



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 22 February 2023

Language: English

Classification: Public

**Decision on Selimi Defence Request Regarding Further Initial Appearance,
Preliminary Motions and Suspension of Alibi Notice Deadline**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 39(4)-(5), 40(6)(a) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 90, 92(2)(c), 95(2)(f) and (5), 97, 98(1) and 104 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 26 January 2023, the Panel decided that all redactions to the confidential redacted version of the confirmed further amended indictment¹ shall be lifted by 27 January 2023 and accordingly ordered the Registry to reclassify the strictly confidential and *ex parte* version of said indictment (“F00999/A01” or “Indictment”) as confidential and to lift the *ex parte* status by that same date.²
2. On 27 January 2023, F00999/A01, including its Albanian and Serbian translations, was reclassified as confidential and the *ex parte* status lifted.³
3. On the same date, the Panel ordered the Defence for Hashim Thaçi (“Thaçi Defence”), the Defence for Kadri Veseli (“Veseli Defence”), the Defence for Rexhep Selimi (“Selimi Defence”) and the Defence for Jakup Krasniqi (collectively, “Accused” and “Defence”), to file, by 15 February 2023, 4pm, and in accordance with Rules 95(5) and 104(1)(a), their notices of alibi, respectively to amend or supplement their existing notices of alibi, as the case may be.⁴

¹ F00999/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Amended Indictment*, 30 September 2022, confidential.

² F01229, Trial Panel II, *Decision on Indictment Redactions*, 26 January 2023, strictly confidential and *ex parte*, para. 40(a); a confidential redacted version was filed on 27 January 2023, F01229/CONF/RED.

³ F01239, Registry (Court Management Unit), *Memorandum in Compliance with the “Confidential Redacted Version of Decision on Indictment Redactions”*, F1229, 30 January 2023, confidential.

⁴ F01231, Trial Panel II, *Order on Further Notice of Alibi and Associated Disclosure*, 27 January 2023, confidential, para. 19(a)-(b).

4. On 13 February 2023, the Selimi Defence filed a request⁵ (“Selimi Request”) wherein it asked the Panel to: (i) invite the Pre-Trial Judge to schedule a further initial appearance in relation to newly unredacted allegations against Mr Selimi in paragraphs 41, 42, 49, 115, 139 and 149 of the Indictment (“Unredacted Allegations” and “First Request”, respectively); (ii) schedule the filing of preliminary motions by the Defence in relation to the Unredacted Allegations no earlier than 20 February 2023 (“Second Request”); and (iii) suspend the deadline for filing an updated notice of alibi until the resolution of preliminary motions filed in relation to the Unredacted Allegations (“Third Request”).⁶
5. On 15 February 2023, during the Specialist Prosecutor’s Office (“SPO”) Preparation Conference, the Selimi Defence was asked whether it maintained its Request, which it confirmed,⁷ and indicated its intention to file associated preliminary motions by 24 February 2023.⁸
6. On the same date, the Thaçi Defence, Veseli Defence and Selimi Defence filed further notices of alibi.⁹
7. On 20 February 2023, the SPO responded to the Selimi Request (“SPO Response”).¹⁰
8. By email of 20 February 2023, the Selimi Defence indicated that it would not reply to the SPO Response.¹¹

⁵ F01281, Specialist Counsel, *Selimi Defence Request for Trial Panel to Schedule a Further Initial Appearance and Preliminary Motions and Suspend the Order Updating the Notice of Alibi*, 13 February 2023.

⁶ Selimi Request, paras 1-2, 31.

⁷ Draft Transcript of Hearing, 15 February 2023, p. 2034, line 13 to p. 2035, line 7.

⁸ Draft Transcript of Hearing, 15 February 2023, p. 2037, lines 17-20 and p. 2038, lines 4-6.

⁹ F01294, Specialist Counsel, *Thaçi Defence Further Notice of Alibi*, 15 February 2023; F01297, Specialist Counsel, *Veseli Defence Supplemental Notice of Alibi*, 15 February 2023, confidential; F01298, Specialist Counsel, *Selimi Defence Updated Notice of Alibi*, 15 February 2023.

¹⁰ F01307, Specialist Prosecutor, *Prosecution Response to Selimi Defence Request for a Further Initial Appearance and Related Relief (F01281)*, 20 February 2023.

