

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: Counsel for Kadri Veseli

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**Public Redacted Version of
Veseli Defence Response to SPO Submission of Corrected Indictment and
Leave to Amend the Indictment (KSC-BC-2020-06/F00455/CONF/RED)
(KSC-BC-2020-06/F00481 dated 20 September 2021)**

Specialist Prosecutor's Office
Jack Smith

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Victims
Simon Law s

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. The Defence hereby presents this response to the Prosecution's request for leave to amend the indictment,¹ pursuant to Rule 90(1)(b).
2. The SPO's request should be rejected in its entirety. The sheer volume of the proposed new charges alone, comprising three locations; fifteen victims; four charges of murder; as well as two new charges of direct participation of the Accused in the crimes (one incident being entirely redacted) should suffice to reject the request. To place this in context, the *Mustafa* case, also currently before the KSC concerns, in total, less than half of the new charges proposed by the SPO – namely six charges of unlawful detention/cruel treatment/torture/ and one charge of murder.
3. The volume and timing of the proposed new charges would unfairly prejudice the Accused and is not in the interests of justice. It has no ameliorating effect on the clarity and precision of the case; it is introduced at an advanced stage of the proceedings; and may considerably affect the right of Mr Veseli to be tried within a reasonable time. Considering that the SPO had prior knowledge of all the allegations comprising the proposed new charges and offers no justification for its failure to include them in the original indictment, the Defence submits that the SPO has also failed to act diligently and complete its investigations prior to filing its original indictment.
4. The Defence takes issue with the hopelessly opaque manner in which the SPO has presented its request. Far from improving the accuracy or consistency of the charges, the manner in which the request has been pleaded adds

¹ F00455/CONF/RED, Confidential Redacted Version of 'Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b)', KSC-BC-2020-06/F00455, dated 3 September 2021 with confidential redacted Annexes 1-3, confidential Annex 4, and confidential redacted Annex 5, 8 September 2021 ("Request").

considerable confusion and uncertainty to an already sprawling and unmanageable case.

II. SUBMISSIONS

A. The Redacted Portions of the Third Category Violate the Right to be Heard

5. The Defence submits that the Pre-Trial Judge should summarily dismiss the so-called Third Category of amendments (two additional instances of the Accused's personal participation) which is not disclosed to the Defence.² The redactions vitiate the Accused's rights under Rule 90(1)(b), by foreclosing the possibility that the Accused be heard prior to the Pre-Trial Judge deciding whether leave to amend the indictment should be granted. Considering that the right of Mr Veseli to be heard is a *conditio sine qua non* to the admissibility of the request, the Defence submits that the Pre-Trial Judge cannot lawfully proceed to entertain the request with respect to the redacted parts contained in Annex 5 of the proposed amendments.
6. While parts of the evidentiary material supporting the allegations relating to the Accused's personal participation in the crimes may legitimately be subject to redactions at this point in the proceedings, it is inconceivable that at this stage, nearly one year after the defendants have been taken into custody, actual allegations with the potential to introduce a new ground for conviction remain redacted. This constitutes a brazen attempt to violate Mr Veseli's right to be informed promptly of the nature and cause of the charges against him, as guaranteed by Article 30(1) of the Constitution, Article 6 of the ECHR, as well as Article 21(4)(a) of the Law.

² Request, para. 11; Annex 5 to the Request, proposed paragraph 42 and relevant redacted parts within proposed paragraph 43.

B. The Proposed Amendments Constitute New Charges

7. The proposed amendments to the Indictment plainly constitute new charges. The SPO's attempt to conflate the concept of 'charges' on the one hand, with 'counts' and 'modes of liability' on the other;³ and its use of misleading language⁴ do not alter the fact that it has sought to add a multitude of new charges to an already over-burdened indictment.
8. Whether a proposed amendment results in the inclusion of new charges should be ascertained on the basis of clear and objective criteria, namely whether the proposed amendment may, in and of its own, constitute grounds for conviction.⁵
9. Settled case-law of the *ad hoc* tribunals provides the following definition of 'new charges':

When considering whether a proposed amendment results in the inclusion of a "new charge", it is therefore appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. In the opinion of the Trial Chamber the key question is, therefore, whether the amendment introduces a basis for conviction that is **factually and/or legally distinct** from any already alleged in the indictment.⁶

³ Request, paras 3, 11.

