

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 Rexhep Selimi

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**Selimi Defence Reply to SPO Response to Defence
Challenge to the Form of the Indictment**

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules¹ and the Scheduling Order issued by the Pre-Trial Judge,² the Defence for Mr. Rexhep Selimi hereby replies to the new issues raised in the Specialist Prosecutor's Response³ to the Defence Challenge to the Form of the Indictment⁴, concerning the Indictment submitted by the SPO to the Pre-Trial Judge on 24 April 2020, revised on 24 July 2020⁵ and confirmed by the Pre-Trial Judge on 26 October 2020.⁶
2. This Reply addresses the following issues which all arise directly from the Response:
 - (1) the erroneous interpretation of material facts and underlying evidence;
 - (2) the impact of the redactions on the overall form of the indictment;
 - (3) the alleged compensatory effect of disclosed materials to resolve ambiguities in the Indictment;
 - (4) the SPO's repeated prejudicial use of non-exclusive language in the indictment;
 - (5) the SPO's mutually exclusive alternative charging on Joint Criminal Enterprise ("JCE") in relation to membership and foreseeable crimes; and,
 - (6) the SPO's failure to adequately specify Mr. Selimi's alleged contribution to the JCE.
3. While the Defence stands fully behind its original submissions and does not accept that the Response sufficiently undermines or contradicts them, given the limited scope of replies no further submissions on these issues is contained herein.

¹ 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 *Prosecutor v. Thaci et al.*, Pre-Trial Judge, Oral order on timeline for provision of responses and replies to preliminary motions filed by Defence, 24 March 2021.

³ *Prosecutor v. Thaci et al.*, Consolidated Prosecution response to Thaci, Selimi, and Krasniqi Preliminary Motions on the Form of the Indictment, KSC-BC-2020-06/F00258, 23 April 2021 ("Response").

⁴ *Prosecutor v. Thaci et al.*, Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021, ("Motion").

⁵ *Prosecutor v. Thaci et al.*, Specialist Prosecutor, Submission of Revised Indictment for Confirmation ("Second Submission"), strictly confidential and *ex parte* with Annex 1 ("Revised Indictment"), strictly confidential and *ex parte*, KSC-BC-2020-06, F00011, 24 July 2020.

⁶ *Prosecutor v. Thaci et al.*, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaci, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020 ("Confirmation Decision").

II. SUBMISSIONS

a. Erroneous definitions of material facts and evidence

4. The Response is predicated on a mistaken interpretation of the terms “material facts” and “evidence”, and repeatedly seeks to deflect legitimate criticism of the absence or ambiguity in the former, by reference to the latter. This fundamentally misunderstands the SPO’s obligation to inform Mr. Selimi of the nature of the case against him.
5. Although it has been held by the ICTY Appeals Chamber that there is a clear difference between the material facts and the evidence proffered to prove them,⁷ the Appeals Chamber has held that whether a fact is material:

“cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. [...] The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.”⁸
6. Therefore, the same factual allegation may be a material fact in one case and simply evidence proffered to prove other material facts in another case. The clear distinction between the two thus derives from the context and clarity provided in the rest of the Indictment. In a case based on more attenuated forms of liability such as JCE or Superior Responsibility, such as that against Mr. Selimi, the material facts are those which set out exactly what Mr. Selimi is alleged to have done or not done, to have known or to have intended. This constitutes the information that allows Mr. Selimi to know the specific nature of the case against him to be able to exercise his right to prepare accordingly.
7. In this regard, the Defence does not suggest that the Prosecution include in the Indictment the evidence that it seeks to rely on to prove these allegations. For example, the question of how the SPO will prove that there were particular “plans, policies, and practices in furtherance of

⁷ ICTY, Appeals Chamber, Prosecutor v. Blaskic, IT-95-14, Judgement 29 July 2004 (‘Blaskic Appeals Judgement’), para. 210. See also ICTY, Appeals Chamber, Prosecutor v. Stakic, IT-97-24, Judgement, 22 March 2006 para. 116; ICTY, Appeals Chamber, Prosecutor v. Kupreskic et al., IT-95-16, Judgement, 23 October 2001, para. 88.

