

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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**Public Redacted Version of Thaçi Defence Motion on Whether There is a Well
Grounded Suspicion in Relation to the SPO's Request to Amend the Indictment**

Specialist Prosecutor

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I. INTRODUCTION

1. On 26 October 2020, the Pre-Trial Judge (“PTJ”) confirmed the indictment¹ against Mr Hashim Thaçi (“Accused”) and his co-accused.² In a decision dated 22 July 2021, the PTJ ordered the Special Prosecutor’s Office (“SPO”) to file a corrected version of the Indictment.³ On 3 September 2021, the SPO filed a corrected indictment as ordered and requested leave pursuant to Article 39(8) of the Law⁴ and Rule 90(1)(b) of the Rules⁵ to amend the Indictment to include three categories of amendments.⁶

2. On 23 December 2021, the PTJ granted the SPO’s motion to amend the Indictment in relation to all three categories of amendments.⁷ The PTJ found that the first and second categories of amendments (“First and Second Categories”) were new charges and therefore must be assessed “against the requisite evidentiary threshold of ‘well grounded suspicion’, as per Rule 86(4) of the Rules, in light of the evidence submitted, as per Rule 86(3) of the Rules.”⁸ The PTJ ordered the SPO to provide, if possible, a lesser redacted Indictment, Rule 86(3)(b) Outlines and Request by 17 January 2022. He further requested that the Defence, should it so wish, file submissions in response to the Request, on the supporting material, relating to the First and Second Categories of amendments by 31 January 2022. These submissions

¹ KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020 (“Indictment”).

² KSC-BC-2020-06/F00026/CONF/RED, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 20 October 2020 (“Confirmation Decision”).

³ KSC-BC-2020-06/F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021 (“Defects Decision”).

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“the Law”).

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

⁶ KSC-BC-2020-06/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 (“Submission of Corrected Indictment and Request to Amend”).

⁷ KSC-BC-2020-06/F00635/CONF, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021 (“Decision Allowing Amendments”).

⁸ *Ibid.* para. 28.

should be on whether a ‘well-grounded suspicion’ has been established pursuant to Rule 86(4) in relation to the First and Second Categories of proposed amendments.⁹

3. On 17 January 2022, the SPO replied that they could not file less redacted versions of the Submission of Corrected Indictment and Request to Amend, the Proposed Amendments and the Additional Outlines as the relevant redactions remain necessary.¹⁰

4. The Defence hereby files this motion pursuant to the invitation by the PTJ in his Decision Allowing Amendments and Rule 86(4), submitting that ‘a well grounded suspicion’ in relation to the First and Second Categories of amendments has not been established, and thus that the PTJ should not allow them.

II. APPLICABLE LAW

5. Article 39(8) of the Law and Rule 90(1)(b) of the Rules provide that after the indictment is confirmed but before the trial has begun, the SPO may, with the permission of the Pre-Trial Judge, having heard the Parties, amend the indictment. If, as in this case, the SPO seeks to add new charges, the PTJ shall review such charges and hold an initial appearance in accordance with Article 39(8) of the Law. In addition, Rules 86(3) and (4) shall apply.¹¹

6. Rule 86(4) provides that the PTJ shall “examine the supporting material in relation to each of the charges and shall determine whether a well grounded suspicion has been established against the suspect.”

⁹ *Ibid.*, para. 53 (d); *see also* para. 48.

¹⁰ KSC-BC-2020-06/F00647, Prosecution Submission of Lesser Redacted Versions of Indictment and Rule 86(3)(b) Outline with Confidential Redacted Annexes, 17 January 2022.

¹¹ Decision Allowing Amendments, para. 16.

7. Neither the Law nor the Rules define 'well grounded suspicion'. However, in his decision confirming the Indictment against the Accused, the PTJ found that:

46. While neither the Law nor the Rules define well-grounded suspicion, the threshold is clearly differentiated from other evidentiary standards provided in the SC's legal framework. The Law establishes four progressively higher evidentiary thresholds: (i) grounds to believe (in Article 38(3)(a) of the Law and Rule 43(1) of the Rules regarding the status of suspects); (ii) grounded suspicion (in Article 41(6) of the Law regarding arrest warrants by the SC or arrest orders by the SPO); (iii) well-grounded suspicion (in Article 39(3) of the Law and Rule 86(4) of the Rules regarding the confirmation of an indictment); and (iv) beyond reasonable doubt (in Article 21(3) of the Law and Rule 158(3) of the Rules regarding convictions). **As the threshold for triggering proceedings against an Accused, well-grounded suspicion is necessarily more onerous than those required for ascertaining suspects and ordering arrests, and is evidently less demanding than the standard for conviction following trial.**

