

**In:** KSC-BC-2020-06

**The Specialist 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 Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Rexhep Selimi

**Date:** 28 June 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Selimi Defence Motion for the Exclusion of  
Evidence of W04445**

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## I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“Defence”) hereby requests the Trial Panel to order the SPO not to lead evidence related to the new information proffered by W04445 during his preparation session on Mr. Selimi’s alleged encounter with W04445 in [REDACTED], his presence at [REDACTED] during W04445’s alleged [REDACTED], and Mr. Selimi’s direct knowledge of W04445’s [REDACTED] (“New Allegation”) and that W04445 be cautioned not to proffer that evidence voluntarily.
2. The New Allegation was notified neither in the Indictment nor in the SPO Pre-Trial Brief and was prompted by the SPO during the Preparation Session of W04445 and notified to the Defence a week prior to W04445’s initially scheduled testimony and more than a year into the SPO’s presentation of its case. In conjunction with concerns about its reliability and credibility, the New Allegation is highly and unfairly prejudicial to Mr. Selimi.

## II. SUBMISSIONS

3. On 21 June 2024, the SPO disclosed to the Defence the notes from the preparation session held with W04445 prior to his anticipated testimony. Preparation Note 2, in particular its paragraph 13, contained a brand new direct personal allegation against Mr. Selimi. W04445 alleged that Mr. Selimi saw W04445 during his [REDACTED] and that Mr. Selimi could see that [REDACTED]. W04445 claimed that they have surely recognised each other due to [REDACTED].<sup>1</sup>
4. On 23 June 2024, the Defence, noting in the *inter partes* correspondence that the New Allegation was not included in W04445’s SPO interview, was not part of his Rule 95 summary or otherwise alleged in the SPO Pre-Trial Brief or Indictment in relation to W04445 and further lacked credibility, inquired

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<sup>1</sup> 121691 – 121694 at 121693, para. 13 (“Preparation Note 2”).

whether the SPO intended to elicit evidence related to the New Allegation during W04445's examination-in-chief and therefore rely upon it as part of its case. The SPO responded indicating that it intended to elicit evidence about W04445's knowledge of Mr. Selimi's presence at the [REDACTED] during W04445's [REDACTED], thereby implicitly confirming that it would lead the New Allegation.

**A. New Allegation falls outside the scope of the notified charges.**

5. The Defence has not been put on notice of the New Allegation in either the Indictment, Pre-Trial Brief or even through the Rule 95(4) summary for W04445. In accordance with the previous findings of the Trial Panel, when an incident alleged by a witness is not expressly charged in the Indictment, does not feature explicitly in the SPO Pre-Trial Brief, did not feature in earlier statements of the witness and when the Accused is not charged specifically with such incident, the evidence should not be admitted for such purpose.<sup>2</sup>
6. The New Allegation is not part of the charges pleaded in the Indictment. Mr. Selimi is not mentioned in relation to allegations of [REDACTED] occurring in the relevant time period, between at least [REDACTED].<sup>3</sup> Similarly, no allegation of Mr. Selimi's personal presence is included in the Indictment in the context of [REDACTED] alleged to have occurred between [REDACTED]<sup>4</sup> except in relation to his presence at [REDACTED].<sup>5</sup> This separate incident is markedly different from the New Allegation, relates specifically to the allegation made by

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<sup>2</sup> Transcript of hearing, Oral Order on Selimi Defence objection to the admission of paragraphs 58 and 64 of Preparation Note 1 of Witness W04377, 10 June 2024.

<sup>3</sup> F00999/A01, Annex 1 to Submission of confirmed amended Indictment with strictly confidential and ex parte Annex 1, confidential Annex 2, and public Annex 3, para. [REDACTED], 30 September 2022, ("Indictment").

<sup>4</sup> Indictment, para. [REDACTED].

<sup>5</sup> Indictment, para. [REDACTED], in particular [REDACTED].

