

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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Public Redacted Version of Selimi Defence Response to Submission of Corrected Indictment and Request to Amend pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00477, dated 20 September 2021

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I. INTRODUCTION

1. The Defence hereby opposes the “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” originally filed by the SPO on 3 September 2021 and notified to the Defence in a redacted format on 8 September 2021 (“Request”) seeking the amendment of the Indictment in relation to three categories of allegations.
2. While the Defence does not take a position in relation to the Third Category of Amendments which related to other accused, the First and Second Category of Amendments are opposed. Considering the lack of proven diligence by the SPO for the amendments being filed at this stage and the continuing extensive redactions to the Indictment and protective measures to the existing Indictment which severely hamper Defence preparations, amending the Indictment to further include new charges is unfairly prejudicial.

II. SUBMISSIONS

a. Nature of Proposed Amendments

3. The SPO erroneously claims that the Proposed Amendments provide additional factual allegations and clarifications supporting the existing charged crimes and modes of liability and as such do not constitute new or more serious charges.¹ Again this misrepresents the Amendments and misunderstands the jurisprudence which is relied upon in support.
4. Multiple decisions of the *ad hoc* Tribunals distinguished between amendments proposed to an indictment which constitute a new charge and those which do not. The rationale for this distinction being to limit those amendments which give rise to the necessity of a new plea or preliminary motions which would inevitably cause some delay in proceedings. A new charge in the context of motions to amend the indictment is that which introduces a new basis for conviction not previously reflected in the

¹ Request, para. 3.

indictment that is factually or legally distinct from any already alleged.² This could constitute a new mode of liability³ or a different qualification of the same underlying crime.⁴ It is also satisfied by the inclusion of an additional factual allegation which could constitute an independent basis for conviction. This is clearest in the *Delic* case where the Chamber held that “the inclusion of three entirely new factual situations- Grabovica, Uzdol, and Bugojno-in support of the existing Counts, results in the inclusion of new charges forming a new basis for conviction not previously included in the March 2005 Indictment.”⁵

5. Applying this jurisprudence to the First and Second Category Proposed Amendments demonstrates that both constitute new charges in the context of motions to amend the indictment. The First Category comprises of alleged crimes in [REDACTED]. These are entirely new crime sites not included in the Indictment, and which comprise a variety of alleged crimes.⁶ The Second Category adds an entirely new set of incidents, namely those allegedly taking place in [REDACTED] rather than those which occurred in [REDACTED] as the SPO had originally pleaded in relation to [REDACTED].
6. Both allegations constitute new factual allegations which could constitute an independent basis for conviction in this case. The Accused could, theoretically, be prosecuted under the different modes of liability set out in the Confirmed Indictment, solely for the alleged crimes in the First and Second Category Proposed Amendments. Without doubt the Proposed Amendments therefore fall within the scope of New Charges.

² ICTY, *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, Decision on Prosecution Motion for Leave to Amend the Amended Indictment (16 December 2005) at p. 4; ICTY, *Prosecutor v Beara*, No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment (24 March 2005) at page 3; ICTY, *Prosecutor v Popovic et al*, No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment (13 July 2006) at para. 11; ICTY, *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006, para. 13.

³ ICTY, *Prosecutor v Beara*, No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment (24 March 2005) at page 3; *Prosecutor v Popovic et al*, No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment (13 July 2006) at para. 11.

⁴ ICTY, *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, Decision on Motion to Amend the Amended Indictment (12 January 2007) at para. 18; *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, Decision on Prosecution Motion to Amend the Indictments (8 June 2006) at para. 12.

⁵ ICTY, *Prosecutor v Delic*, No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment (30 June 2006) at para. 55.

⁶ See Request Annex 2 which alleges that the following crimes were committed at these locations: (1) War crimes of Illegal or Arbitrary Arrest and Detention, Cruel or Inhuman Treatment, Torture and Murder of Killing; and (2) Crimes against Humanity of Imprisonment, Other Inhumane Acts, Torture, Murder, Enforced Disappearance and Persecution.

7. The Defence notes the misplaced reliance by the SPO in this regard on a previous Decision by the Pre-Trial Judge, to suggest that the Proposed Amendments were the same as those considered in the Decision as constituting facts and particulars supporting or underpinning the charges.⁷ Reliance is also placed on the purported endorsement by the Appeals Panel in *Haradinaj and Gucati* of the finding in Muvunyi that “there is a clear distinction between counts or charges made in an indictment and the material facts that underpin the charge or count.”⁸ Yet both decisions relate to the form of the indictment rather than motions to amend. The distinction employed in these decisions to determine the level of clarity necessary for different elements within the indictment is not relevant when determining whether the new allegation forms an independent basis of conviction, which it demonstrably does in this case.

