its characterisation, including the existence of an organised armed group and the protracted violence between the parties to the conflict, manifested through the intensity of fighting; and
 2. the factual allegations constituting the crimes allegedly committed at the Zllash/Zlaš detention compound from on or about 1 April 1999 to around the end of April 1999;
 3. the factual allegations corresponding to the: (i) respective acts and omission constituting the contributions of Mr Mustafa to the crimes charged under Counts 1-4; (ii) existence of a common plan, design or purpose to interrogate and mistreat persons detained at the Zllash/Zlaš detention compound; (iii) participation of Mr Mustafa in the common plan, design or purpose to interrogate and mistreat persons detained at the Zllash/Zlaš detention compound and its consequences;
 - iii. A statement of crimes delineating with greater clarity:

1. the legal characterisation of the factual allegations as war crimes, including their constitutive elements; and
 2. where necessary, how the acts and omissions attributable to Mr Mustafa fulfil the constitutive elements of each mode of liability for each count separately; and
- c) Separate submissions from the SPO regarding the Specialist Chambers' jurisdiction over the war crime of arbitrary detention under Article 14(1)(c) of the Law, as pleaded, or under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) as incorporated in Article 15(1)(a) of the Law, including its legal elements.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 28 February 2020
At The Hague, the Netherlands.