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:	Defence Counsel for Jakup Krasniqi
Date:	14 May 2021
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Krasniqi Defence Reply

to Consolidated Prosecution Response to Thaçi, Selimi, and Krasniqi Preliminary Motions on the Form of the Indictment

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I. INTRODUCTION

1. What, specifically, is Jakup Krasniqi alleged to have done which renders him criminally responsible for the crimes alleged in the Indictment?

2. The key paragraphs in the Indictment concerning Mr. Krasniqi's alleged acts and conduct – paragraphs 42, 47, 51 and 53 – 55 – are vague, couched in generic terms and deliberately avoid pleading specific acts or omissions. Nothing in the Specialist Prosecutor's Office ("SPO") Response[1] can hide or explain this fundamental defect. The SPO should be ordered to amend the Indictment to provide specificity in relation to the alleged acts and conduct of Mr. Krasniqi.

II. PROCEDURAL HISTORY

3. On 15 March 2021, the Defence for Jakup Krasniqi ("Defence") filed their Preliminary Motion Alleging Defects in the Indictment.[2]

4. On 23 April 2021, pursuant to an extension ordered by the Pre-Trial Judge,[3] the SPO filed their Response to Thaçi, Selimi, and Krasniqi Preliminary Motions on the Form of the Indictment.[4]

III. SUBMISSIONS

A. THE INDICTMENT MUST IDENTIFY THE ACTS AND CONDUCT OF THE ACCUSED WITH SPECIFICITY

[1] KSC-BC-2020-06, F00258, Specialist Prosecutor, *Consolidated Prosecution Response to Thaçi, Selimi, and Krasniqi Preliminary Motions on the Form of the Indictment* ("SPO Response"), 23 April 2021, public.
[2] KSC-BC-2020-06, F00221, Krasniqi Defence, *Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment* ("Defence Preliminary Motion Alleging Defects in the Indictment"), 15 March 2021, public.
[3] KSC-BC-2020-06, Revised Transcript of Hearing, 24 March 2021, public, p. 391, lines 15-16.
[4] SPO Response.

5. The Defence agree with the SPO that an Indictment is required to plead the material facts and is not required to plead the evidence.[5] But the SPO appear to regard any detailed facts about the acts and conduct of the accused as matters of evidence which do not need to be pleaded.[6] That is wrong; the material facts which must be pleaded in the Indictment include the specific acts and conduct of the accused which support the legal elements of the modes of responsibility charged.

6. The difference between material facts and evidence was explained by the Appeals Chamber of the International Criminal Court ("ICC") in these terms:-

> [T]he term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail […].[7]

7. The particular acts and conduct of the accused which are relied upon by the SPO to support the legal elements of the alleged JCE are thus clearly material facts which must be pleaded. Persuasive authorities from other international courts and tribunals have repeatedly held that the acts and conduct of the accused must be pleaded – and pleaded with specificity.

8. Thus, the ICC has held in relation to a common plan that "the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its

[5] *See* SPO Response, para. 6.
[6] *See ibid*., paras 6, 11, 14, 20, 22, 25, 27, 29, 31, 33.
[7] ICC, *Prosecutor v. Lubanga*, 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, fn. 163.

implementation as well as the accused's contribution" (emphasis added).[8] More recently, in *Yekatom and Ngaïssona* (an authority actually relied on by the SPO),[9] the ICC confirmed that the accused must be informed of "the *cause* of the charges – that is, the *acts* he or she is alleged to have committed".[10] The ICC emphasised that "greater specificity in a charging document is desirable"[11] and preferred "detail about the role of an accused in the charges".[12]

9. Importantly, in that case the accused's contribution to the common plan was identified as:

> (i) structuring, training and equipping his Anti-Balaka elements;
> (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in the execution of these attacks and advances;
> (iii) issuing orders to Anti-Balaka members, including patently illegal instructions; and
> (iv) conscripting and/or enlisting children under the age of fifteen years into his group and using them to assist him in the camp-bases, giving orders for them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.[13]

10. In relation to these generic descriptions, the Appeals Chamber of the ICC held that "on its own, the description above is insufficient to provide adequate notice and to assist Mr Yekatom in the preparation of his defence".[14] The alleged contribution to the common plan as pleaded was only redeemed because more precise details of Mr. Yekatom's participation were found elsewhere in the pleadings.[15] If the SPO's Response was correct, none of these more precise details would have been required and the bare bones identified in paragraph 9 would have been held to be sufficient.