⁴ Request, para. 11 ('Proposed Amendments concern only additional factual allegations underpinning the existing charges, follow the same fact patterns as those already pleaded, and do not alter the nature of the charges') (emphasis added). To suggest that these are not 'new' simply because the allegations follow a similar 'fact pattern' to other incidents in the indictment that involve, variously, separate dates, locations, and perpetrators is not remotely credible or convincing.

⁵ [ICC, Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiisona, 'Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61\(9\) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional](#), para. 20.

⁶ [ICTY, Prosecutor v. Halilović, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004](#), para. 30. See also, *Prosecutor v. Popović*, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 26; [Prosecution v. Đorđević, Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Amendment](#), para. 12; [Prosecutor v. Karadžić, Decision on Prosecution Motion to Amend the First Amended Indictment, 16 February 2009](#), para. 34 (emphasis added).

10. The Defence agrees with the above definition provided by the *Halilović* Trial Chamber and urges a similar analysis here. As the Trial Chamber in that case further elaborated, such legal standard:

[I]s neither overbroad nor underinclusive: it would not make new charges out of new allegations that carry no additional risk of conviction by themselves, and would include new allegations that are clearly new charges based on the prior practice of this Tribunal. For example, an amendment seeking to replace a vague reference to an unknown number of victims with a specific number of victims is merely a new factual allegation, not a new charge, because it does not expose the Accused to an additional risk of conviction. On the other hand, an amendment that alleges a different crime under the Statute or a different underlying offence, even without additional factual allegations, is a new charge because it could be the sole legal basis for the Accused's conviction.⁷

11. It is clear from *Halilović* that the SPO has misconstrued the legal significance of the new allegations being charged under criminal prohibitions already utilised in relation to other allegations in the indictment. The relevant question is not whether the indictment already contains allegations of murder, but whether the new charges could be the sole legal basis for the Accused's conviction. The Defence submits that all of them concern new charges, and that each of them is individually capable to expose the Accused to an additional risk of conviction.
12. The **First Category** proposes to include two new sites ([REDACTED]), in addition to the 42 sites⁸ already charged in the Confirmed Indictment. It relates to 12 new victims, comprising several new charges, including two allegations of murder. It follows that each proposed amendment in the First Category introduces a basis for conviction that is factually and legally distinct from any already alleged in the Indictment.

⁷ [ICTY, *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004](#), para. 35.

⁸ F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, para. 153.

13. Further, the suggestion that some of these charges should be allowed on the basis that two of the alleged victims are women⁹ is misguided. If the SPO wished to afford meaningful recognition to female victims of the conflict, it is respectfully submitted that they should have planned their investigation accordingly. The SPO has had ten years to investigate and shape their case. Including these new allegations now, at the eleventh hour, is not a meaningful attempt to achieve gender justice and it comes directly at the expense of the rights of the Accused. This argument should be rejected in its entirety.
14. The **Second Category** relates to Gjilan and is illustrative of the extent to which the Prosecution has sought to obscure the true nature of these proposed amendments. The original indictment refers to the detention of “at least three persons” in a former boarding school and dormitory in late June 1999. The evidence underwriting this allegation emanated from two individuals who were both later released – one of whom, [REDACTED],¹⁰ alleges seeing a third detainee during his own detention, bringing the count to three.¹¹
15. The proposed amended indictment purports to extend only the timeframe from June alone, to June-July, maintaining the number of victims in paragraph 93 at ‘at least three’.¹² In reality, however, the number of victims has now expanded to six, by adding [REDACTED] – and the charges are expanded to include three new alleged detentions and two new alleged murders.
16. Only by retaining the imprecise phraseology of ‘at least three persons’ is the SPO able to present a veneer of consistency with the original indictment. There are now in fact two sets of allegations (encompassing five incidents); one from June, the other from July. They are separated in time by approximately three

⁹ SPO Request, para. 7.