¹¹ CRSPD180, *Email from Selimi Defence to CMU re Reply to F01307*, 20 February 2023.

II. SUBMISSIONS

9. The Selimi Defence submits that the practical effect of the removal of redactions in the Indictment was to reveal various new allegations against Mr Selimi which, in effect, amount to “new charges” pursuant to Rule 90(2).¹² In particular, the Selimi Defence points to newly unredacted sections in paragraphs 41, 42, 49, 115, 139 and 149 of the Indictment.¹³ On that basis, and to safeguard Mr Selimi’s fair trial rights,¹⁴ the Selimi Defence requests the Panel to invite the Pre-Trial Judge to schedule a further initial appearance of Mr Selimi in relation to the Unredacted Allegations,¹⁵ to schedule the filing of preliminary motions pursuant to Rule 90(4)¹⁶ and to suspend the deadline set by the Panel for the Defence to file amended notices of alibi.¹⁷

10. The SPO responds that the Selimi Request should be dismissed¹⁸ as the unredacted sections of the Indictment do not constitute “new charges” and, therefore, there is no entitlement to a further initial appearance or preliminary motions.¹⁹ In particular, the SPO submits that the Accused are not charged with having directly committed any of the charged crimes but to have contributed (including by personally participating in crimes) to the commission of crimes by means of a joint criminal enterprise.²⁰ In this context, the unredacted sections of the Indictment are to be understood not as additional charges, but as facts material

¹² See, in particular, Selimi Request, paras 2, 4-5, 7.

¹³ Selimi Request, para. 1.

¹⁴ Selimi Request, paras 2, 9, 30.

¹⁵ Selimi Request, paras 10-13, 31(i).

¹⁶ Selimi Request, paras 14-20, 31(ii).

¹⁷ Selimi Request, paras 21-27, 31(iii).

¹⁸ SPO Response, paras 1, 5.

¹⁹ SPO Response, in particular, paras 1-3.

²⁰ SPO Response, para. 2.

to establishing the pleaded crimes and associated modes of liability.²¹ The Third Request is, according to the SPO, unsubstantiated.²²

III. DISCUSSION

A. FIRST REQUEST AND SECOND REQUEST

11. As a preliminary matter, the Panel must determine whether, as claimed by the Selimi Defence, the Unredacted Allegations constitute “new charges”. If that is not the case, there would be no valid grounds under the Law and the Rules for any of the reliefs sought by the Defence.

12. Article 39, paragraph 8, of the Law provides that:

After the indictment is confirmed but before the trial has begun, the Specialist Prosecutor may, with the permission of the Pre-Trial Judge (or the Trial Panel if seized) having heard the parties, amend the indictment. If the Specialist Prosecutor seeks to add new charges or to substitute more serious charges, the Pre-Trial Judge shall review such charges and hold an initial hearing in accordance with this Article.

The Law contains no other reference to the notion of “new charges”.

13. As for the Rules, they contain three separate references to “new charges”, all of them in Rule 90, which deals with an “Amendment of the Indictment”.²³ Pursuant to Articles 39(8) and 40(7) and Rule 90, after the confirmation of the charges, an amendment of the indictment requires leave to be sought and granted by the Panel.

²¹ SPO Response, para. 2. *See also* Draft Transcript of Hearing, 15 February 2023, p. 2035, line 23 to p. 2036, line 4 and p. 2036, line 18 to p. 2037, line 1.

²² SPO Response, para. 1.

²³ *See* Rule 90, paragraphs 2-4.

14. It is apparent from the above that the legal framework of the Specialist Chambers (“SC”) foresees that “new charges”, *i.e.*, charges not contained in the initial confirmed indictment, are only those resulting from a judicially authorised process of amendment of the indictment. Only in such a case would a further appearance be required²⁴ and only then would deadlines for preliminary motions run anew.²⁵

15. For these reasons, the Panel concludes that the removal of redactions from the Indictment in the present case does not constitute or result in “new charges” within the meaning of the SC’s legal framework.