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[8] 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.
[9] SPO Response, para. 5.
[10] ICC, *Prosecutor v. Yekatom et al.*, ICC-01/14-01/18-874, Appeals Chamber, *Judgment on the Appeal of Mr Alfred Yekatom Against the Decision of Trial Chamber V of 29 October 2020 entitled 'Decision on Motions on the Scope of the Charges and the Scope of Evidence at Trial'*, 5 February 2021, para. 38.
[11] *Ibid.*, para. 42.
[12] *Ibid.*, para. 44.
[13] *Ibid.*, para. 55.
[14] *Ibid.*, para. 56.
[15] *Ibid.*

11. The position is similar at the *ad hoc* tribunals. Jurisprudence repeatedly confirms that the precise details to be pleaded as material facts include the acts and conduct of the accused.[16] Moreover, the accused "should be in a position to determine from the […] Indictment by what exact conduct or act he allegedly participated in the JCE".[17] The pleading "must delve into particulars".[18] The specific acts or course of conduct of the accused must be pleaded.[19]

12. The case of *Mrkšić et al.* provides a good illustration of the application of this approach in practice. The Indictment alleged that the accused were part of a joint criminal enterprise to persecute Croats and other non-Serbs present in the Vukovar hospital. One accused's contribution in the JCE was pleaded as including that he "was aware that an agreement had been reached in Zagreb, on 18 November 1991, between the JNA and Croatian authorities regarding the evacuation of patients from Vukovar Hospital and also, subsequently, participated in the further negotiations over the evacuation of patients".[20] Thus it identified awareness of a particular agreement and personal participation in negotiations. Nonetheless, the phrase 'participated in the further negotiations' was held to be insufficiently specific. The Prosecution was "ordered to plead its case more specifically, in particular stating where, when and between whom the 'further negotiations' […] took place, and what the outcome of those negotiations was".[21] If the SPO's Response was correct, each of these additional matters would have been regarded as evidence and need not have been pleaded. That

[16] ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, *Judgement*, 29 July 2004, para. 210.
[17] ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Trial Chamber I, *Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment*, 19 March 2007, para. 23.
[18] ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, *Appeal Judgement*, 23 October 2001, para. 98.
[19] ICTY, *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. 32.
[20] ICTY, *Prosecutor v. Mrkšić et al.*, IT-95-13/1, *Consolidated Amended Indictment*, 9 February 2004, para. 9(b).
[21] ICTY, *Prosecutor v. Mrkšić et al.*, IT-95-13/1-PT, Trial Chamber II, *Decision on Form of Modified Consolidated Amended Indictment*, 20 July 2004, para. 17.

the Prosecution was required to amend the Indictment to plead the specific details of the negotiations proves that these issues are material facts and not evidence.

13. In general, when considering the past determinations about the specificity of Indictments relied on by the SPO, it is necessary not only to read the decisions but also to consider the text of the Indictments in issue. For instance, the SPO relies on a decision upholding the Indictment in *Šešelj*.[22] In that case, the Indictment pleaded *inter alia* that "[i]n public speeches he called for the expulsion of Croat civilians from parts of the Vojvodina region in Serbia and thus instigated his followers and the local authorities to engage in a persecution campaign against the local Croat population".[23] In the following paragraphs of the Indictment, particular public speeches were pleaded.[24] Thus the content of the Indictment which was found not to be defective pleaded the acts of the accused in detail (calling for the expulsion of Croat civilians in public speeches) and particularised the actual public speeches involved. That is substantially more specific than the Indictment in this case.

14. Further, in multi-accused cases, in order to provide sufficient specificity the Prosecution must plead the acts of each accused individually. In *Prlić et al.*, the International Criminal Tribunal for the former Yugoslavia ("ICTY") required that "[e]ach Accused should be in a position to determine from the Indictment what exact conduct or participatory act he allegedly had".[25] The original Indictment in that case made it unclear what role each Accused had in respect of the offences and the Prosecution was directed to amend to "further specify the exact alleged role or conduct of each Accused".[26]

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[22] Relied on by the SPO, SPO Response, fn. 25, citing ICTY, *Prosecutor v. Šešelj*, IT-03-67/PT, Trial Chamber II, *Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment*, 26 May 2004.
[23] ICTY, *Prosecutor v. Šešelj*, IT-03-67, *Indictment*, 15 January 2003, para. 10(d).
[24] *Ibid*., paras 19, 20.
[25] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber I, *Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment*, 22 July 2005, para. 27.
[26] *Ibid*., paras 27-28.

15. In carrying out this assessment, the fact that the Indictment is nearly 70 pages long[27] (the last 20 pages of which are schedules) or over 100 paragraphs long[28] is irrelevant. The issue is whether the contents of those 50 pages or 100 paragraphs are sufficiently specific as to the acts and conduct of the accused. A long vague pleading is as defective as a short vague pleading.

