



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

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 15 March 2024

Language: English

Classification: Confidential

Prosecution reply to 'Response to the Request to Amend pursuant to Rule 90(1)(b)'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Response¹ should be rejected, and leave to include the Proposed Amendments² should be granted, as per the Request. The Response ignores that the Proposed Amendments do not prejudice the Accused and instead seeks to impose baseless procedural requirements.

II. SUBMISSIONS

A. LEAVE TO AMEND WAS PROPERLY SOUGHT

2. Januzi misrepresents the Amendment Decision³ as incorporating a decision to reject the previous request for leave to amend such that the Specialist Prosecutor's Office ('SPO') would now be required to seek interlocutory appeal requiring certification pursuant to Rule 77 of the Rules⁴ or reconsideration pursuant to Rule 79.⁵

3. Both the clear language of and the obvious intent behind the Amendment Decision render such an interpretation absurd. In the Amendment Decision, the Pre-Trial Judge concluded that the Proposed Amendments amounted to a new charge within the meaning of Rule 90(2) and accordingly triggered the application of Rule 86(3) and (4).⁶ The Pre-Trial Judge then 'invite[d] the SPO to file a proper request to amend' with respect

¹ Response to the Request to Amend pursuant to Rule 90(1)(b), KSC-BC-2023-10/F00199, 7 March 2024, Confidential ('Response').

² As defined in Request to amend pursuant to Rule 90(1)(b), KSC-BC-2023-10/F00189, 27 February 2024, Confidential ('Request'), para.1.

³ Public redacted version of 'Decision on Request for Joinder and Amendment of the Indictment,' KSC-BC-2023-10/F00161/RED, 8 February 2024 ('Amendment Decision').

⁴ 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.

⁵ Response KSC-BC-2023-10/F00199, paras 7-19, 32.

⁶ Amendment Decision, KSC-BC-2023-10/F00161/RED, para.53.

to the Proposed Amendments, 'in accordance with the provisions of Rule 86.'⁷As set forth in the plain language of the Amendment Decision, the Pre-Trial Judge concluded that the request to amend then before the Court was not 'proper' under Rule 86 but declined to consider the merits of the request. This reading is clearly reinforced by the Court's invitation to the SPO to 'request to amend' rather than to seek reconsideration or appeal. Therefore, the Pre-Trial Judge never, as suggested by Januzi,⁸ made a 'decision' on the merits of the SPO's prior request to amend such that reconsideration or an interlocutory appeal would be necessary.

4. In any case, despite Januzi's arguments to the contrary,⁹ nothing in Rule 90(1)(b) (or anywhere else in Rules) expressly limits the number of times the Specialist Prosecutor's Office may seek leave to amend an indictment. Indeed, Rule 86(9) expressly sets forth that 'non-confirmation of any charge in an indictment shall not preclude the Specialist Prosecutor from subsequently filing an amended indictment or form including the same charge in an indictment supported by new evidentiary material.' It is consistent with the Rules that the SPO in its Request sets forth the Proposed Amendments for the Court's consideration a second time. As such, a request to amend pursuant to Rule 90(1)(b) is the proper legal and procedural vehicle under which to proceed in this case.

B. THE SPO EXERCISED DILIGENCE SUCH THAT THERE IS NO PREJUDICE TO THE ACCUSED

5. The SPO agrees with Januzi that when seeking to add a previously non-confirmed charge, Article 39(2) of the Law¹⁰ requires support by 'additional evidence' and Rule 86(9)

⁷ Amendment Decision, KSC-BC-2023-10/F00161/RED, paras 55, 58(e).

⁸ See Response KSC-BC-2023-10/F00199, paras 7, 13, 14, 15.

⁹ See Response KSC-BC-2023-10/F00199, para.13.

