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:	Specialist Counsel for Hashim Thaçi
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Thaçi 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 AND APPLICABLE LAW

1. On 12 March 2021, the defence for Mr Hashim Thaçi ("Defence") filed a motion under Rule 97(b) of the Rules[1] alleging that the Indictment filed against him[2] is defective due to a lack of specificity and significant errors in pleading.[3] On 23 April 2021, the Special Prosecutor's Office ("SPO") filed its response.[4] The Defence hereby replies to the SPO's Response pursuant to Rule 76.

2. The Defence maintains its Preliminary Motion on Defects in the Indictment in full. This reply focuses on the following new issues arising from the SPO's Response: i) the SPO's misunderstanding or mischaracterisation of Defence submissions; ii) the law – notably the difference between a legal element of a crime/mode of liability, a material fact, and evidence, in an attempt by the SPO to argue that the Defence is seeking to plead evidence as opposed to material facts; iii) the status of the Kosovo Criminal Procedure Code ("KCPC") before the Kosovo Specialist Chambers ("KSC") which the SPO incorrectly argues is inapplicable.

3. The Defence notes that the SPO, without leave of the Court,[5] responded to the separate motions of three of the accused filed under Rule 97(b) in a global manner with a 'consolidated' response. This approach does not treat the case against each of

[1] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").
[2] KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020 ("Indictment").
[3] KSC-BC-2020-06/F00215, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021 (Confidential) ("Thaçi Preliminary Motion on Defects in the Indictment")
[4] KSC-BC-2020-06/F00258, Consolidated Prosecution response to THAÇI, SELIMI, and KRASNIQI preliminary motions on the form of the Indictment, 23 April 2021 ("SPO Response on Form of the Indictment" or "SPO Response").
[5] The SPO sought permission to file a consolidated response on the issue of JCE only in the context of an application for an increased word count, *see*, KSC-BC-2020-06/F00248, Prosecution Request for Extension of Word Limit on Preliminary Motions Responses, 15 April 2021, para. 2. The Pre-Trial Judge allowed the increased word count, noting that a consolidated response '*is required* to address the four filings that challenge the applicability of joint criminal enterprise', *see,* KSC-BC-2020-06/F00250, Decision on Prosecution Request for Extension of the Word Limit, 16 April 2021, para. 6 (emphasis added).

the accused as separate, which they are. The Defence submits it is more appropriate for the SPO to respond to submissions made by each accused separately and in their own right unless expressly permitted to do otherwise by the Court. In any event, the absence of comment on any aspect of the SPO Response in the present filing, or in any of the concurrently-filed Thaçi Defence replies, is not a concession as to its validity.

II. SUBMISSIONS

A. JCE

1. The SPO misstates Defence arguments regarding the common purpose of the JCE

4. The SPO misunderstands and misstates the Defence challenge to the common plan as pleaded. The Defence does not 'merely' argue that it is 'insufficient' to constitute a common criminal purpose,[6] but rather that the pleaded common purpose "to gain and exercise control over all of Kosovo"[7] is not a crime and thus the pleading is defective. Contrary to the SPO's position,[8] and notwithstanding what other Tribunals may have done, the Defence submits that *if* there is a legal error in the confirmed Indictment (which the Defence say there is), it is in the interests of justice that it is dealt with by the Pre-Trial Judge as soon as it is raised by a party, rather than waiting to do so at trial. It will save time and expense investigating something that cannot legally amount to a crime regardless of how much evidence the SPO leads.

5. In its Preliminary Motion on Defects in the Indictment, the Defence did not, as stated by the SPO, argue that the SPO's failure to specify whether each of the charged crimes fell within the common criminal purpose or was an extended crime, creates "ambiguity".[9] Rather the problem identified with the alternative pleading is, in this

[6] SPO Response on Form of Indictment, para. 8.
[7] Indictment, para. 32.
[8] SPO Response on Form of Indictment, para. 6.
[9] *Ibid*, para. 11.

case, the common plan is not a criminal one. Consequently, opening the door to all crimes being only "foreseeable" and therefore outside the common plan means that none of them remain as "a means contemplated to achieve the objective".[10]

6. Moreover, in order to determine whether the extended crimes could be foreseeable consequences of the crimes that were part of the common plan, the accused and the trial panel have to know what crimes were encompassed in the plan. If the SPO pleads in the alternative, i.e. "either/or" as in this case, it becomes impossible to make that determination.[11]

2. The SPO misstates the Defence challenge to Participants of the JCE

7. The SPO has misstated the Defence challenge. Contrary to the SPO's argument at paragraph 14 of its Response, the Defence has not asked for the names of *additional* JCE members, but rather simply the identity of the current JCE members if known. Similarly, it has not asked for the *specific unit*, or *exact structure*, *size* or *membership* of any category of JCE members. Rather, it has observed that adequate temporal or geographical references have not been given - which they should have been (if possible) in cases such as this where members are not identified by name.[12] While the SPO is correct that greater specificity is given in some instances in paragraphs 56-171 of the Indictment, the majority of unnamed JCE members are simply described as KLA members with insufficient temporal and geographical references. This is too vague.[13]

[10] Thaçi Preliminary Motion on Defects in the Indictment, para. 22.
[11] ICTY, *Prosecutor v. Brdanin and Talic,* IT-99-36, Trial Chamber II, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 44.
[12] ICTR, *Uwinkindi v. The Prosecutor,* ICTR-01-75-AR72 (C), Appeals Chamber, Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, paras. 15-17; *See also,* ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Appeals Chamber, Judgement, 28 September 2011, para. 162.
[13] *See,* Thaçi Preliminary Motion on Defects in the Indictment, paras. 23-26.