8. The Request is also entirely self-contradictory on this point. In the same paragraph it asserts both that the Accused “would be charged with the same crimes and modes of liability in relation to two additional sites”⁹ and that they “relate to locations and incidents already included in the Indictment.”¹⁰ Both of these statements cannot be true. Only the first of these assertions is accurate. Therefore, both the First and Second Category Proposed Amendments constitute new charges.

b. Scope of Challenges to Proposed Amendments

9. The SPO erroneously asserts that Defence Submissions pursuant to Rule 90(1)(b) are “limited to the impact of the Proposed Amendments on the Accused’s rights at this stage of proceedings”¹¹ and that “the admissibility and weight of the evidence falls outside the scope of his review.”¹² It is also argued that the Proposed Amendments “do

⁷ Request, Fn. 10 citing Decision, KSC-BC-2020-06/F00413, paras 27-40, 91.

⁸ Ibid citing *Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC- 2020-07/IA004/F00007, 23 June 2021, para.37, citing with approval ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55AAR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para.19.

⁹ Request, para 11.

¹⁰ Ibid.

¹¹ Request, para. 5.

¹² Ibid.

not add new counts or new modes of liability. [...]. As such, they do not constitute new or more serious charges”¹³ and therefore “Rule 86(3)-(4) does not apply.”¹⁴

10. Pursuant to Rule 90(1)(b) the SPO may amend an indictment between its confirmation and the assignment of the case to the Trial Panel, with leave of the Pre-Trial Judge who confirmed the indictment, after having heard the Accused. No limitation is established therein as to the scope of Defence submissions on amendments proposed under this regime. If the Defence submissions pursuant to this provision were limited to the question of whether the amendment is prejudicial or inconsistent with the rights of the Accused, it would have been explicitly set out in Rule 90(2).¹⁵ The absence of such a limitation is telling.
11. Indeed, Rule 90(2) provides that a “Panel may grant leave to amend the indictment if satisfied that the amendment is not prejudicial to or inconsistent with the rights of the Accused” rather than being obliged to do so. As such a Panel is obliged to first verify whether a request to amend the indictment would be prejudicial to or inconsistent with the rights of the Accused as a preliminary assessment. It is only if that question is answered in the negative the Pre-Trial Judge is permitted to grant the motion. However, the examination by the Pre-Trial Judge does not stop there. Other factors must be examined as mirrored by Rule 50(A)(ii) of the ICTY RPE which refers specifically to “any other factors relevant to the exercise of the discretion” in determining whether to authorize an amendment of the indictment. Evidently, the Pre-Trial Judge is not constrained by Rule 90(1)(b) to only examine whether the amendments are inconsistent with or otherwise cause prejudice to the accused and must examine all other relevant factors to properly exercise his discretion.
12. Equally, the SPO’s submission that Rule 86(4) does not apply to the Proposed Amendments, and an assessment of the evidence is not required in this instance,¹⁶ wholly misunderstands the regime for amending the indictment.

¹³ Id, para. 3.

¹⁴ Id.

¹⁵ See for example, Rule 86(7) which limits the types of challenges that may be submitted against a confirmed indictment.

¹⁶ Request, para. 4.

13. Rule 86(4) requires the Pre-Trial Judge to “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.” Yet, following the SPO’s submissions, the Pre-Trial Judge is not required to perform this task and indeed may not examine the underlying evidence at all and may only examine whether the addition of charges would cause prejudice to the accused, not whether they are sufficiently supported. This would essentially allow the SPO to confirm charges through the amendment process, which could not be confirmed through the normal process for confirmation pursuant to Article 39(2). It also flies in the face of the jurisprudence from the *ad hoc* Tribunals which require an assessment to be undertaken of the supporting material¹⁷ and indeed the equivalent provision at the IRMCT which explicitly requires that “Leave to amend an indictment shall not be granted unless the Trial Chamber or the Single Judge is satisfied that the Prosecutor has established a *prima facie* case as set forth in Article 17, paragraph 1, of the Statute to support the proposed amendment.”¹⁸
14. The SPO must therefore satisfy the Pre-Trial Judge that the evidence underlying the Proposed Amendments meets the standard of reasonable suspicion in Rule 86(4). Defence submissions relating to the sufficiency of the evidence tendered by the SPO in support of the Proposed Amendments, as well as all other relevant factors, must be considered by the Pre-Trial Judge.

c. Unfair prejudice by the Proposed Amendments

15. Rule 90(2) codifies some of the principles derived from the jurisprudence of the *ad hoc* Tribunals by referring to whether the amendments are either prejudicial to, or inconsistent with the rights of the accused. In this regard, at a minimum, the fundamental issue in deciding whether to grant leave to amend an indictment is whether

¹⁷ ICTR, *Prosecutor v Kabuga*, ICTR-98-44B-PT, Decision on the Amended Indictment (24 June 2005) at para.5; ICTR, *Prosecutor v Bisengimana*, No. ICTR-00-60-I, Decision on the Prosecutor’s Request for Leave to Amend the Indictment (27 October 2005) at para. 24; ICTR, *Prosecutor v Setako*, No. ICTR-04-81-I, Decision on Prosecution’s Request to Amend the Indictment (18 September 2007) at para. 6.