47. The Pre-Trial Judges notes that according to **Article 19.1.12 of the Kosovo Criminal Procedure Code of 2012, No. 04/L-123 ("CPC")**, well-grounded suspicion is reached when the evidence "would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence". Notably, it is not sufficient, as required for grounded suspicion under Article 19.1.9 CPC, that the objective observer be satisfied that "the person concerned is more likely than not to have committed the offence".

48. Therefore, while falling short of the certainty of a proven fact, **determining the existence of a well-grounded suspicion nevertheless requires a conviction on the part of the Pre-Trial Judge, beyond mere theory or suspicion, that: (i) the contextual elements of the crime (if any) are present; (ii) the underlying acts or crimes have indeed occurred; and (iii) the suspect committed or participated in the commission of the crime through the alleged mode(s) of liability.** The Pre-Trial Judge bases such findings on concrete and tangible supporting material, demonstrating a clear line of reasoning underpinning the charges in the indictment. In so doing, the Pre-Trial Judge evaluates the supporting material holistically, without scrutinising each item of evidentiary material in isolation.¹²

8. The Defence observes that the PTJ has mistakenly omitted from the test of well-grounded suspicion under the KCPC at paragraph 47 of his Confirmation Decision the fact that the evidence that the assessment is made upon must be "admissible".¹³

¹² Confirmation Decision, paras. 46-48.

¹³ See Article 19.1.12 of the KCPC.

9. Pursuant to Rule 86(4), the Defence has only examined the relevant paragraphs of the proposed amended indictment and outline and supporting material to make its submissions that a well grounded suspicion does not exist.¹⁴

10. If the First and Second Categories of proposed amendments are confirmed by the PTJ in due course, the Defence reserves its position to submit a preliminary motion under Rule 97(1)(b) alleging defects in the form of the Indictment. This is because the procedure under Rule 97(1)(b) is distinct from, and comes subsequent to, the confirmation/amendment of the indictment process.

III. SUBMISSIONS

A. CATEGORY ONE: A WELL GROUNDED SUSPICION HAS NOT BEEN ESTABLISHED

11. The proposed amendments in the first category of amendments concern two detention sites at Budakovë/Bdakovo and Semetishtë/Semetište, Suharekë/Suva Reka municipality at or in connection with which KLA members committed acts of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance (“First Category”).¹⁵

1. Proposed new indictment paragraphs 68 and 105

12. Proposed new indictment paragraph 68 alleges that:

“[B]etween about 4 July 1998 and September 1998 and on or around [redacted] 1999, certain KLA members detained at least twelve persons without due process of law in Budakovë/Budakovo. Detainees, who were held for varying periods of time, were physically restrained, and held in locked rooms and under armed guard. Immediately following detention in Budakovë/Budakovo, at least [redacted] transferred to Semetishtë/Semetište and also detained there between around around 19 to 20 August 1998. Multiple KLA members were involved in these detentions, including members of Brigade 123 within the Pashtrik Operational Zone.”¹⁶

¹⁴ Submission of Corrected Indictment and Request to Amend.

¹⁵ Submission of Corrected Indictment and Request to Amend, para. 1.a. This relates to paragraphs 68, 105 and 157 of Annex 2 to the Submission of Corrected Indictment and Request to Amend.

¹⁶ Annex 2 of Submission of Corrected Indictment and Request to Amend (Confidential).

Proposed new indictment paragraph 105 alleges that:

“[B]etween about 4 July 1998 and September 1998 and on or around [redacted] 1999, detainees at Budakové/Budakovo and Semetishtë/Semetište were held in makeshift detention cells. Multiple KLA members routinely subjected detainees to severe beatings and psychological abuse. Detainees were hit all over their bodies. Detainees, [redacted], were interrogated about and accused of associating, collaborating, or assisting Serbs and Serbian authorities.”¹⁷

13. The Confidential Redacted Evidentiary Outline deals with these allegations by victim group as follows:¹⁸

(a) [REDACTED], [REDACTED], [REDACTED], and Unidentified Albanian man.