¹⁰ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

by 'new evidentiary material,' as has been offered in this case.¹¹ However, the meaning given to these terms, contained in legal provisions that apply during the pre-trial stage,¹² are not in any way circumscribed by reference to the provisions of Rule 181, which applies post-trial.¹³

6. Januzi's attempt to twist the language of Rule 181 in service of his position is unavailing. At the appeals stage of a proceeding, Rule 181(1) allows a party to 'apply by motion to present additional evidence before the Court of Appeals Panel.' Rule 181(3) further provides: 'Where the Court of Appeals Panel finds that the additional evidence was not available at the time of trial and could not have been discovered with the exercise of due diligence, it shall determine whether it could have been a decisive factor in reaching a decision at trial and render a decision.'

7. Januzi attempts to mould the Rule to his needs, changing the reference to additional evidence 'not available at the time of trial' to 'not available at the time of [the earlier ruling].'¹⁴ Januzi alters the language of the Rule in order to rely on it for the proposition that if the Court previously rendered a decision rejecting the Proposed Amendments on the merits, the Request would be barred because the additional evidence it relies upon was available at the time of the prior ruling.

8. First, as discussed, the Request was in fact invited by the Amendment Decision. Moreover, Rule 181(3)'s reference to additional evidence not available at the time of trial cannot be altered in service of Januzi's proposition. Rule 181(3) does not govern indictments, amendments to indictments, or related litigation, and its words may not be

¹¹ Response KSC-BC-2023-10/F00199, para.9. This requirement has been met by the SPO. *See* Request, KSC-BC-2023-10/F00189, para.10.

¹² Article 39 describes the powers and functions of the Pre-Trial Judge, and Rule 86 is part of Chapter 6, which is relegated to and titled: 'Indictment and Pre-Trial Proceedings'.

¹³ Rule 181 is part of Chapter 10, sub-section 2, titled: 'Appeals Against Judgements'.

¹⁴ Response KSC-BC-2023-10/F00199, para.9.

replaced and its meaning transformed to make it applicable. Indeed, Rule 181(3) is necessarily silent on issues and stages of proceedings that it does not seek to address.

9. Amendments to an indictment, including those based on new evidentiary material, are squarely governed by Rules 86(9) and 90, which relate to indictment and pre-trial proceedings and address requirements such as diligence and prejudice.¹⁵ There is no requirement under Rule 86(9) or Rule 90 that the new evidentiary materials underlying the Proposed Amendments, namely, the recording of the 12 April Approach,¹⁶ were 'not available at the time of [the earlier ruling],' – although, as already outlined in the Request, that was in any event the case. Rather, the relevant due diligence metric here is whether the SPO requested the Proposed Amendments in a timely manner that avoids creating an unfair advantage, which is satisfied in the instant case.¹⁷

10. This renders the remainder of Januzi's arguments in this vein,¹⁸ which are generally irrelevant and misleading attacks on justifiable SPO investigative actions, meritless.

III. CLASSIFICATION

11. This filing submitted as confidential pursuant to Rule 82(4). A public redacted version will be filed.

¹⁵ See Request, KSC-BC-2023-10/F00189, para.9 *citing* Public Redacted Version of Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00635/RED, 23 December 2021 ('Case 6 Decision'), para.34.

¹⁶ As defined in the Request, KSC-BC-2023-10/F00189, para.3.

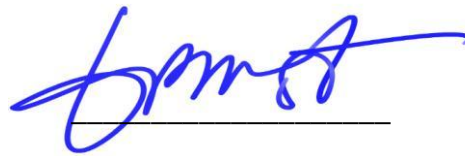
¹⁷ See Request, KSC-BC-2023-10/F00189, para.9 *citing* Case 6 Decision, KSC-BC-2020-06/F00635/RED, para.34.

¹⁸ Response KSC-BC-2023-10/F00199, paras 23-31.

IV. CONCLUSION

12. For the foregoing reasons, the Pre-Trial Judge should reject the Response, which fails to engage in any meaningful way with the threshold issue of prejudice to the Accused, and grant leave to include the Proposed Amendments in the indictment.

Word count: 1,199



Kimberly P. West

Specialist Prosecutor

Friday, 15 March 2024

At The Hague, the Netherlands