⁸ Ibid.

the common purpose”, whether this is proven by witness testimony, a written document or a speech from an accused, is a matter of evidence. By contrast, the question of what the plan, policy or practice allegedly was, is a material fact.

8. Further, the requirement to plead all material facts is not satisfied by simply repeating the alleged elements of an offence or a mode of liability as the SPO suggests for superior responsibility.⁹ What matters, and what must be provided is how these elements of the charged form of liability are met by Mr. Selimi in this case. While the Defence notes that the SPO has claimed to have provided further information in this regard for each of the elements,¹⁰ an analysis of the actual language used demonstrates nothing more than an eloquent, if largely meaningless, repetition of these elements. In this regard, the alleged pleading of certain acts and omissions in paragraph 55(a)-(e) as alleged material facts demonstrative of Mr. Selimi’s alleged failure to take the necessary and reasonable measures to prevent the commission of the crimes adds almost nothing to the generalised repetition of that element.
9. As such, wherever the SPO claims that it has provided the requisite material facts and the Defence is simply requesting further evidentiary details,¹¹ the Pre-Trial Judge must examine in detail these facts to see whether they provide the necessary information to Mr. Selimi about the scope and nature of the allegations against him. For the reasons set out in the Motion, they do not.

b. Redactions to the Indictment and disclosed materials

10. The SPO claims, without any support, that the redactions applied to the Indictment “are irrelevant to form and fall outside the scope of Rule 97.”¹² This bizarre submission undermines the credibility of the Response.
11. Self-evidently, if redactions are applied to an Indictment, this directly affects the ability of Mr. Selimi to know the nature of the case against him contained within the redacted parts thereof

⁹ Response, para 24.

¹⁰ Response, para. 5.

¹¹ Response, paras 5, 6, 11, 14, 19, 20, 22, 25, 27-29, 31, 33, 35, 42 and 44.

¹² Response, para. 45.

which is impossible to challenge and the Defence fully reserves the right to challenge such sections as and when these redactions are lifted.

12. However, as the SPO itself argues, “the Indictment must be read as a whole and select paragraphs should be read in the context of the entire document.”¹³ Therefore, the extensive redactions applied to the Indictment¹⁴ must be taken into account by the Pre-Trial Judge when assessing the other parts challenged by the Defence.
13. The issue is not therefore, as the SPO insinuates,¹⁵ whether the redactions to the Indictment or even the protective measures which underpin them and authorised by the Pre-Trial Judge are justified or not, but the consequences of these redactions on the ability of the Defence to prepare adequately. This can only be considered fully now by the Pre-Trial Judge when assessing challenges to the form of the Indictment as a whole.

c. Disclosure of evidence as compensation for ambiguity in the Indictment

14. The SPO erroneously suggests both that “the Defence has already received and will continue to receive all available evidentiary details supporting the material facts” and that “the combined information provided through these documents and the Indictment ensures the ability of the Defence to fully prepare and the fairness of these proceedings.”¹⁶ Simultaneously, for good measure, it threatens that requiring further material facts to be pleaded in the Indictment would “potentially threaten the fairness and expeditiousness of the proceedings.”¹⁷
15. This attempt to persuade the Pre-Trial Judge to uphold one of Mr. Selimi’s right to the detriment of another is sadly symptomatic of the SPO’s approach to its obligations. While it should not need stating, Mr. Selimi has the right to know the nature of the case against him through a clear and complete indictment, as well as the disclosure of the relevant evidence relied upon by the SPO in support of the Indictment’s allegations. Similarly, Mr. Selimi has the right to clarity and completeness in the Indictment as well as to fair and expeditious proceedings. The enforcement of one right does not compensate for a violation of the other and

¹³ See *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para. 39 cited approvingly in Response, para. 6, Fn. 26.

