



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

**Date:** 27 September 2021

**Language:** English

**Classification:** Confidential

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**Prosecution reply relating to its Rule 90(1)(b) request**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby replies to certain new issues<sup>1</sup> arising from the Responses.<sup>2</sup> The Request<sup>3</sup> should be granted as the Proposed Amendments<sup>4</sup> – which do not cause unfair prejudice to the Accused or undue delay – seek to ensure the rights of victims and that relevant issues and incidents are fully before the court for determination.<sup>5</sup>

## II. SUBMISSIONS

2. The Defence's generalised submissions and hypotheticals, unconnected to the concrete circumstances of this case, fail to establish any unfair prejudice or undue delay caused by the Proposed Amendments.<sup>6</sup> First, considering that the Proposed

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rule 76. All references to 'Rule' or 'Rules' are to the Rules, unless otherwise indicated.

<sup>2</sup> Selimi Defence Response to Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00477, 20 September 2021, Confidential ('Selimi Response'); Thaçi Defence Response to 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, KSC-BC-2020-06/F00478, 20 September 2021, Confidential ('Thaçi Response'); Krasniqi Defence Response to the SPO Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1), KSC-BC-2020-06/F00480, Confidential ('Krasniqi Response'); 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, Confidential ('Veseli Response'; collectively with the Selimi Response, Thaçi Response, and Krasniqi Response, 'Responses').

<sup>3</sup> 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').

<sup>4</sup> The amendments subject of the Request are referred to herein as the 'Proposed Amendments'. See Request, KSC-BC-2020-06/F00455, para.1.

<sup>5</sup> Request, KSC-BC-2020-06/F00455, paras 2, 7, 11. See also ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ('*Brđanin Decision*'), para.50 ('Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence'); IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116, Decision on the Prosecution Motion to Amend the Indictment, 17 October 2019 ('*Turinabo Decision*'), para.11 and the sources cited therein.

<sup>6</sup> Krasniqi Response, KSC-BC-2020-06/F00480, paras 12-15; Veseli Response, KSC-BC-2020-06/F00481, paras 23-35; Thaçi Response, KSC-BC-2020-06/F00478, paras 16-22.

Amendments and supporting materials are relatively limited in scope,<sup>7</sup> the fact that no trial date has been set and preliminary motion litigation is ongoing, the Defence has failed to concretely establish that it will not have sufficient time to prepare. Defence investigations need not be completed before trial and schedules can be adjusted throughout the pre-trial and trial phases to enable adequate defence preparations.<sup>8</sup>

3. Second, Defence submissions concerning delay<sup>9</sup> ignore the reality that – even if they do apply in this case – Rule 92 and 97 procedures can run concurrently with the remaining stages of the pre-trial phase and need not prolong the actual time it will take to proceed to trial. Indeed, considering that the form and detail of the Proposed Amendments are consistent with other parts of the Indictment and there are no new crimes or modes of liability alleged,<sup>10</sup> it is unclear what issues the Defence could raise under Rule 97 that have not already been decided or are not already part of pending litigation.

4. Third, the Defence wrongly asserts that the Request was not made diligently, referring only to the dates of certain interviews relied upon in the supporting materials.<sup>11</sup> However, due diligence should be assessed in light of the need to transcribe, translate, and analyse evidence, consider it in the context of the case as a whole, pursue appropriate follow-up investigations, take and request appropriate protective measures, and avoid

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<sup>7</sup> Insofar as the Defence seeks to exaggerate the scope of the Proposed Amendments by comparison with other cases (*see* Veseli Response, KSC-BC-2020-06/F00481, paras 2, 29), the scope and impact must be assessed in the concrete circumstances of this case.

<sup>8</sup> *See, similarly*, Eighth Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-06/F00438, Strictly Confidential and *Ex Parte*, para.65. So long as the Defence has adequate time to prepare, no unfair prejudice will be caused. *See* ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009 ('*Tolimir* Decision'), paras 36-38.