16. Furthermore, even assuming that the SC’s legal framework encapsulated a notion of “new charges” going beyond situations of formal amendment of the Indictment, the Unredacted Allegations would still not constitute “new charges” in a material sense. Under the applicable standard, a “new charge” is one which introduces a new basis for conviction not previously reflected in the indictment that is factually or legally distinct from any basis already alleged.²⁶

17. In the present case, the Unredacted Allegations do not constitute self-standing “new charges” under the applicable standard. Instead, as made clear by

²⁴ Rule 90(3).

²⁵ Rule 90(4). *See also* ICTY, *Prosecutor v. Delić*, 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, para. 22; *Prosecutor v. Halilović*, IT-01-48-PT, *Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment*, 17 December 2004, in particular, paras 22 ff.; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, *Decision on Motion and Supplementary Motion for Leave to Amend the Indictment*, 28 April 2009, para. 14.

²⁶ IA018-F00007, Court of Appeals Panel, *Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules* (“22 March 2022 Appeals Decision”), 22 March 2022, para. 24. *See also, e.g.*, ICTY, *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, *Decision on Prosecution Motion for Leave to Amend the Amended Indictment*, 16 December 2005, p. 4; *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2, *Decision on Prosecution’s Motions to Amend the Indictment*, 7 October 2005, para. 29; *Prosecutor v. Popović et al.*, IT-05-88-PT, *Decision on Further Amendments and Challenges to the Indictment*, 13 July 2006, para. 11; *Prosecutor v. Šešelj et al.*, IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments*, 8 June 2006, para. 12; *Prosecutor v. Haradinaj et al.*, 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; *Prosecutor v. Beara*, IT-02-58-PT, *Decision on Prosecution Motion to Amend the Indictment*, 24 March 2005, p. 3.

the SPO, they constitute factual allegations forming part of a broader factual matrix which constitutes a charge in the Indictment.²⁷ Paragraphs 41, 42 and 49 of the Indictment (including the unredacted parts thereof), for instance, provide further particulars as to how the Accused are alleged to have participated in a joint criminal enterprise to commit charged offences, and/or aided and abetted such crimes, at various locations during the period of time covered by the Indictment. The newly unredacted parts merely constitute further factual specification of existing allegations, already known to the Accused, regarding their alleged participation in the commission of the charged crimes.²⁸ Furthermore, the Panel recalls that: (i) paragraph 42 of the Indictment was already subject to an analysis as to whether it constituted a new charge; (ii) the Pre-Trial Judge found that it was not a new charge; and (iii) this finding was upheld on appeal.²⁹

18. Similarly, the newly unredacted allegations contained in paragraph 115 of the Indictment form part of an existing charge of “other inhumane acts and cruel treatment” allegedly committed by the Accused during the Indictment period in various locations, including in Klečké/Klečka between at least November 1998 and June 1999. They are not self-standing allegations that could constitute a new basis for a conviction within the meaning of “new charges” as defined above. The same is true for the newly unredacted allegations in paragraphs 139 and 149 of the Indictment in relation to murders allegedly committed by the Accused at various locations, including Likoc/Likovac and Drenoc/Drenovac, during the Indictment period.

²⁷ Draft Transcript of Hearing, 15 February 2023, p. 2035, line 23 to p. 2036, line 4 and p. 2036, line 18 to p. 2037, line 1.

²⁸ See F00635, *Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)* (“23 December 2021 Decision”), 23 December 2021, confidential, para. 26; a public redacted version was issued on 14 February 2022, F00635/RED.

²⁹ See 23 December 2021 Decision, para. 26. See also 22 March 2022 Appeals Decision, paras 15, 22-29.

19. Based on the above, the Panel finds that the Unredacted Allegations do not constitute “new charges” for the purpose of the present proceedings.

20. Consistent with Rule 90(2)-(3), there is therefore no valid legal justification for a further initial appearance of the Accused or for new deadlines for the Defence to file preliminary motions. For this reason, neither the Selimi Defence nor any other Defence team is authorised under the Law or the Rules to file any preliminary motions in respect of the Unredacted Allegations. The Selimi Defence’s suggestion that the redactions ordered in this case might amount to an abuse of process³⁰ is unsubstantiated and therefore also dismissed.