¹⁸ IRMCT Rule 50(A)(ii). See IRMCT, *Prosecutor v. Turinabo*, Decision on the Prosecution Motion to Amend the Indictment, 17 October 2019, para 29 which explained that “the supporting material must provide "a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge).

the amendment will unfairly prejudice the accused,¹⁹ and the factors to be considered include (1) whether the amended indictment improves the clarity and precision of the case to be met; (2) the diligence of the prosecution in making the amendment; and (3) any delay or prejudice to the defence from the amendment.²⁰

16. While the changes ordered to the Indictment by the Pre-Trial Judge in the Decision in light of the Defence challenges to the form of the indictment may improve the clarity and precision of the case to be met, these are not at issue in the current litigation. The First and Second Category Proposed Amendments instead add new allegations rather than improve the clarity of existing ones.
17. The SPO justifies the filing of the Request now, almost a year after Mr. Selimi was arrested on the basis that “the pre-trial phase is ongoing and litigation relating to preliminary motions is still pending”²¹ and that “facilitates and streamlines the process and avoids unnecessary, multiple amendments at different times.”²² This implies that the SPO had been in a position to file such a request earlier but chose to wait until the Form of Indictment Decision until this request was issued thereby undermining claims of diligence. If the evidence had been collected earlier, the Request should have been filed earlier, or at the very least authorisation should have been sought and obtained from the Pre-Trial Judge for such a delay.
18. As for the SPO’s unsubstantiated assertion that “interviews of key witness - which were necessary to a consideration of the strength and relevance of these additional factual allegations - occurred thereafter”²³ this is manifestly insufficient to justify the delay in seeking the Proposed Amendments. The Statements which appeared to have been relied upon by the SPO were taken between [REDACTED], well before the Request was filed. There is no justification for therefore waiting [REDACTED] since the last statement

¹⁹ ICTR, *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (12 May 2005), para. 22; ICTY, *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment (1 November 2005), para. 7.

²⁰ ICTR, *Prosecutor v Karemera*, No. ICTR-98-44-T, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment (14 February 2005) at para. 35; ICTR, *Prosecutor v Mpambara*, No. ICTR2001-65-I (4 March 2005), para. 8; ICTR, *Prosecutor v Simba*, No. ICTR-2001-76-I, Decision on Motion to Amend Indictment (26 January 2004) at para. 9.

²¹ Request, para 9.

²² Ibid.

²³ Id, para 10.

was taken to make the Request. Nor is there any explanation of why the interviews of certain supposed key witnesses could not take place until this date rather than before the indictment was submitted for confirmation. The Prosecution have claimed to have acted diligently without actually providing any information or evidence to support this claim. Absent such evidence, the assertions of diligence by the SPO are baseless.

19. Indeed, the Request appears to be based on nothing more than the generic assertion that without the Proposed Amendments the victims would be deprived of their rights to the effective investigation and prosecution of the crimes in the Proposed Amendments, to participate in proceedings and seek reparations before this court.²⁴ While this is not disputed, it is the case for all alleged victims. There is nothing that would distinguish this specific allegation from any other. Moreover, the SPO's reliance on this factor is undermined by their lack of diligence in pursuing the allegations in a timely manner.
20. Most importantly, the Request neglects to make any reference to the extensive redactions to the Indictment that still apply, despite having been repeatedly raised by the Defence.²⁵ Even at the current stage, after Mr. Selimi has been detained for over ten months, there doesn't appear to be any concrete schedule for the removal of these redactions.²⁶ These redactions permeate the indictment and prevent the Defence from undertaking proper and effective investigations in relation to a significant number of allegations against Mr. Selimi, a task further complicated by the ever slipping deadline for the SPO to provide the Pre-Trial Brief in accordance with Rule 95(4).
21. In light of the continuing effect of these redactions, as well as the extensive redactions that have been applied to the evidence relied upon by the SPO in support of the allegations already in the Indictment, adding yet more crime sites to the Indictment and more victims, in relation to allegations for which Mr. Selimi is not alleged to have been directly and personally involved, is unfairly prejudicial to him. It requires the dilution of investigative priorities which are already stretched to the many distinct locations named in the Indictment.

²⁴ Request, para. 6.

²⁵ See Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021, paras 9-18.

²⁶ KSC-BC-2020-06, Transcript, 14 September 2021, public, p. 614, lines 11-17.

22. While the Defence fully recognizes that this case is still in pre-trial, the Proposed Amendments must therefore not be assessed in a vacuum, but in full awareness of these redactions and their impact on the Defence preparations and the future conduct of trial proceedings. The Request, and any future requests for amendment of the indictment must be scrupulously assessed to see whether they meet the applicable standard. In these circumstances, it conspicuously does not.

III. CONCLUSION and RELIEF SOUGHT

23. For the abovementioned reasons, the Defence respectfully requests the Pre-Trial Judge to DENY the Request to Amend the Indictment.

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Respectfully submitted on 22 October 2021,



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