8. The SPO misunderstands the Defence concern with the definition of Tools. The SPO accepts in its Response that the terms 'JCE Members' and 'Tools' are interchangeable.[14] This is precisely why the Defence say it is defective as it lacks clarity and impermissibly allows the SPO to hedge its bets about who did what.[15]

3. Participation of the Accused

9. The SPO mischaracterises the detail that the Defence has requested about the nature of the Accused's participation in the JCE as matters of evidence rather than material facts.[16] For example, the SPO alleges that the Accused participated in the JCE and aided and abetted crimes by issuing "directions, instructions and orders regarding Opponents".[17] The nature or content of the 'directions', 'instructions' or 'orders' *is* the material fact (not the evidence) because they are the "acts or omissions of the accused that gives rise to that allegation of infringement of a legal prohibition."[18] Without more detail, it is not clear that these instructions, orders or directions give rise to an infringement of a legal prohibition.

10. The Defence is also concerned that the SPO considers that it can simply provide (as it says it has in its Response) "certain *examples* of each Accused's direct involvement in …. criminal acts."[19] An accused is entitled to know the case against him, which translates into his ability to assume that any list of alleged acts contained in an indictment is exhaustive regardless of the use of words such as 'including'.[20]

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[14] SPO Response on Form of Indictment, para. 16.
[15] *See,* Thaçi Preliminary Motion on Defects in the Indictment, paras. 27-28.
[16] SPO Response on Form of Indictment, para. 20.
[17] Indictment, para. 39.
[18] *See*, ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Appeals Chamber, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 19.
[19] SPO Response on Form of Indictment, para. 18 (emphasis added).
[20] ICTY, *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber, Decision on Motion for Acquittal pursuant to Rule 98 *bis*, 28 November 2003 ("*Brdjanin* Acquittal Decision"), para. 88. Notwithstanding this, the Defence has already argued in its Preliminary Motion on Defects in the Indictment that the use of non-exhaustive terms is impermissibly vague and leads to ambiguity, which it will not repeat here.

B. SUPERIOR RESPONSIBILITY

11. The SPO is incorrect in its Response that the use of the defined term 'JCE Members and Tools' 'clearly' identifies the Accused's subordinates because that definition itself lacks clarity.[21] Paragraph 35 of the Indictment, where JCE Members and Tools are defined, does not, contrary to the SPO's Response, identify JCE Members and Tools by "*both* name and category".[22] In paragraph 35, eight individuals are named but the rest are identified *only* by group, i.e. KLA zone commanders, without any further detail.[23] As the SPO states, further detail is given about some JCE Members and Tools in paragraphs 56-171 of the Indictment, but as set out in detail in the Thaçi Preliminary Motion on Defects in the Indictment, the vast majority are only defined as KLA members without further details.[24] This is an insufficient level of detail either to inform the accused or to enable the defence to carry out a meaningful investigation.

12. In respect of the *mens rea,* the material fact that the SPO has to plead is the 'conduct' by which the accused knew or should have known that crimes had or were about to be committed by subordinates.[25] The critical word 'conduct' is missing from the SPO's Response detailing its understanding of what it has to plead.[26] For the avoidance of any doubt, the Defence argument is that the alleged *conduct* of the Accused is insufficiently detailed in paragraph 54 of the Indictment for the accused to know the case he has to meet as an aidor and abettor and prepare his defence.[27]

[21] *See,* Thaçi Preliminary Motion on Defects in the Indictment, paras. 23-28.
[22] SPO Response on Form of Indictment, para. 27 (emphasis added).
[23] *See* Thaçi Preliminary Motion on Defects in the Indictment, paras. 41-42.
[24] *Ibid*, paras. 58-60.
[25] ICTR, *Renzaho v. The Prosecutor*, ICTR-97-31-A, Appeals Chamber, Judgement, 1 April 2011, paras. 115, 119.
[26] SPO Response on Form of Indictment, para. 29.
[27] Thaçi Preliminary Motion on Defects in the Indictment, paras. 44-45.

C. THE PLEADING OF SPECIFIC CRIMES

13. It is evident that the SPO and the Defence have different views on what is a material fact as opposed to evidence, which the Defence will not repeat here.[28]

14. The SPO is correct that some courts have permitted less specificity in pleading *some aspects* (namely geographic and temporal parameters) of continuous crimes. For example, in the case of sexual slavery and child soldiers, the pleading of exact locations has been recognised to be difficult at the Special Court for Sierra Leone as the perpetrators moved between locations over significant periods of time while committing these crimes. However, each case turns on its facts. The nature of a crime as continuous does not *per se* (as the SPO appears to suggest) relieve it of its duty to plead all material facts within its possession to enable the accused to prepare a defence.[29] Accordingly, the Defence rejects the SPO's suggestion that the details it has sought (including, the identity of the perpetrators and Mr Thaçi's link and role) are impossible to plead because some of the crimes are continuous.

15. Contrary to the SPO's Response, the use of non-exhaustive terms such as 'including' throughout the Indictment is impermissible as it has created ambiguity about the charges and modes of liability.[30] Notwithstanding, an accused is entitled to know the case against him which translates into his ability to assume that any list of alleged acts contained in an indictment is exhaustive regardless of the use of words such as 'including'.[31]

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[28] For the Defence views, *see for example,* Thaçi Preliminary Motion on Defects in the Indictment, paras. 58-60.
[29] SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Chamber II, Judgement, 20 June 2007, paras. 39-40; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Trial Chamber II, Judgment, 18 May 2012, paras. 117-119.
[30] *See*, for example, Thaçi Preliminary Motion on Defects in the Indictment, paras. 23 and 31. *See also*, KSC, *Specialist Prosecutor v. Gucati and Haradinaj,* KSC-BC-2020-07/F00147, Decision on Defence Preliminary Motions, 8 March 2021, para. 44.
[31] *Brdjanin* Acquittal Decision, para. 88.

D. THE SPO MISUNDERSTANDS THE STATUS OF THE KOSOVO CRIMINAL PROCEDURE CODE AT THE KSC

16. In paragraph 43 of its Response on the Form of Indictment, the SPO states that Article 145 of the KCPC does not apply at the KSC because it has not been expressly incorporated into the Law. (The Defence assumes that the SPO's reference to Article 145 is a typing error and that the SPO meant to refer to the provisions of the KCPC that the Defence referred to in its motion.[32]) In any event, the SPO's position that the KCPC does not apply to the pleading of the Indictment is incorrect.

17. Rule 86(3) of the Rules (together with Article 38(4) of the Law)[33] sets out the required level of specificity in an indictment. As cited in paragraph 61 of the Thaçi Preliminary Motion on Defects in the Indictment, Article 19(2) of the Law expressly states that in "determining its Rules of Procedure and Evidence the Specialist Chambers *shall be guided by* the Kosovo Criminal Procedure Code." *[Emphasis added]*. As a result of this, Rule 4(1) obliges the KSC to interpret the Rules "in a manner consonant with the framework as set out in Article 3 of the Law and, *where appropriate*, the Kosovo Criminal Procedure Code." *[Emphasis added]*.

18. The Defence submits that it *is appropriate* to ensure that the Indictment complies with the KCPC. However, should there be any ambiguity in the Rules, Rule 4(3) provides that:

> any ambiguity not settled in accordance with paragraph (1) shall be resolved by the adoption of the most favourable interpretation to … the Accused in the given circumstances.

[32] Footnote 41 of the Thaçi Preliminary Motion on Defects in the Indictment contains a typo and should have referred to Article 241.1.4 not Article 24.1.4, but it was clear from the text that this was a typo.
[33] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("the Law").

19. In this case, the most favourable interpretation of the Rules for Mr Thaçi is that the indictment is interpreted in a manner consonant with the KCPC. This is because applying the Rules in a manner consonant with the KCPC would mean that the SPO had to specify "the legal name" of the criminal offence, which enables the accused to understand the case against him. Such referencing is mandatory under the KCPC and is also foreseen under Article 21(4)(a) of the Law, which provides that the Accused has the right "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her." [*Emphasis added*]. The Defence recalls that the KSC is not an international court but a specialised court operating within Kosovo's domestic legal system. An accused should not be prejudiced because his trial is at the KSC and not before an ordinary Kosova court.

20. For all these reasons, the SPO is incorrect when it states that the KCPC (specifically Article 241.1.4) does not apply to the pleading of the Indictment in this case.

E. TIMING OF THE AMENDMENT OF THE INDICTMENT

21. The Defence submits that the amendment of the Indictment to include all material facts to enable the Accused to prepare his defence would not, as per the SPO's submission, threaten the fairness or expeditiousness of the proceedings.[34] To the contrary. It is a critical and perhaps the most central element of the Accused's right to a fair trial that he is entitled to know the case against him in order that he can defend himself. A properly pleaded indictment will also assist in the expeditiousness of the trial rather than making the Accused pick through the greatly redacted Outline, future disclosures, witness and exhibit lists and pre-trial brief to piece the case against him together.

[34] SPO Response on Form of Indictment, para. 44.

III. REQUESTED RELIEF

22. The Defence reiterates the relief sought in its Preliminary Motion on Defects in the Indictment.[35]

[Word count: 2759]

Respectfully submitted,

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14 May 2021

At London, United Kingdom

[35] Thaçi Preliminary Motion on Defects in the Indictment, para. 63.