¹⁴ Motion, para. 12.

¹⁵ Response, paras 45-46.

¹⁶ Response, para. 44.

¹⁷ *Ibid.*

the SPO may not, through its own actions or inactions, deliberately create a situation where Mr. Selimi has to choose between the two.

16. Moreover, as the Defence has already explained while “the disclosed indictment supporting material may also need to be re-examined by the Pre-Trial Judge to verify how the terms of the Indictment are to be understood,”¹⁸ by definition this can only apply to the evidence disclosed thus far at the time of the Pre-Trial’s assessment of the form of the Indictment and not some future disclosed materials based on nothing more than the word of the SPO.
17. Further, disclosure of such materials “does not mean that such other documents can provide sufficient notice by themselves to constitute sufficient notice to the accused of the allegations against him.”¹⁹ As held by the Appeals Chamber, “the prejudicial effect of a defective indictment may only be “remedied” if the Prosecution provided the accused with clear, timely and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges.”²⁰ Therefore, while disclosure may compensate for vagueness, this will not be the case if there are inconsistencies between the evidence or if it was not disclosed in a timely manner which demonstrates why such additional clarity must be provided now.

d. Repeated and prejudicial use of non-exhaustive language in the Indictment

18. The SPO’s attempts to satisfy its obligation to provide adequate notice to the accused of the case against him in the Indictment, serves to demonstrate the highly prejudicial use of non-exhaustive language to list the allegations against him.
19. The following aspects of the Indictment use the non-exhaustive term ‘includes’ or ‘including’ and were rejected by the SPO in reference to specific Defence challenges:
 - a) The alleged means by which the common plan was accomplished;²¹

¹⁸ Motion, para. 21.

¹⁹ Ibid, para. 22.

²⁰ ICTY, Appeals Chamber, Prosecutor v. Martić, IT-95-11, Judgement, 8 October 2008, para. 163.

²¹ Indictment, para. 32; Response, paras 3, 10.

- b) The alleged members of the JCE;²²
 - c) Mr. Selimi's alleged actual or constructive knowledge of crimes being committed by his subordinates;²³ and,
 - d) Mr. Selimi's alleged failure to take other adequate measures to prevent or punish his subordinates for their alleged crimes.²⁴
20. The SPO's central argument that the word 'includes' or 'including' in relation to JCE liability is not ambiguous, as the common criminal purpose remains criminal even if some means used to achieve it were not, or that criminal liability for JCE is not dependent on the full scope of JCE members, misses the point. By using the word 'includes' in this section, the Indictment introduces an unnecessary and unhelpful level of ambiguity as to what criminal acts Mr. Selimi, and the other alleged JCE members were charged with. The same criticism applies to the use of the word 'includes' or 'including' in several of the specific allegations of Mr. Selimi's alleged contribution to the JCE.²⁵
21. As for the non-exhaustive lists of how Mr. Selimi allegedly gained knowledge of crimes under the control of his subordinates or failed to take measures to prevent or punish these subordinates, the prejudice is even clearer as it allows for the SPO to seek a conviction for Mr. Selimi based on other allegations which were not specifically charged, but which fall within this phrase.
22. Nothing is gained by the repeated inclusion of the word 'includes' or 'including' in the Indictment, apart from impermissible flexibility to the SPO to shape the cases as it sees fit. Removal of each of these instances of the word 'include' or 'including' in the Indictment is therefore required.

²² Indictment, para. 35; Response, para. 12

²³ Indictment, para 54; Response, para. 30.

²⁴ Indictment, para 55(e); Response, para. 33.