16. The need for specificity in relation to the particular acts and conduct of the Accused is underscored by human rights law. Mr. Krasniqi is entitled to know the 'nature and cause' of the charge against him.[29] He will not know the 'cause' of the charge against him until his own acts and conduct giving rise to the charges are specifically pleaded. In this regard, the SPO Response that amending the Indictment would "potentially threaten the fairness and expeditiousness of the proceedings" is wholly wrong.[30] It is difficult to imagine how pleading the case specifically, and therefore enabling the SPO, the Defence and the Court to focus their preparations on specific allegations, would endanger either the fairness or the expeditiousness of proceedings. Preparing to respond to unfocussed and generic allegations takes longer than preparing to respond to specific allegations. The real danger to the fairness and expeditiousness of proceedings is in requiring the Defence to prepare for trial on the basis of non-specific and general allegations.

B. THE INDICTMENT DOES NOT IDENTIFY JAKUP KRASNIQI'S ACTS OR CONDUCT WITH SUFFICIENT SPECIFICITY

17. The SPO attempts to particularise Mr. Krasniqi's alleged participation in a JCE in this way: paragraphs 42 and 47 of the Indictment allege his presence or involvement

[27] SPO Response, para. 5.
[28] *Ibid*., para. 36.
[29] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, Article 21(4)(a).
[30] SPO Response, para. 44.

at two detention centres; and paragraph 51 alleges his significant contribution to the JCE. Considered in the context of the Indictment as a whole, none of these paragraphs plead the material facts about Mr. Krasniqi's acts and conduct with sufficient specificity.

18. Paragraph 42 of the Indictment pleads that "in Malishevë / Mališevo in late July 1998, Jakup Krasniqi was identified as being present on site and, on one occasion, visiting the room where detainees were held".

19. The Defence agree that the Indictment should be read holistically.[31] But that does not redeem the vagueness of paragraph 42 of the Indictment. The SPO relies on paragraphs 65, 101 and 151-152 of the Indictment to provide further details.[32] None of those paragraphs add any further particulars about Mr. Krasniqi. Indeed, they highlight the lack of specificity with regard to the allegation that Mr. Krasniqi was present. Paragraphs 151 – 152 plead that different groups of detainees were held at Malishevë / Mališevo at different dates. The Indictment does not identify which group of detainees are alleged to have been there at the time of Mr. Krasniqi's alleged visit (if, indeed, it is alleged that there were any detainees there at all – paragraph 42 and 101 only plead that he visited the "room where detainees were held" not that any detainees were actually in the room at the time).

20. Moreover, the Indictment does not plead when specifically this visit allegedly took place, what Mr. Krasniqi is alleged to have done in the course of this visit and how it is connected to the alleged JCE. These are material facts not evidence because they relate to the specific acts and conduct of Mr. Krasniqi by which he is alleged to have "personally participated in the treatment of Opponents on the ground".[33]

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[31] SPO Response, para. 18.
[32] Being the paragraphs relied on by the SPO at fn. 77.
[33] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, para. 40.

21. Paragraph 47 pleads that "[i]n 1999, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi were involved in various aspects of the transfer, detention, and/or release of detainees held at a detention site near Kleçkë/Klečka".

22. Again, reading the Indictment holistically cannot redeem the ambiguity of this allegation against Mr. Krasniqi. The SPO relies on paragraphs 75-76, 112-113, and 158-162 of the Indictment to provide further details.[34] However, these paragraphs provide no further detail of the alleged involvement of Mr. Krasniqi in this location.

23. The Defence maintain that this pleading is defective. First, it does not distinguish between Mr. Krasniqi, Mr. Selimi and Mr. Veseli with the result that Mr. Krasniqi cannot determine what exact conduct of participatory act is alleged against him personally.[35] Second, it does not specify the date of Mr. Krasniqi's involvement beyond saying that it was in 1999. Whilst details may only need to be pleaded "as far as possible",[36] it must be possible to provide more specificity about the date of his involvement than that it occurred at some point in the year 1999. Third, it fails to specify what it is alleged that Mr. Krasniqi actually did and how his alleged action is connected to the alleged JCE. It is a material fact to specify which aspect of transfer, detention or release of detainees it is alleged that Mr. Krasniqi was involved in. That is a material fact because it goes directly to the acts and conduct of the accused and the 'cause' of the case against him.

24. Paragraph 51 then pleads the allegation that Mr. Krasniqi significantly contributed to the alleged JCE. Not one specific act or specific course of conduct is pleaded against Mr. Krasniqi. One subparagraph after another proceeds with a series of vague and generic allegations, usually in the alternative, without a single concrete

[34] As relied on by the SPO at fn. 77.
[35] *See* para. 14 above.
[36] SPO Response, fn. 21.

instance to anchor them. The result is that Mr. Krasniqi does not understand the 'cause' of the case against him.