¹⁰ The identity of the other alleged victim is unknown to the Defence.

¹¹ F00136/A01, SPO outline, pp.565-568.

¹² Request, Annex 2, para. 93.

weeks, and apparently involve six distinct victims – any of which could independently form the basis of a conviction.

17. If the SPO intends to lead evidence on the detention of 6 victims at the dormitory in Gjilan, then it should say as much in its proposed amended indictment. If, on the other hand, it intends to drop the original victims and substitute them with the accounts of these newly identified individuals, this also needs to be made clear. It is the right of the Accused to know the case against him; the SPO is acting in blatant disregard of this right by approaching the charges in this manner.
18. With respect to the **Third Category** of amendments, which contain new allegations of direct participation, the Defence recalls the Pre-Trial Judge's finding that it is immaterial whether the conduct is legally qualified as contribution to the common purpose of the JCE or as direct commission. Failure to plead material facts is failure to inform the Accused of the conduct that gives rise to criminal liability.¹³ It is for this reason that the SPO was required to seek leave to plead new facts regarding personal participation.
19. Taking into account (i) that the Pre-Trial Judge warned the SPO to request leave to amend the Indictment in case it wished 'to plead further instances of personal participation of the Accused in the crimes charged';¹⁴ and (ii) guidance set out Article 46(6) of the Law which makes it abundantly clear that personal participation may be a separate basis for conviction even where JCE has been pleaded,¹⁵ the Defence submits that the proposed amendments in the Third

¹³ F00413, Confidential Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, para. 91.

¹⁴ F00413, Confidential Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, para. 92.

¹⁵ Article 46(6): When the Court of Appeals Panel overturns a Trial Panel's finding of guilt based on one mode of liability and the Trial Panel has failed to make findings on alternative modes of liability, the Court of Appeals Panel shall consider the evidence contained in the trial record, as well as any other Trial Panel findings, to determine whether to enter convictions under an alternative mode of liability.

Category also introduce a new basis for conviction that is factually and legally distinct from any already alleged in the Indictment.

20. In summary, the Defence submits that the proposed amendments introduce new bases for conviction that are factually and legally distinct from any previously alleged in the confirmed Indictment. In truth, these are separate alleged crimes which the SPO could have, but did not, include in the original indictment and as such, the request should be rejected.

C. The proposed amendments are prejudicial to, and inconsistent with, the rights of the Accused

21. Decisions on requests for leave to amend the Indictment should, in general, follow a cautious and restrictive approach.¹⁶ Contrary to the SPO's submissions,¹⁷ whether the proposed amendment would deprive the Accused of an adequate opportunity to prepare an effective defence and whether leave to amend the Indictment would result in undue delay of the proceedings represents only one of three main overlapping factors considered by the case-law of *ad hoc* tribunals in assessing whether leave to amend the indictment should be granted. Other key factors are:

(1) whether the proposed amendments produce an ameliorating effect on the clarity and precision of the case to be met; and

(2) whether the prosecution has been diligent in seeking the amendment.¹⁸

¹⁶ [ICC, Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, 'Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61\(9\) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges, para. 22.](#)

¹⁷ Request, fn. 22.

¹⁸ [MICT, Prosecutor v. Kabuga, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021](#), para. 8. See also *Prosecutor v. Turinabo et al.*, Decision on Prosecution Motion to Amend the Indictment, 17 October 2019, para. 6; [Prosecutor v Karemera et al, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003](#), para. 15; [Prosecutor v. Karadžić, Decision on Prosecution Motion to Amend the First Amended Indictment, 16 February 2009](#), para. 32.

1. Ameliorating effect on the clarity and precision of the case

22. None of the three categories clarifies the SPO's case, reduces or consolidates any charges, or otherwise enables Mr Veseli to adequately prepare his defence. To the contrary, the SPO simply proposes to add more charges in relation to additional sites and victims, with the effect of further complicating the case, expanding the universe of relevant material for the purposes of evidence review and investigation, and making it even more difficult for Mr Veseli to adequately prepare his defence. There is no ameliorating effect.