<sup>9</sup> Veseli Response, KSC-BC-2020-06/F00481, para.30; Thaçi Response, KSC-BC-2020-06/F00478, para.17.

<sup>10</sup> Request, KSC-BC-2020-06/F00455, paras 4 (and fn.15), 11.

<sup>11</sup> Selimi Response, KSC-BC-2020-06/F00477, paras 17-19; Krasniqi Response, KSC-BC-2020-06/F00480, paras 12-15; Veseli Response, KSC-BC-2020-06/F00481, paras 31-32; Thaçi Response, KSC-BC-2020-06/F00478, paras 17-21.

multiple, piecemeal amendment requests.<sup>12</sup> Moreover, as previously submitted, the Request follows the Pre-Trial Judge's findings concerning the scope of the charges, the use of inclusive language in the Indictment, and matters requiring amendment, such as further instances of the Accused's personal participation in the crimes charged.<sup>13</sup> In any event, even where the prosecution fails to exercise due diligence – which is not the case here – amendments should not be barred for that reason alone where they serve the interests of justice and victims, and would not cause undue prejudice or delay.<sup>14</sup>

5. Finally, contrary to Defence submissions,<sup>15</sup> the redactions to the Proposed Amendments and related evidentiary outlines do not prejudice the overall ability of the Defence to make submissions concerning the impact of the Proposed Amendments on the fairness of the proceedings, which is the fundamental matter for consideration under Rule 90.<sup>16</sup> The redactions are necessary to give effect to court-ordered protective measures, which the Pre-Trial Judge has previously found to be necessary and proportionate.<sup>17</sup> These redactions will be lifted on an ongoing basis when they are no longer justified.

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<sup>12</sup> The time and resources the Prosecution required for pre-trial litigation is also relevant to an assessment of diligence. *See, for example, Turinabo* Decision, para.19 (In view of the particular features of the case, finding that the Prosecution justifiably waited one year after the confirmation of the original indictment in order to present all relevant amendments at once and in light of the need to assess and analyse evidence and the considerable pre-trial litigation that arose since the initial appearances of the accused). *See also* Request, KSC-BC-2020-06/F00455, paras 9-10 and fn.23.

<sup>13</sup> Request, KSC-BC-2020-06/F00455, paras 9-10 and the sources cited therein.

<sup>14</sup> In other cases, even where it was found that the prosecution did not exercise due diligence and where a trial date had been set, leave to amend the indictment – including the addition of new incidents – was granted where the amendments contributed to ensuring that the full issues in the case were before the chamber and there was no unfair prejudice to the Accused. *See, for example, Tolimir* Decision, paras 36-38.

<sup>15</sup> Selimi Response, KSC-BC-2020-06/F00477, paras 20-22; Krasniqi Response, KSC-BC-2020-06/F00480, paras 7-11; Veseli Response, KSC-BC-2020-06/F00481, paras 5-6; Thaçi Response, KSC-BC-2020-06/F00478, paras 14, 25.

<sup>16</sup> Rule 90(2). *See also Tolimir* Decision, para.20; *Brđanin* Decision, para.50.

<sup>17</sup> In this regard, the redactions to the Proposed Amendments concern incidents involving the Accused that only certain witnesses – who have been granted protective measures, including delayed disclosure of their identities – could testify about. To give effect to their protective measures, the Pre-Trial Judge previously

### III. CLASSIFICATION

6. This reply is classified pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

### IV. RELIEF REQUESTED

7. For the foregoing reasons, the Pre-Trial Judge should grant the Request and authorise the Proposed Amendments.

**Word count: 1250**



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**Jack Smith**

**Specialist Prosecutor**

Monday, 27 September 2021

At The Hague, the Netherlands.

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authorised redactions to such potentially identifying information. *See* Request, KSC-BC-2020-06/F00455, para.12, fn.25.