²⁵ Indictment, para 50(a)(d-f).

e. Mutually exclusive charging on JCE membership and foreseeable crimes

23. The SPO takes issue²⁶ with the Defence's suggestion that as currently pleaded the JCE could encompass "any member of the Kosovo Liberation Army, police or intelligence services or any official, at any level, in the PGoK"²⁷ and yet simultaneously is unable to refute it. Far from "precisely setting out the SPO's position on who was a member of the JCE"²⁸ the Indictment does nothing more than suggest certain individuals who could be responsible for committing crimes through a JCE, while placing no limits on who else they committed these crimes with, save that they shared the criminal purpose.
24. Concretely, this means that Mr. Selimi could be charged with any of these qualitatively and quantitatively different criminal plans:
- a) Mr. Selimi is alleged to be a member of a JCE with Mr. Thaci, Mr. Veseli and Mr. Krasniqi who all physically perpetrated the crimes themselves (JCE Members);
 - b) Mr. Selimi is alleged to be a member of a JCE with Mr. Thaci, Mr. Veseli and Mr. Krasniqi (JCE Members); with crimes having been physically perpetrated by Mr. Rustem Mustafa, Mr. Shukri Buja, and Mr. Latif Gashi (JCE Tools);
 - c) Mr. Selimi is alleged to be a member of a JCE with Mr. Rustem Mustafa, Mr. Shukri Buja, and Mr. Latif Gashi (JCE Members); with crimes having been physically perpetrated by unknown individuals who were members of the KLA and PGoK police and intelligence services (JCE Tools);
 - d) Mr. Selimi is alleged to be a member of a JCE with unknown and unidentified members of the KLA and PGoK police and intelligence services (JCE Members); with crimes having being physically perpetrated by Mr. Rustem Mustafa, Mr. Shukri Buja, and Mr. Latif Gashi (JCE Tools);
 - e) Mr. Selimi is alleged to be a member of a JCE with unknown and unidentified members of the KLA and PGoK police and intelligence services (JCE Members); with crimes having been physically perpetrated by other unknown and unidentified members of the KLA and PGoK police and intelligence services (JCE Tools).

²⁶ Response, para. 14.

²⁷ Motion, para. 33.

²⁸ Response, para. 16.

25. The list of possible cases against Mr. Selimi could literally continue forever.
26. These are five substantively different combinations of JCEs out of the almost infinite possible combinations of JCE Members and Tools advocated by the SPO as being the best understanding of the case in the Indictment.
27. Added to the similar allegation that all crimes set out in the Indictment could fall within the joint criminal enterprise, or that it was foreseeable that they might be perpetrated by one or more JCE Members or Tools, this means that the type of cases against which Mr. Selimi needs to be compared is increased even further.
 - a) Mr. Selimi is alleged to be a member of a JCE with Mr. Thaci, Mr. Veseli and Mr. Krasniqi; with crimes having been physically perpetrated by Mr. Rrustem Mustafa, Shukri Mr. Buja, and Mr. Latif Gashi which were part of the JCE or were a foreseeable consequence of the JCE; or
 - b) Mr. Selimi is alleged to be a member of a JCE with unknown and unidentified members of the KLA and PGoK police and intelligence services who commit crimes through unknown members of the KLA and PGoK police and intelligence services which were either part of the JCE or, alternatively were a foreseeable consequence of the crimes intended and committed by the unknown and unidentified JCE Members.
28. This is not a fair, appropriate or lawful manner of respecting Mr. Selimi's right to be informed of the nature and cause of the offence for which he has been charged and for which he has already been provisionally detained for over six months.
29. The Pre-Trial Judge must take the necessary measures to impose concrete obligations upon the SPO to specify not every possible case it could plead in the Indictment, but rather what case it is actually pleading against Mr. Selimi. If such action is not taken towards the SPO's pleading, the risks of compromising a fair and expeditious trial will be exponentially increased.