21. Furthermore, the Selimi Defence’s suggestion that, at the SPO Conference, the Panel “agreed” to the Selimi Defence filing preliminary motions³¹ is plainly misguided. No such indication was given and the Panel merely heard and took notice of the Selimi Defence’s indication that it planned to do so. The Panel notes, furthermore, that the Rules do not provide the Panel with the authority to decide whether and when preliminary motions can be filed; this is determined exclusively by the Law and the Rules. Finally, the Selimi Defence must have been aware that the possibility for it to file such motions was dependent upon the Panel’s preliminary determination that the unredacted parts of the Indictment constitute “new charges” for the purpose of the Rules, which the Panel has now determined that they are not.

22. Accordingly, the First Request and the Second Request are rejected.

³⁰ Selimi Request, paras 16-17.

³¹ CRSPD180, *Email from Selimi Defence to CMU re Reply to F01307*, 20 February 2023.

B. THIRD REQUEST

23. For the reasons outlined above with respect to the First and Second Requests, there is no justification for the Third Request. In any event, the Third Request is moot as the deadline for further notices of alibi has passed, and the Defence filed such a notice on 15 February 2023.³²

24. Accordingly, the Third Request is also rejected.

C. INFORMED NATURE OF THE PLEA

25. Article 39(5) and Rule 124(3) make it clear that the competent Judge must be satisfied that the accused understands the indictment before instructing the accused to enter a plea. Where the Judge is unable to be satisfied that the plea is, in fact, informed by the necessary understanding of the accused, the Judge can refuse to receive a guilty plea and, instead, enter a not guilty plea on the accused's behalf.³³

26. In the present case, and due to the redactions in the Indictment at the time of Mr Selimi's initial appearance on 11 November 2020 and further initial appearance on 10 May 2022, he may not have been in a position to enter a fully informed plea in relation to those aspects of the charges that were still subject to redactions at the time.³⁴ The Panel notes that, in any case, Mr Selimi pleaded not guilty to all charges.³⁵

27. Considering that some of the allegations in respect of which the Accused entered a plea were redacted at the time, the Panel considers that fairness demands that Mr Selimi be afforded an opportunity to amend his plea, should he wish to

³² See above, para. 6.

³³ For an illustration, see, e.g., ICTY, *Prosecutor v. Dragoljub Kunarac*, IT-96-23, Transcripts of 9, 10 and 13 March 1998. See also Rule 94.

³⁴ Transcript of Hearing, 11 November 2020; Transcript of Hearing, 10 May 2022.

³⁵ See Transcript of Hearing, 11 November 2020, in particular, pp. 87, 89, 91-92; Transcript of Hearing, 10 May 2022, in particular, pp. 1212, 1215, 1216.

do so, having had the benefit of reading a completely unredacted Indictment. The Panel further considers that the same applies to the three other Accused.

28. Article 40(6)(a) provides that the Trial Panel may exercise any functions or powers of the Pre-Trial Judge under Article 39(5). Rule 124(3) in turn, requires the Presiding Judge of the Trial Panel to be satisfied that the accused understands the indictment and to afford the accused the opportunity to confirm his or her initial plea.

29. The Panel understands that the unredacted Indictment was served on the Accused on 27 January 2023 pursuant to Rule 87. The Panel orders the Defence to advise the Accused of their rights in respect of the Unredacted Allegations so as to enable them to decide whether to amend their initial plea at the opening of the case. Should they elect not to do so, the Panel will, in accordance with Article 40(6)(a) and Rule 92(2)(f), enter a not guilty plea on behalf of each Accused.

IV. DISPOSITION

30. In light of the above, the Panel:

- (a) **REJECTS** the Selimi Request in its entirety;
- (b) **DOES NOT AUTHORISE** the Selimi Defence, nor any other Defence team, to file new preliminary motions in respect of the Unredacted Allegations;
- (c) **ORDERS** the Defence to ensure that the Accused are advised of their rights in respect of the Unredacted Allegations so as to enable them to decide whether to amend their plea of not guilty (entered on their behalf by the Pre-Trial Judge, as the case may be); and
- (d) **INFORMS** the Accused that, consistent with Rule 124(3), they will be offered the opportunity to amend their plea of not guilty (entered on their

behalf by the Pre-Trial Judge, as the case may be) in respect of the Unredacted Allegations at the opening of the case.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 22 February 2023

At The Hague, the Netherlands.