

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe,
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 13 February 2023

Language: English

Classification: Public

**Selimi Defence Request for Trial Panel to Schedule a Further Initial
Appearance and Preliminary Motions and Suspend the Order Updating the
Notice of Alibi**

Acting Specialist Prosecutor

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. On 27 January 2023, the redactions in the Amended Indictment were lifted pursuant to the Trial Panel's Decision on Indictment Redactions¹ revealing various allegations that were hitherto redacted. Newly unredacted paragraphs 41, 42, 49, 115, 139 and 149 of the unredacted indictment contain specific and direct allegations against Mr. Selimi ("New Selimi Allegations").
2. Pursuant to the legal framework established by Articles 21(4) and Article 39(4) of the Law and Rules 80, 90, 92 and 104 of the Rules²³, Mr. Selimi is entitled to a variety of legal rights and procedures in relation to the New Selimi Allegations, including a further initial appearance and the right to file preliminary motions in relation to these allegations. The process for updating Mr. Selimi's notice of alibi must also be effective in order not to deprive him of the opportunity of doing so at the earliest opportunity.

II. SUBMISSIONS

A. Nature of New Selimi Allegations

3. The New Selimi Allegations contain allegations of actions carried out by Mr. Selimi personally at different stages of the Indictment Period.
4. On the question of what constitutes a "new charge" pursuant to Rule 91(2), The Appeals Panel has held that:

¹ KSC-BC-2020-06/F01229, Confidential Redacted Version of Decision on Indictment Redactions, 26 January 2023.

² 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.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

“The Panel notes that neither the Law nor the Rules sets out how to determine whether amendments constitute new charges or substitute more serious charges – which would trigger the application of Rule 86(3) and 86(4) of the Rules. The Panel recalls the distinction between counts or charges made in an indictment and the material facts underpinning them – the count or charge being the legal characterisation of the material facts which support that count or charge. The Pre-Trial Judge found that a new charge introduces a new basis for conviction not previously reflected in the Indictment that is factually or legally distinct from any already alleged. The Pre-Trial Judge also found that the introduction of a factual allegation not previously alleged in the indictment may amount to a new charge, but only where it exposes an accused to an additional basis for conviction. The Panel notes that the legal standard set forth by the Pre-Trial Judge is strongly embedded in the jurisprudence of international criminal tribunals, and is not disputed by the Parties.”⁴

5. Applying this definition, the New Selimi Allegations could, in theory, expose Mr. Selimi to an additional basis for conviction. Therefore, they constitute a new charge in the sense of Rule 91(2).
6. In this regard, the Defence fully recognises that the New Selimi Allegations were not added to the Indictment pursuant to a request for an amendment filed

⁴ KSC-BC-2020-06/IA018/F00007, Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, 22 March 2022, para 24 (“Amendment Appeal Decision”).

pursuant to Rule 90, such as that previously proposed and granted in relation to other amendments.⁵

7. However, to all intents and purposes, the New Selimi Allegations do constitute in nature and cause, amendments to the Indictment. They were wholly unknown to the Defence before 27 January 2023, as was the evidence relied upon by the SPO in support. The indictment, as known to the Defence for over two years up and until 26 January 2023, did not include these allegations. By lifting these redactions imposed by the Pre-Trial Judge, the Trial Panel effectively amended it towards the Defence.
8. Indeed, the Defence suffered greater prejudice by the lifting of the redactions of the New Selimi Allegations as opposed to the situation where these were new allegations subject to a motion to amend the indictment submitted by the SPO pursuant to Rule 90. In such circumstances, not only the SPO would be obliged to seek leave for the amendment *inter partes* and provide the Defence with both the time to make submissions on these allegations as well as the material allegedly submitted in support of them. Moreover, the Pre-Trial Judge would be obliged to ensure that such amendments were not prejudicial to or inconsistent with the rights of the Accused.⁶ In the current circumstances, the Defence has no direct procedural avenue to do so and no judicial assessment has taken place as to the impact of the New Selimi Allegations on the fairness of the proceedings.
9. In accordance with Mr. Selimi's rights to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him and to have adequate time and facilities for the preparation of his defence

⁵ KSC-BC-2020-06/F00635, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021; KSC-BC-2020-06, F000777/RED, Pre-Trial Judge, Decision on the Confirmation of Amendments to the Indictment, 22 April 2022.

⁶ Rule 90(2). See also, Amendment Appeal Decision, para 40.

under Article 21(4)(a) and (c) respectively, at the very minimum, he should be entitled to the same protections and rights applicable to amendments to indictments granted pursuant to Rule 90.

B. Initial Appearance

10. Rule 90(3) provides as follows:

“If the amended indictment includes new charges or substitutes more serious charges, and the Accused has already appeared before a Panel in accordance with Rule 92, a further appearance shall be held as soon as practicable.”