14. The SPO relies on the evidence of the following witnesses to establish the allegations against these victims: [REDACTED].¹⁹

15. The SPO’s evidence in support of the crimes outlined in proposed new paragraphs 68 and 105 of the indictment against this victim group is internally inconsistent, as the witnesses that the SPO seeks to rely on contradict each other about the occurrence of the alleged crimes. Specifically, [REDACTED]’s evidence that these crimes occurred is directly contradicted by the evidence of [REDACTED].

16. [REDACTED] states that other than “[REDACTED], [REDACTED] and [REDACTED]”, and two Serbs from [REDACTED], he had not heard that any others were arrested and/or detained in Budakove or elsewhere in 1998 or 1999. In respect of the two Serbs, he said that they were brought from [REDACTED] to Budakove, spoken to and then released. He did not mention any mistreatment.²⁰ He also denied

¹⁷ *Ibid.*

¹⁸ See Annex 3 of Submission of Corrected Indictment and Request to Amend (Confidential).

¹⁹ *Ibid.*

²⁰ [REDACTED].

that “[REDACTED]” and “[REDACTED]” were detained in Budakove around the time that [REDACTED] and “[REDACTED]” were.²¹

17. [REDACTED] directly contradicts the evidence of [REDACTED] that [REDACTED] and [REDACTED] [REDACTED] and [REDACTED] were detained and mistreated in several regards. First, [REDACTED] states that [REDACTED] was with [REDACTED] and [REDACTED] when they were arrested and they were subsequently detained and mistreated together.²² [REDACTED] contradicts this, as he states that [REDACTED] was with a child when he was brought in for questioning. He denies that he was stopped and questioned with anyone else as alleged.²³ Secondly, [REDACTED] denies that [REDACTED] was detained or mistreated as alleged but rather that he was taken by the KLA to a house in Bukove to be questioned as he had gone to KLA positions with a hunting gun and rifle. He was interviewed and then the Red Cross was called and he was released. No mistreatment occurred.²⁴

18. [REDACTED] also expressly contradicts the evidence of [REDACTED] that [REDACTED] was detained at Budakove.²⁵

19. More generally, and contrary to the evidence of [REDACTED], [REDACTED] states that he did not hear of any beating or mistreatment of detainees in Budakove by soldiers at the relevant time. He describes it as a ‘safe’ place.²⁶

20. Taken as a whole, and in light of these contradictions, it cannot be said that there is a well grounded suspicion that the victims named above were illegally

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

detained and mistreated as alleged. Indeed, how can prosecution evidence that is internally inconsistent on the occurrence of an alleged crime possibly satisfy an objective observer that the crime occurred, let alone that the Accused committed or participated in it? This cannot on any view satisfy the test of well grounded suspicion required under the Rules: it cannot establish in the Pre-Trial Judge a “conviction beyond mere theory or suspicion.”

(b) [Redacted], [REDACTED] & [REDACTED], & [REDACTED]

21. The SPO relies on the evidence of the following witnesses to establish the allegations against these victims: [REDACTED].²⁷

22. At the outset, the Defence notes that the identity of one of the victims and the witness statement/s of one or more witnesses supporting this allegation are entirely redacted. Article 39(8) of the Law and Rule 90(1)(b) of the Rules provide that after the indictment is confirmed but before the trial has begun, the SPO may, with the permission of the Pre-Trial Judge, *having heard the Parties*, amend the indictment. Accordingly, the Defence is limited in the submissions it can make about whether or not a well grounded suspicion exists in relation to the allegations about this category of victims as it cannot review all the relevant evidence. Accordingly, the Defence reserves its position in relation to making more detailed submissions about this victim group, as at present, the extent of the SPO’s redactions violates its right to be heard.

23. Notwithstanding the above, the prosecution evidence that the Defence is able to review is contradictory about the occurrence of the crimes themselves as set out below. The consequence is that it cannot be said, on any view, that there is a well

²⁷ See Annex 3 of Submission of Corrected Indictment and Request to Amend (Confidential).

grounded suspicion that the victims named above were illegally detained and mistreated as alleged, let alone that the Defendant committed or participated in it.