25. The Defence submit that paragraph 51 should be measured against the authorities summarised above. It is as vague as the pleading in *Yekatom and Ngaïssona*, which the Appeals Chamber of the ICC held was insufficient on its own.[37] It lacks the specificity required by the ICTY in *Mrkšić et al.*, and provided by the Prosecutor in cases including *Šešelj*. Measured by the standards previously applied by other international courts and tribunals, the pleading of Mr. Krasniqi's contribution to the alleged JCE falls short on every level.

26. The SPO responds that the "Indictment describes in sufficient detail 'who did what, when, where and against whom'".[38] It does not. Paragraph 51 does not describe what Mr. Krasniqi did or when. No accused reading the various sub-paragraphs of paragraph 51 could understand what exactly is the cause of the case against them. The ambiguity of the pleaded case instead leaves the SPO free to mould its case as the trial develops.

C. THE USE OF 'INCLUDING' AND 'LIKE' IN THE INDICTMENT IS IMPERMISSIBLY OPEN-ENDED

27. Contrary to the SPO's repeated submission, the words "including" and "like" are used impermissibly in the Indictment. On this very issue, the Pre-Trial Judge has held that:

> Open-ended statements in respect of the facts underpinning the charges (such as "including, but not limited to") are not permitted, unless they are exceptionally necessary given the

[37] *Supra* para. 10.
[38] SPO Response, para. 5.

> circumstances of the case or the nature and scale of the offences and they do not create ambiguity as regards the charged offences.[39]

28. In defending its use of 'including', the SPO makes no attempt to show that it was "exceptionally necessary" to deploy it.[40] Nor could any such submission be advanced; the use of open-ended language was a choice made by the draftsman not a necessity.

29. Moreover, it is not correct for the SPO to submit that these open-ended terms do not create ambiguity or the possibility that the SPO may seek to expand its case.[41] Take, for example, paragraph 40 of the Indictment, which pleads that the accused "personally participated in the treatment of Opponents on the ground, including participating in the intimidation, interrogation, mistreatment, and detention of Opponents, like in the cases discussed below". Instances in which the accused are alleged to have personally participated in crimes are paradigm examples of material facts which must be pleaded. The only purpose of pleading "including" and "like" is to keep the list open-ended and hence to allow additional allegations to be introduced later. Indeed, it is inherent in the SPO Response which submits that open-ended terms are "appropriately used to provide further, known detail supporting the material facts"[42] that the SPO intends to preserve the option to rely on additional un-pleaded facts at a later date. That is impermissible. The SPO must plead each instance it relies upon in which Mr. Krasniqi is alleged to have personally participated in the intimidation, interrogation, mistreatment and detention of Opponents and it must not be allowed to leave open the possibility of relying on other instances later.

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[39] KSC-BC-2020-07, F00147, Pre-Trial Judge, *Public Redacted Version of Decision on Defence Preliminary Motions* ("Gucati Indictment Decision"), 8 March 2021, public, para. 44.
[40] SPO Response, paras 20, 39. *See* further the similar language and explanation offered at SPO Response, paras 30, 33, 35.
[41] *Ibid*., para. 20.
[42] *Ibid*., paras 20, 39. *See also* paras 30, 33, 35.

30. Exactly the same principles apply to the other instances of open-ended language in the Indictment.[43] They are unnecessary. They do create ambiguity and the possibility of the SPO expanding their case at trial. They should not be permitted.

D. THE INDICTMENT MUST BE A STAND ALONE DOCUMENT

31. The SPO Response submits that the Defence will receive further details in the Rule 86(3)(b) Outline, disclosed materials and future disclosures and pre-trial brief. The SPO further submits that "[t]he combined information provided through these documents and the Indictment ensures the ability of the Defence to fully prepare […]".[44] That is not the point. The Indictment is required to comply with the minimum requirements specified above. It is a stand alone document; the Defence are not required to consult other documents to piece together the facts underlying the charges.[45] The correct position is thus the Indictment must stand or fall on its own. As set out above, it fails to plead the specific acts or conduct of Mr. Krasniqi. It cannot be rescued by reliance on future disclosure or pre-trial briefs.

IV. CONCLUSION

32. The Defence maintain that the Indictment is defective and request that the Pre-Trial Judge order the SPO to produce an Amended Indictment, pleading in particular the specific acts and conduct of Mr. Krasniqi which are the cause of the case against him.

Word count: 3,500

[43] Defence Preliminary Motion Alleging Defects in the Indictment, paras 58-60.
[44] SPO Response, para. 44.
[45] Gucati Indictment Decision, para. 38.

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