11. Rule 92 relates to the Initial Appearance of the accused and the rights which attach to him in relation to this appearance. It requires that the appearance take place before the Pre-Trial Judge as no reference is made to a Panel throughout the Rule. In pertinent part, Rule 92(2)(a)-(c) provides that, pursuant to Article 39(5) of the Law, the Pre-Trial Judge shall:

“(a) be satisfied that the right of the Accused to counsel is respected;

(b) read or have the indictment read to the Accused in a language the Accused understands and speaks, and be satisfied that the Accused understands the indictment;

(c) inform the Accused that, within thirty (30) days of the initial appearance, he or she will be called upon to admit guilt or plead not guilty on each charge, or, if the Accused wishes to do so, that he or she may immediately admit guilt or plead not guilty.

12. These are mandatory requirements upon the Pre-Trial Judge that may not be dispensed with. They provide substantive protections for the rights of Mr. Selimi

in relation to serious, if unsubstantiated, allegations and were followed by the Pre-Trial Judge in relation to other amendments.⁷

13. At the time of filing, Mr. Selimi has not been requested to appear before the Pre-Trial Judge in relation to the New Selimi Allegations and no other procedural steps have been undertaken to ensure that his rights under Rule 92 are fully respected.

C. Motions pursuant to Rule 97

14. Rule 90(4) provides as follows:

“(4) The Defence shall be granted twenty-one (21) days to file preliminary motions pursuant to Rule 97 in respect of the new charges. Where necessary, a Panel may postpone the date for the opening of the case to ensure adequate time for the preparation of the Defence.”

15. While the Selimi Defence has already submitted a preliminary motion challenging the form of the indictment before the Pre-Trial Judge⁸ it would have then been impossible for the Defence to contest the specificity of the New Selimi Allegations at that time as they were entirely redacted.
16. Further, the Selimi Defence is examining whether a jurisdictional motion may be filed in relation to part of the New Selimi Allegations pursuant to Rule 97(1)(a). In particular, given the nature of the New Selimi Allegations and the deliberate actions of the SPO in hiding these allegations from the Defence until the last moment, the Defence is considering whether such actions constitute an abuse of process. In this regard, contrary to other international tribunals, the KSC does

⁷ KSC-BC-2020-06, Transcript 10 May 2022, Further Initial Appearance of Mr. Selimi, T. 1205-1217. See also, KSC-BC-2020-06/F00794, Decision Setting the Date for Further Appearances and Related Matters, 2 May 2022.

⁸ KSC-BC-2020-06/F00222, Selimi Defence Challenge to the Form of the Indictment, 15 March 2021.

not limit jurisdictional motions under Rule 97(1)(b) to those “which challenge an indictment on the ground that it does not relate to the material, territorial, temporal, or personal jurisdiction” of the relevant Tribunal.⁹ As such, a motion for abuse of process, would, *prima facie*, fall within this Rule.

17. The Trial Panel is therefore competent to rule on the present motion by virtue of the residual powers accorded to the Panel under Article 39 of the Law and Rule 116. Finding otherwise would place the Accused in a manifestly unfair position where he would be prevented from understanding the nature of the case against him¹⁰ owing to the redaction regime approved by the Pre-Trial Judge.
18. Rule 97(1)(b) provides that “[t]he Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which: [...] (b) allege defects in the form of the indictment.” While said rule refers solely to the authority of the Pre-Trial Judge to decide on such motions, Article 40(6)(a) of the Law provides that “[p]rior to a trial or during the course of a trial, the Trial Panel may, as necessary: a. exercise any functions or powers of the Pre-Trial Judge referred to in Article 39”. Among the powers referred to in Article 39 counts reviewing an indictment.¹¹ Similarly, Rule 116(1) provides that “[t]he [Trial] Panel shall, on an ongoing basis, take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.”
19. This process is also consistent with Rule 90(4) which explicitly provides that for amendments to the Indictment:

⁹ International Residual Mechanism for Criminal Tribunals, Rules of Procedure and Evidence, 4 December 2020, Rule 79(D).

¹⁰ Article 21(4) of the Law.

¹¹ Article 39(1) of the Law.

“(4) The Defence shall be granted twenty-one (21) days to file preliminary motions pursuant to Rule 97 in respect of the new charges.”

20. Consistent with Rule 90(4) and given the multitude of competing obligations on the Defence, in these circumstances, the Defence would require twenty-one days from the date of notification of the New Selimi Allegations, to file preliminary motions pursuant to Rule 97, namely by Monday 20 February 2023.¹²

D. Notice of Alibi

21. In light of the vagueness of the New Selimi Allegations which will be the subject of a preliminary motion under Rule 97(1)(b), the Defence requests the suspension of the Trial Panel’s order of 27 January 2023, for the accused to amend or supplement their existing notices of alibi by 15 February 2023.¹³
22. At present, while the Defence has sought to commence investigations of the New Selimi Allegations and considers that updating its notice of alibi may be required, the imprecise nature of the New Selimi Allegations prevents this from occurring.
23. For example, paragraph 42 of the Indictment includes an allegation in relation to Mr. Selimi which occurred at some point over a whole month. In the absence of any particulars as to the date where the alleged incident has occurred, the Defence would be required to construct an alibi defence covering that entire month.