24. First, [REDACTED] denies that [REDACTED] and [REDACTED], and [REDACTED] were prisoners or that they were arrested at all before being transported from Budakove to Semetishte, but rather that they were just transported.²⁸

25. Second, contrary to the SPO's allegation, [REDACTED] states that when [REDACTED] and [REDACTED], and [REDACTED] were transferred from detention in Budakove to the Brigade, they had not been mistreated.²⁹ [REDACTED] states that when two women [assumed to be [REDACTED] & [REDACTED]] were transported from Budakove to Semetishtë a handwritten document was issued stating that they were taken in 'good health condition.'³⁰ In addition, [REDACTED] denied that [REDACTED] and [REDACTED] had been mistreated while being questioned but did not rule out the possibility that it happened after they were transferred to the Brigade.³¹ Further, [REDACTED] does not indicate that [REDACTED] and [REDACTED] were mistreated or tortured in the course of his evidence about them.

(c) *[REDACTED] and [redacted]*

26. The SPO relies on the evidence of the following witnesses to establish the allegations against these victims: [REDACTED].

27. Article 39(8) of the Law and Rule 90(1)(b) of the Rules provide that after the indictment is confirmed but before the trial has begun, the SPO may, with the

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

permission of the Pre-Trial Judge, *having heard the Parties*, amend the indictment. The Defence cannot make submissions about whether or not a well grounded suspicion exists in relation to the allegations about this category of victims as the evidence it needs to assess to do so – i.e. [REDACTED]’s statement – is redacted in the relevant places. There is another witness whose statement/s are purportedly relevant but his/her identity and statements are entirely redacted. Accordingly, the Defence reserves its position in relation to making more detailed submissions about this victim group, as at present, the extent of the SPO’s redactions violates its right to be heard.

28. Notwithstanding the above, and as stated above, [REDACTED] on who the SPO relies in relation to all allegations in paragraphs 68 and 105 of the new indictment states that he did not hear of *any* beating or mistreatment of detainees in Budakove by soldiers at the relevant time. He described it as a ‘safe’ place.³² Accordingly, whatever the redacted SPO evidence says, one of its other witnesses on the same allegation contradicts him/her. In the face of internally inconsistent evidence, it cannot be said that the victims named above were illegally detained and mistreated as alleged.

(d) Conclusion regarding paragraphs 68 and 105 of proposed new indictment

29. As set out above, the SPO’s own evidence is internally inconsistent about the existence of the crimes alleged in paragraphs 68 and 105. Consequently, this cannot on any view satisfy the test of well grounded suspicion required under the Rules, and the Defence submit that the PTJ should not allow the addition of proposed paragraphs 68 and 105.

³² [REDACTED].

2. Proposed new indictment paragraph 157

30. Proposed new indictment paragraph 157 alleges:

“[o]n or about 17 August 1998, [REDACTED] and [REDACTED] were arrested and subsequently questioned and detained in Budakovë/Budakovo for about three days. An order for their transfer to KLA Brigade 123 was then issued. Their bodies were found on or around 23 August 1998, shortly after having been handed over by KLA members who transferred them from their detention location in Budakovë/Budakovo to a KLA member in or around Semetishtë/Semetište. Family members were denied information regarding their fate.”³³

31. The SPO relies on evidence including witnesses [REDACTED], [redacted] and the following exhibits: [REDACTED] to establish this allegation.

32. From the evidence presented by the SPO, there is a well grounded suspicion that [REDACTED] and [REDACTED] were killed. However, the Defence denies that there is a well grounded suspicion that the Accused committed or participated in this crime as set out below and thus invites the PTJ to reject this proposed amendment.

33. Exhibit [REDACTED], an MUP Report produced to the SPO from the SPRK and the Basic Court of Prizren confirms the deaths of [REDACTED] and [REDACTED] by gunshot. It concludes that the perpetrator was likely to be [REDACTED] because the shots were fired from a type of a gun that he owned.³⁴ This is corroborated by [REDACTED] who stated that he had heard but could not confirm, that [REDACTED] “committed the killings as he himself pleased and that he undertook actions without asking anyone for permission or anything.”³⁵ There is no evidence that the Accused directly or via a charged mode of participation was involved in these crimes. In light of this, the Defence submits that it is impossible to conclude that a well grounded suspicion that the Accused committed or participated in this crime exists.

³³ *Ibid.*

³⁴ Exhibit [REDACTED].

³⁵ [REDACTED].