2. Prejudice to the Accused
 - (i) *The amendments deprive Mr Veseli of an adequate opportunity to prepare an effective defence*

23. As indicated above, the proposed amendments do not streamline or reduce any charges in the indictment, nor do they clarify the case to be met by Mr Veseli.

24. The request is not timely: as a general rule, the "closer to trial the prosecution moves to amend the indictment, the more likely it is that the [Pre-Trial Judge] will deny the motion on the ground that granting such leave would cause unfair prejudice to the accused by depriving him of an adequate opportunity to prepare an effective defence".¹⁹ As the SPO itself has submitted to the Pre-Trial Judge, the present proceedings are at a 'significantly advanced' stage.²⁰

25. In addition, the Defence did not have any prior notice of the SPO's intention to request leave to amend the Indictment (at least with regard to the First, Second, and the redacted incident in the Third Category). The Defence recalls the

¹⁹ [Prosecutor v. Stanišić & Župljanin, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009](#), para. 12.

²⁰ SPO, Status Conference, 21 July 2021, pp. 508-509.

statement made by the SPO representative during the Sixth Status Conference of 21 July 2021:

[...] And contrary to submissions made in the Thaci Defence filing, it has absolutely no impact on Mr. Thaci's right to know the charges against him. Those charges are clearly set out in the Confirmed Indictment which delineates the scope of the case. The relevant question is not one of what investigations are being undertaken by the office but, rather, one of what material the SPO intends to rely upon to prove its case at trial. There is a clear legal framework regulating that, and the SPO is fully aware that at a certain point in the event additional incriminating evidence of relevance to this case is identified in the course of such investigations, it would be a matter for the Panel to decide whether or not it may be used. And that decision would be taken in light of the degree of prejudice, if any, which would occur. Such prejudice would primarily arise as a result of the stage of proceedings.²¹

26. Considering the scope of the proposed amendments, the Defence submits that it was impossible for the SPO not to have known at that time that the present leave to amend the Indictment would be filed shortly thereafter. Consequently, the SPO's failure to provide notice to the Pre-Trial Judge and the Defence of its intention to request leave to introduce new charges to the Indictment should be considered as an intention of the SPO to conduct a trial by ambush.
27. As to the claim that the SPO has already disclosed part of the evidentiary material,²² the Defence recalls that, even if that were the case, the mere disclosure of material to the Defence cannot be regarded as adequate notice of a charge against the Accused if that charge is not specifically set out in the Indictment.²³
28. The request adds to the sheer volume of evidentiary material and scope of the Defence investigations: the Pre-Trial Judge is well aware of the current complexity of the case, comprising an unprecedented number of charges, locations, witnesses and other evidentiary material. The Pre-Trial Judge is also

²¹ SPO, Status Conference, 21 July 2021, p. 508 (emphasis added).

²² Request, para. 12.

²³ [Prosecutor v. Stanišić & Župljanin, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009](#), para. 39.

aware of the serious concerns raised by the Defence in relation to the conduct of the SPO in discharging its disclosure obligations, as well as other related obstacles to the Defence's right to adequately prepare an effective defence, which are hereby incorporated by reference.²⁴

29. Moreover, the volume of the proposed amendments is substantial. As the Defence indicated in the Introduction,²⁵ the scope and volume of the evidentiary material (and in consequence, the relevant Defence investigations) is double the size of other cases litigated before the KSC. In this regard, it is reminded that the Pre-Trial proceedings in the *Mustafa* case lasted for almost one year.

(ii) *The proposed amendments would significantly delay the proceedings*

30. The Defence submits that in case the proposed amendments (which constitute new charges) are allowed, this would cause substantial delays in the proceedings, considering that Rule 86(3) and (4) shall apply *mutatis mutandis*. The time required to complete such procedures, including the scheduling of a further appearance as well as the time required to file preliminary motions (and have them adjudicated eventually by the Appeals Chamber) would substantially delay the proceedings and violate Mr Veseli's right to be tried within a reasonable time. In this respect, it is recalled that the jurisdictional challenges related to the original indictment are only now before the Appeals Chamber and have not yet been ruled upon. The potential to delay the proceedings is significant.