¹² The Unredacted Indictment was reclassified and notified to the Defence on Friday 27 January 2023. Deadlines at the KSC normally run from the next working day, which was Monday 30 January.

¹³ KSC-BC-2020-06/F01231, Order on Further Notice of Alibi and Associated Disclosure, 27 January 2023. The Defence for Mr. Selimi had originally filed its original notice of alibi on 28 October 2023 and reserved its right to offer a defence of alibi following the lifting of the relevant redactions in the Amended Indictment, the SPO’s Pre-Trial Brief and the underlying evidence. See KSC-BC-2020-06/F01067, Selimi Defence Notice of Alibi, 28 October 2022.

24. In accordance with Rule 104(1)(a) read in conjunction with Rule 95(5), the Defence would be required to notify the SPO of “the place(s) at which the Accused claims to have been present at the time of the alleged crime, the names and current contact information of witnesses and any other evidence on which the Accused intends to rely to establish the alibi” which would require the Defence to produce a comprehensive account of the whereabouts of Mr. Selimi for the whole month covered by paragraph 42. Trial Chambers have recognized the “near impossibility” of providing such an account.¹⁴ In that respect, it was explicitly found that “[t]he absence of such information [i.e. the alleged precise date(s)] effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi.”¹⁵
25. The Defence has, in advance of filing this motion, sought further information from the SPO as to the New Selimi Allegations and specifically requested the SPO to provide more specificity in relation to the date of these allegations and, in particular, provide the unredacted versions of its Pre-Trial Brief relating to those allegations in advance of the deadline of 15 February 2023 for the filing of a lesser redacted pre-trial brief ordered by the Panel.¹⁶ While the SPO rejected the Defence proposal in this regard, it was able to confirm that in relation to paragraph 42, the most specific information the SPO can provide in relation to this allegation is that it covered the whole month. A specific date was however provided by the SPO for the allegation in paragraph 49.
26. Rule 9 provides that the Trial Panel may, “*proprio motu* or upon showing of good cause: (a) extend or reduce any time limit prescribed by the Rules or set by the

¹⁴ *The Prosecutor v. Kayishema et al*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 83; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 533.

¹⁵ *Prosecutor v. Krnojelac*, Case No. IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 40.

¹⁶ KSC-BC-2020-06/F01229, Confidential Redacted Version of Decision on Indictment Redactions, 26 January 2023, paras 15, 16 and 40(b).

Panel.” In light of the above, the Defence requests that the Panel finds that good cause exists for suspending the deadline for filing notices of alibi for such time as required to resolve the challenge to the form of the indictment.

27. As the Defence is not currently provided with sufficient information to be able to effectively update its notice of alibi, it hereby requests the Trial Panel to suspend the deadline of 15 February 2023, until resolution of preliminary motions filed pursuant to Rule 97.

E. Confidentiality

28. These submissions are filed publicly as they do not contain any confidential information although they may refer to confidential issues. Indeed, as required by the Trial Panel¹⁷ they are specifically drafted to be public.

III. CONCLUSION AND RELIEF REQUESTED

29. The Pre-Trial Judge, at the behest of the SPO, implemented a regime of redactions to the Indictment so strict as to wholly deprive the Defence of any opportunity to know the nature, content or cause of certain allegations for over two years while Mr. Selimi and his co-accused were detained. Despite repeated and sustained Defence requests for lesser or unredacted versions of the Indictment to at least know the nature of these allegations, it was only when case was transferred to the Trial Panel, that notice of the new charges in the New Selimi Allegations to the Defence.
30. In these circumstances, the Defence is fully entitled to exercise the full panoply of rights and enforce obligations on others as clearly set out in the KSC legal framework in relation to the New Selimi Allegations, and, in so doing, ensure

¹⁷ KSC-BC-2020-06/F01226, Order on the Conduct of Proceedings, 25 January 2023, Annex 1, para. 2.

the extensive prejudice caused by the Pre-Trial Judge's redaction scheme is not further exacerbated.

31. Therefore, the Defence hereby requests the Trial Panel to:

- (i) INVITE the Pre-Trial Judge to schedule a further initial appearance in relation to the New Selimi Allegations;
- (ii) SCHEDULE the filing of preliminary motions by the Defence in relation to the New Selimi Allegations no earlier than Monday 20 February 2023; and
- (iii) SUSPEND the deadline for filing an updated notice of alibi until the resolution preliminary motions filed in relation to the New Selimi Allegations.

Word count: 2770

Respectfully submitted on 13 February 2023,



GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI

Co-counsel for Rexhep Selimi