B. CATEGORY TWO: A WELL GROUNDED SUSPICION HAS NOT BEEN ESTABLISHED

34. The proposed amendments in the second category concern two incidents of persecution and murder committed in connection with the Gjilan/Gnjilane detention site and an amended timeframe for an incident at that site (“Second Category”).³⁶

35. Proposed new indictment paragraphs 93 and 174, with corresponding amendments to Schedules A-B, respectively extend the temporal scope of alleged underlying criminal acts at the Gjilan/Gnjilane dormitory detention site (from “late June 1999” to “late June **and July 1999**”), and further allege two additional incidents of persecution and murder committed in connection with the Gjilan/Gnjilane detention site. These incidents are charged both as crimes against humanity and as war crimes.

36. In particular, proposed new paragraph 93 would be amended to read: “In late June 1999 **and July 1999**, certain KLA members detained at least three persons without due process of law at a KLA headquarters located in a former boarding school and dormitory in Gjilan/Gnjilane.”³⁷ Proposed paragraph 174, which would be entirely new, alleges:

“[REDACTED] and [REDACTED] were both abducted in Gjilan/Gnjilane on [REDACTED] July 1999, respectively. [REDACTED] was taken towards the Dormitory and was not seen again, until his body was found in June 2000. The cause of death was multiple gunshot wounds. Just two days later, on [REDACTED] July 1999, [REDACTED] was abducted from his home and taken to the Dormitory. His body was found in 2002. [REDACTED]”³⁸

³⁶ Submission of Corrected Indictment and Request to Amend, para. 1.b. This relates to paragraphs 93 and 174 of Annex 2 to the Submission of Corrected Indictment and Request to Amend.

³⁷ See Annex 2 to the Submission of Corrected Indictment and Request to Amend, para. 93.

³⁸ See Annex 2 to the Submission of Corrected Indictment and Request to Amend, para. 174.

37. The SPO relies on the evidence of witnesses [REDACTED] to establish the allegations against these victims, as well as documents such as birth and death certificates, and autopsy/exhumation reports of the two alleged victims of persecution and murder.

38. The evidence presented by the SPO supports a well grounded suspicion that two victims were killed.³⁹ It does not, however, support a well grounded suspicion that the contextual elements of the crimes are present, nor that the Accused committed or participated in these crimes as set out below. In particular, the evidence is insufficient to establish a well grounded suspicion that there is a nexus between the incidents in question and the attack against the civilian population (as necessary for crimes against humanity) and the non-international armed conflict (in relation to war crimes). Rather, the evidence suggests that the acts in question were committed pursuant to a personal vendetta unrelated to the 'attack' or armed conflict.

39. First, [REDACTED] explains in her statement that, based on the information received after the disappearance of [REDACTED], what happened to [REDACTED] and [REDACTED] was all part of personal revenge by a certain [REDACTED]. According to [REDACTED], [REDACTED] "hated" the two alleged victims, for personal reasons: [REDACTED] had once in his professional capacity arrested [REDACTED], and [REDACTED] also had a cousin that had at a point been detained in the prison where [REDACTED] worked.⁴⁰ [REDACTED] indicates this as the most likely explanation for what happened to [REDACTED] and [REDACTED].⁴¹ Indeed, while the two alleged victims were previously [REDACTED] ([REDACTED]) and as

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

a [REDACTED] ([REDACTED]), [REDACTED] states that she did not hear about any other [REDACTED] being targeted.⁴²

40. Second, while both murder victims were Serbs, the evidence of [REDACTED] and [REDACTED] does not suggest that they were targeted because of their Serb ethnicity, for being associated with Serbs, or because they held political views perceived as anti-KLA. Rather, they were targeted for personal reasons as set out above.

41. Finally, the supporting evidence does not support a well grounded suspicion that the Accused participated in or contributed to these offences either directly or via a mode of liability charged. There is no mention at all of him in relation to these offences. Related to this is the fact that [REDACTED] does not mention the involvement of the KLA in the detention of the third alleged victim.

42. To conclude, the evidence in support of the Category Two amendments cannot, on any view, satisfy the test of well grounded suspicion required under the Rules.

IV. RELIEF SOUGHT

43. For the above reasons, the Defence submit that a 'well grounded suspicion' has not been established in relation to the First and Second Categories of amendments and requests that the PTJ deny the SPO permission to amend the Indictment to include new paragraphs 68, 105, 157, 174 and the amended paragraph 93.

Word count: 3,730 words

⁴² [REDACTED].

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Friday, 6 May 2022

At Tampa, United States