f. Mr. Selimi's contribution to the alleged JCE

30. In response to Mr. Selimi's criticism regarding the clarity provided in the Indictment in respect of his alleged contribution to the JCE, the SPO argues that "whether and how an alleged act or omission contributes to the common criminal purpose is a matter of evidence."²⁹
31. However, providing adequate notice to the accused as to the nature of the charges against Mr. Selimi, requires that the specific material facts describing his alleged contribution to the JCE be set out specifically in the Indictment. This reflects the central finding by the Appeals Chamber in *Blaskic* that, the "precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible."³⁰ Mr. Selimi's alleged contribution to the JCE, set out in paragraph 50(a)-(g) of the Indictment must therefore be set out with greater specificity than is currently the case.
32. While leaving to one side in this reply the issue of whether the contribution to a JCE that is not inherently criminal requires a greater level of contribution to ground liability, the absence of an inherently criminal JCE does accentuate the requirement of notice to the accused of the specific allegations against him.
33. It is not sufficient for the SPO to simply assert that the acts of Mr. Selimi were undertaken in "furtherance of the common criminal purpose."³¹ Instead, the SPO must clearly set out in the Indictment, the precise nature of the contribution of Mr. Selimi to the alleged JCE and how his contribution assisted in achieving this purpose. Indeed, the contribution of Mr. Selimi must be alleged, (and ultimately demonstrated), to have furthered the criminal means which underpinned the JCE. Some examples may assist the Pre-Trial Judge to evaluate this request.
34. First, the allegation that Mr. Selimi was responsible for "formulating and/or participating in the development, approval, promotion, dissemination, and implementation of plans, policies, and practices in furtherance of the common purpose"³² does not specify how his contribution

²⁹ Response, para. 20 citing Prosecutor v. Stanišić and Župljanin, IT-08-91-A, Appeals Chamber Judgement, para.110 and the sources cited therein; Prosecutor v. Stanišić and Župljanin, IT-08-91-PT, Decision on Mićo Stanišić's and Stojan Župljanin's Motions on Form of the Indictment, 19 March 2009, para.39.

³⁰ Blaskic Appeals Judgement, para. 210.

³¹ Response, para. 19.

³² Indictment, para. 50(a).

was criminal and directed at the commission of crimes which were alleged contemplated by the JCE.

35. Second, the allegation that Mr. Selimi was providing “logistical, military, and/or financial support, including to JCE Members and Tools committing crimes in furtherance of the common purpose”³³ does not specify whether this support was directed to further the commission of crimes or any legitimate actions of those alleged JCE Members and Tools who were allegedly committing crimes.
36. Third, the allegation that Mr. Selimi was “Coordinating and liaising between JCE Members and Tools in furtherance of the common purpose”³⁴ provides no clarity as to how this coordination furthered commission of crimes which were necessarily involved in the common purpose.
37. These three examples clearly demonstrate how the SPO’s allegations in paragraph 50 regarding Mr. Selimi’s alleged contribution to the JCE is inherently defective. None of the three sets out, with sufficient clarity, exactly how Mr. Selimi furthered the JCE. Absent this information, it becomes impossible for Mr. Selimi to defend himself against these accusations.

III. CONCLUSION & RELIEF SOUGHT

38. The Defence therefore requests the Pre-Trial Judge to:
 - a. **GRANT** this Challenge to the Form of the Indictment;
 - b. **ORDER** the SPO to amend the Indictment based on the Challenges contained herein to provide greater specificity regarding the allegations against Mr. Selimi.

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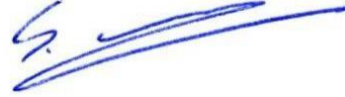
³³ Indictment, para. 50(f).

³⁴ Indictment, para. 50(g).

Respectfully submitted on 14 May 2021,

A handwritten signature in black ink that reads "David A. Young". The signature is written in a cursive style with a large, sweeping "D" and "Y".

DAVID YOUNG
Lead Counsel for Rexhep Selimi

A handwritten signature in blue ink that reads "G. Roberts". The signature is written in a cursive style with a large, sweeping "G" and "R".

GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi