



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist 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 Prosecutor

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Prosecution reply regarding request to amend pursuant to Rule 90(1)(b)

Specialist Prosecutor's Office

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby replies¹ to the Responses,² which exceed the scope of the submissions authorised in the Decision, seek to circumvent the applicable framework, and attempt to impermissibly relitigate matters already decided. They should be summarily dismissed and, in any event, are without merit. The Responses fail to detract from the concrete and tangible supporting materials demonstrating a well-grounded suspicion that the alleged crimes concerned by the Proposed Amendments³ have been committed.

II. SUBMISSIONS

2. The Responses all have similar faults relating to: (i) the interpretation and application of the standards for confirmation and amendment; and (ii) the connection between the alleged crimes concerned by the Proposed Amendments and other parts of the previously confirmed Indictment,⁴ in particular, the modes of liability and contextual elements.

¹ Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00635, 23 December 2021 ('Confidential'), paras 48, 53(e); Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

² THAÇI Defence Motion on Whether There is a Well Grounded Suspicion in Relation to the SPO's Request to Amend the Indictment, KSC-BC-2020-06/F00666, 31 January 2022, Confidential ('THAÇI Response'); Veseli Defence Submissions on the Supporting Material Submitted by the SPO in Respect of the First Category and Second Category of Amendments to the Indictment, KSC-BC-2020-06/F00668, 31 January 2022, Confidential ('VESELI Response'); Krasniqi Defence Submissions Pursuant to Decision KSC-BC-2020-06/F00635, KSC-BC-2020-06/F00669, 31 January 2022, Confidential ('KRASNIQI Response'; collectively with the THAÇI Response and VESELI Response, 'Responses'). For purposes of this filing, the THAÇI Defence, VESELI Defence, and KRASNIQI Defence are referred to collectively as the 'Defence'.

³ The term 'Proposed Amendments' collectively refers to the First Category and Second Category amendments, which have the same meaning as in the Request. See Submission of Corrected Indictment and request to amend pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00455, 3 September 2021, Strictly Confidential and *Ex Parte* ('Request'), para.1.

⁴ Indictment, KSC-BC-2020-06/F00455/A01, 3 September 2021, Strictly Confidential and *Ex Parte* ('Indictment').

3. In addition to these deficiencies, which are addressed in more detail below, the Responses rely heavily on arguments concerning the extent of redactions applied to the Proposed Amendments and supporting materials.⁵ Such submissions should be rejected outright. They amount to nothing more than an attempt to impermissibly re-litigate the Pre-Trial Judge's findings that: (i) the redactions are necessary and proportionate to give effect to existing protective measures; and (ii) the Defence is in a position to meaningfully challenge the Proposed Amendments on the basis of available information.⁶

A. THE RESPONSES EXCEED THE SCOPE OF AUTHORISED SUBMISSIONS

4. In the Decision, the Pre-Trial Judge determined that the parties' submissions – consistent with the scope of his review and to avoid encroaching on the prerogatives of the Trial Panel – should not address issues of admissibility and weight, unless the evidence is manifestly non-authentic or obtained through serious violations, as defined in Rule 138(2)-(3).⁷ The Responses far exceed these limits: they impermissibly focus on alleged inconsistencies in the evidence,⁸ witness bias,⁹ and a selective reading¹⁰ and misrepresentations¹¹ of the supporting materials and applicable law. The Pre-Trial Judge

⁵ THAÇI Response, KSC-BC-2020-06/F00666, paras 22, 27; VESELI Response, KSC-BC-2020-06/F00668, paras 32-33; KRASNIQI Response, KSC-BC-2020-06/F00669, paras 11-15.

⁶ Decision, KSC-BC-2020-06/F00635, para.47.

⁷ Decision, KSC-BC-2020-06/F00635, para.46.

⁸ THAÇI Response, KSC-BC-2020-06/F00666, paras 14-20, 23-25, 28-29; VESELI Response, KSC-BC-2020-06/F00668, paras 19-21.

⁹ VESELI Response, KSC-BC-2020-06/F00668, para.22.

¹⁰ For example, in relation to the First Category, the THAÇI Defence selectively focuses on parts of the evidence of former KLA members with reasons to downplay or deny certain aspects of the alleged events; however, this cannot detract from the evidence of direct victims and the cumulative effect of the evidence considered as a whole. *Contra* THAÇI Response, KSC-BC-2020-06/F00666, paras 15-29. Further, in relation to the Second Category, the Defence ignores whole parts of the relevant fact patterns establishing the alleged crimes, as clearly set out in the supporting materials. *Compare* KSC-BC-2020-06/F00455/A04; *and* THAÇI Response, KSC-BC-2020-06/F00666, paras 38-40; VESELI Response, KSC-BC-2020-06/F00668, paras 42-43; KRASNIQI Response, KSC-BC-2020-06/F00669, paras 18-23.

¹¹ For example, the VESELI Defence, in claiming that one Second Category victim went voluntarily with his abductors, ignores the evidence and context establishing the opposite. *Compare* VESELI Response, KSC-BC-2020-06/F00668, paras 42-43; *and* KSC-BC-2020-06/F00455/A04, pp.2-4. Moreover, the Defence indicates that

need not address, let alone resolve, such deficient submissions to grant the Request.¹² Likewise, insofar as the Defence effectively seeks reconsideration of the applicable standard and scope of review¹³ without demonstrating any error or injustice,¹⁴ such submissions should be summarily dismissed.

5. At the Specialist Chambers ('SC'), considerations of admissibility and weight are reserved for the Trial Panel.¹⁵ In fact, the THAÇI Defence's reference to the Kosovo Criminal Procedure Code ('KCPC')¹⁶ – which employs a different indictment confirmation procedure not applicable before the SC – nevertheless supports the scope of review adopted by the Pre-Trial Judge.¹⁷

6. Moreover, the VESELI Defence does not explain why case law of the International Criminal Court ('ICC') is more relevant than that of other international(ised) courts.¹⁸ Indeed, the ICC decision referenced by the VESELI Defence permits limited pre-trial evidence evaluations and credibility assessments because they are consistent with and

the crimes of other inhumane acts and cruel treatment are limited to physical mistreatment, without citation or explanation. *See* KRASNIQI Response, KSC-BC-2020-06/F00669, para.14(c); VESELI Response, KSC-BC-2020-06/F00668, para.24. As found by the Pre-Trial Judge, other inhumane acts and cruel treatment may encompass a range of acts – not limited only to physical mistreatment – causing serious mental or physical suffering, or constituting an attack on human dignity. *See* Decision on the Confirmation of the Indictment Against Hashim THAÇI, Kadri VESELI, Rexhep SELIMI and Jakup KRASNIQI, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte* ('Confirmation Decision'), paras 62-64, 98-100.

¹² ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment, 8 February 2006.

¹³ THAÇI Response, KSC-BC-2020-06/F00666, para 8; VESELI Response, KSC-BC-2020-06/F00668, para.5.

¹⁴ Rule 79.

¹⁵ Rules, Section III.

¹⁶ THAÇI Response, KSC-BC-2020-06/F00666, para 8.

¹⁷ As set out above, the Pre-Trial Judge has found that admissibility and weight may only be considered where material is manifestly non-authentic or falls under Rule 138(2)-(3). *See* Confirmation Decision, KSC-BC-2020-06/F00026, para.50. Similarly, under the KCPC, pre-trial objections to evidence submitted with an indictment are limited to submissions that the evidence was unlawfully obtained or is 'intrinsically unreliable'. *See* KCPC Article 249. *See also* KCPC Article 19(1.29) (defining 'intrinsically unreliable').

¹⁸ VESELI Response, KSC-BC-2020-06/F00668, paras 5-6.

provided for in the relevant rules and procedures.¹⁹ That is not the case at the SC²⁰ or at international(ised) tribunals with similar indictment review and confirmation procedures.²¹

B. THE VESELI DEFENCE FAILS TO ESTABLISH THAT ANY SUPPORTING MATERIAL WAS OBTAINED IN VIOLATION OF THE LAW AND RULES

7. The Veseli Defence allegation that the SPO seeks to rely on information obtained in violation of the Law and Rules²² is unfounded. Contrary to the Veseli Defence assertion, the fact that the Pre-Trial Brief lists certain witnesses among the KLA members who ‘arrested and detained’ persons²³ does not, in and of itself, demonstrate that the SPO considered such persons to be suspects either now or at the time of their interviews.²⁴

8. The SPO treats persons as suspects following a careful consideration of multiple factors and available information.²⁵ Based on such assessment, the SPO determined that W03812 and W03865 were not suspects and interviewed them as witnesses. In that capacity, they were informed of their rights, *inter alia*, not to incriminate themselves and both confirmed their understanding thereof.²⁶ The Defence does not demonstrate any error in the SPO’s assessment or treatment of these witnesses.

¹⁹ ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 [...], 30 May 2012, paras 37-49.

²⁰ Rules 86, 90. Notably, issues of credibility and reliability are generally not relevant even at the Rule 130 stage. See *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Motions to Dismiss Charges, KSC-BC-2020-07/F00450, 26 November 2021, para.18 (in determining a motion to dismiss the charges under Rule 130, the Trial Panel ‘should not be drawn into evaluations of witness credibility, the quality and reliability of the evidence or the strengths and weaknesses of contradictory or different evidence’).

²¹ See STL, STL-17-07/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment, 18 October 2017, paras 105-108.

²² VESELI Response, KSC-BC-2020-06/F00668, paras 14-17.

²³ Prosecution Pre-Trial Brief, KSC-BC-2020-06/F00631/A01, 17 December 2021, Strictly Confidential and *Ex Parte*, para.390.

²⁴ *Contra* VESELI Response, KSC-BC-2020-06/F00668, para.15.

²⁵ Rule 2(1) (defining, *inter alia*, a suspect).

²⁶ 088941-TR-ET Part 1, p.3; 078562-TR-ET Part 1, pp.3-4.

C. THE ALLEGED CRIMES ARE ADEQUATELY LINKED TO THE ACCUSED, CONFLICT, AND ATTACK AGAINST A CIVILIAN POPULATION

9. Defence submissions claiming a lack of a sufficient link between the alleged crimes and the Accused²⁷ ignore the Indictment, which has already been confirmed and must be read as a whole, together with the Proposed Amendments, and prior rulings of the Pre-Trial Judge.

10. As alleged in the Proposed Amendments and as demonstrated in the supporting materials, JCE Members or Tools²⁸ arrested, detained, interrogated, mistreated, transferred, and/or killed Opponents²⁹ at or in connection with KLA bases and detention sites.³⁰ The Accused are allegedly responsible for their participation in a joint criminal enterprise encompassing crimes against Opponents by JCE Members and Tools, for aiding and abetting the commission of such crimes, and for their culpable omissions as superiors of the JCE Members and Tools committing the crimes.³¹ Accordingly, consistent with the Pre-Trial Judge's previous conclusions,³² the Indictment, read holistically together with the Proposed Amendments, adequately pleads and the supporting materials establish a well-grounded suspicion that the Accused are responsible for the alleged crimes.

²⁷ THAÇI Response, KSC-BC-2020-06/F00666, paras 32, 38, 41; VESELI Response, KSC-BC-2020-06/F00668, paras 8-13, 30, 34; KRASNIQI Response, KSC-BC-2020-06/F00669, para.22.

²⁸ The perpetrators of the alleged crimes (*see, inter alia*, KSC-BC-2020-06/F00455/A03, p.2, fns 1-2; KSC-BC-2020-06/F00455/A04, pp.9, 11) are JCE Members and Tools, as defined in the Indictment. *See* Indictment, KSC-BC-2020-06/F00455/A01, para.35.

²⁹ The victims of the alleged crimes (*see, inter alia*, KSC-BC-2020-06/F00455/A03, pp.21-23, 32; KSC-BC-2020-06/F00455/A04, p.11) are Opponents, as defined in the Indictment. *See* Indictment, KSC-BC-2020-06/F00455/A01, para.32.

³⁰ *See* Indictment, KSC-BC-2020-06/F00455/A01, paras 90, 131; KSC-BC-2020-06/F00455/A03, p.2, fns 1-2; KSC-BC-2020-06/F00455/A04, p.13.

³¹ Indictment, KSC-BC-2020-06/F00455/A01, paras 32-55.

³² Confirmation Decision, KSC-BC-2020-06/F00026, Section IV(C); Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413, 22 July 2021 ('Indictment Decision'), paras 72-84, 115-118, 174-175.

11. Among others, the same facts set out above – including the identities of the perpetrators and victims and the place, time, nature, and manner of commission – also demonstrate that the alleged crimes: (i) were committed in furtherance of the common criminal purpose or were reasonably foreseeable consequences thereof;³³ and (ii) have a nexus with both the armed conflict and attack against a civilian population.³⁴

12. Finally, the VESELI Defence’s attempt to, once again, relitigate the existence of an armed conflict impermissibly incorporates prior submissions by reference³⁵ and, if entertained, would allow the Defence to end-run the deliberate limits placed on challenges to the Indictment and Confirmation Decision.³⁶ The Pre-Trial Judge has already found a well-grounded suspicion that a non-international armed conflict existed between at least March 1998 and approximately 16 September 1999³⁷ and dismissed the VESELI Defence’s submissions challenging such findings.³⁸ Once again, the Pre-Trial Judge should summarily dismiss such submissions, which are most appropriately advanced and considered in the course of the trial.

III. CLASSIFICATION

13. This filing is confidential in accordance with Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

14. For the foregoing reasons, the Pre-Trial Judge should grant leave for the Proposed Amendments.

³³ See, *similarly*, Confirmation Decision, KSC-BC-2020-06/F00026, paras 453-454, 476. *Contra* VESELI Response, KSC-BC-2020-06/F00668, paras 38-41; KRASNIQI Response, KSC-BC-2020-06/F00669, para.22.

³⁴ See, *similarly*, Confirmation Decision, KSC-BC-2020-06/F00026, paras 446-450. *Contra* THAÇI Response, KSC-BC-2020-06/F00666, para.38; KRASNIQI Response, KSC-BC-2020-06/F00669, para.22.

³⁵ VESELI Response, KSC-BC-2020-06/F00668, paras 34-37.

³⁶ Rule 86(7), 97. See also Indictment Decision, KSC-BC-2020-06/F00413, paras 45-49.

³⁷ Confirmation Decision, KSC-BC-2020-06/F00026, paras 120-137.

³⁸ Indictment Decision, KSC-BC-2020-06/F00413, para.49.

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Jack Smith

Specialist Prosecutor

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At The Hague, the Netherlands.