²⁴ Submissions of the Defence of Mr Veseli, Status Conference, 14 September 2021.

²⁵ *Supra*, para. 2.

3. Prosecutorial Diligence

31. Finally, the Defence submits that the SPO has failed its duty to act diligently and investigate the relevant allegations in due time. The Defence notes the SPO's acknowledgment that "with respect to the First Category and Second Category [...] investigation had commenced before the confirmation of the Indictment."²⁶ However, the SPO fails to provide reasons as to why interviews of key witnesses occurred thereafter – and gives no indication that they were prevented from doing so at an earlier date.
32. It is the SPO that decides when to file the Indictment and what charges to include therein. Under the circumstances, the SPO's appeal to the 'interests of the victims'²⁷ rings hollow. As the SPO itself points out, failure to include these victims in the indictment deprives them of any possibility to participate or seek reparations before this Court. To request amendment of the indictment at this late stage, knowing that it would place their interests in direct conflict with the fundamental rights of Accused, was the SPO's prerogative. However, to grant the request under these circumstances would be highly and unfairly prejudicial to the Accused.

D. The proposed amendments fail to address the order of the Pre-Trial Judge to file an amended Indictment excluding JCE III for special intent crimes

33. The Defence notes that the SPO decided not to address the order of the Pre-Trial Judge for a separate amendment of the Indictment in relation to the exclusion of JCE III liability for special intent crimes.²⁸ While the Pre-Trial Judge did not explicitly order the SPO to comply with his order by a specific date (as he did with KSC-BC-2020-06/F00413), it is obvious that he did not intend the SPO to file two separate amended Indictments. Nor did he intend to leave the

²⁶ Request, para. 10.

²⁷ Request, paras 6-7.

²⁸ Request, footnote 2.

timing of the execution of his order to the discretion of the SPO. The SPO's attempt to benefit from such "loophole" should, therefore, be acknowledged as such and rejected.

34. Considering that the SPO has already appealed the relevant finding of the Pre-Trial Judge in relation to the application of JCE III to special intent crimes,²⁹ the Defence considers that such failure to comply with the order of the Judge in KSC-BC-2020-06/F00412 is tantamount to a violation of Rule 171³⁰ of the Rules, by attempting to *de facto* give suspensive effect to its interlocutory appeal.
35. It follows that the SPO's request to include certain incidents of "persecution" and "torture" (First category),³¹ as well as two incidents of "persecution" (Second category),³² while charging the Accused with "the same modes of liability",³³ should be summarily dismissed.

II. CONCLUSION

36. For the reasons set out above, the proposed amendments to the indictment are unduly prejudicial to the Accused and would not serve the interests of justice.
37. Accordingly, the Defence respectfully requests the Pre-Trial Judge to reject the SPO request in its entirety. In alternative, should the Pre-Trial Judge grant leave to the SPO to introduce new charges to the Indictment, the Defence reserves its

²⁹ KSC-BC-2020-06/IA009/F00014, Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3), 27 August 2021.

³⁰ Rule 171: Subject to Rule 58(4), interlocutory appeals shall not have suspensive effect unless otherwise ordered in the certification decision or by the Court of Appeals Panel, upon request filed prior to or with the appeal. Suspensive effect shall only be granted as an exceptional measure where the Appellant demonstrates that the implementation of the decision under appeal could potentially defeat the purpose of the appeal or would lead to consequences which may be irreversible.

³¹ Request, para. 1(a).

³² Request, para. 1(b).

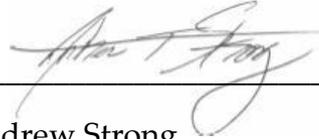
³³ Request, para. 11.

right to provide, at a later date, submissions relating to the admissibility and sufficiency of the evidence.

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Ben Emmerson, CBE QC
Counsel for Kadri Veseli



Andrew Strong
Co-Counsel for Kadri Veseli