[REDACTED] describing Mr. Selimi's alleged interaction with him and can not in any way constitute proper notice of the New Allegation.

7. The Prosecution has an obligation to state in the Indictment the material facts supporting the charges and an Accused should be "reasonably able" to identify the crime and criminal conduct alleged in each paragraph of the Indictment.<sup>6</sup> The inclusion of the specific allegation of Mr. Selimi's alleged knowledge in relation to [REDACTED] in the Indictment, is demonstrative of the SPO's obligation to plead such allegations of personal acts and knowledge of the Accused therein as a material fact. No reasonable interpretation of the Indictment could be understood as including the allegation that Mr. Selimi was present and directly aware of W04445's alleged [REDACTED]. No request for amendment pursuant to Rule 90(1)(c) has been filed by the SPO in relation to the New Allegation.
8. The SPO also fails to include Mr. Selimi's alleged knowledge of W04445's alleged [REDACTED] in its Pre-Trial Brief. In relation to the alleged crimes committed in [REDACTED], Mr Selimi's personal involvement in [REDACTED] is again only alleged regarding [REDACTED].<sup>7</sup> No other aspect of the Pre-Trial Brief provides sufficiently specific notice of the New Allegation.
9. Finally, the New Allegation was also not part of the Rule 95(4) summary of evidence of W04445 describing what evidence the SPO intends to present regarding the commission of the alleged crime and the alleged mode of liability of the Accused. When summarising evidence that the SPO intends to elicit from

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<sup>6</sup> ICTR, Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Decision on Exclusion of Testimony and Admission of Exhibit, para. 6, 20 March 2007.

<sup>7</sup> F01594/A03, Annex 3 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief with strictly confidential and ex parte Annex 1 and confidential Annexes 2-3, para. [REDACTED] referring exclusively to the evidence of [REDACTED] in relation to the alleged events [REDACTED], 9 June 2023 ("SPO Pre-Trial Brief").

W04445 in relation to his alleged [REDACTED] around [REDACTED], Mr. Selimi's presence or knowledge of such events was not notified therein.

**B. Late notice of the New Allegation renders it inadmissible due to prejudice to Mr. Selimi**

10. W04445 was prompted by the SPO to make the New Allegation during the preparation session which occurred merely a week before W04445's scheduled testimony. While W04445's testimony was delayed by a week, the SPO's refusal to delay it further despite a reasonable Defence request in that regard and during the testimony of one of the principal witnesses in the entire case, fails to mitigate this prejudice.
11. W04445 was shown during his preparation session by the SPO his Application for Victim Participation in Proceedings ("VPP Application")<sup>8</sup> where it is merely stated that [REDACTED].<sup>9</sup> The SPO has been in a possession of W04445's VPP Application since at least 13 July 2023.<sup>10</sup> No further interviews have been conducted of W04445 by the SPO to clarify this statement, since this information first became available almost a year ago.
12. Instead, the SPO chose to elicit new evidence from W04445 against Mr. Selimi by means of a direct and leading question "what he meant when he said" that [REDACTED] only a week before W04445's scheduled testimony and over a year into the SPO's presentation of its case. This appears to be a deliberate attempt to both elicit new and incriminating evidence at the last minute against Mr. Selimi,

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<sup>8</sup> Preparation Note 2, para. 13, see also F01676/A42, Annex 42 to Notification of Application Forms of Dual Status Witnesses to the Defence Pursuant to F01348 with confidential Annexes 1-59, 13 July 2023 ("VPP Application").

<sup>9</sup> VPP Application, section 2, para.2.

<sup>10</sup> F01676, Notification of Application Forms of Dual Status Witnesses to the Defence Pursuant to F01348 with confidential Annexes 1-59, 13 July 2023.

and to do so in a manner which prevents the Defence from properly being able to investigate it.

13. The Trial Panel has already heard various witnesses who have given evidence about [REDACTED].<sup>11</sup> Had the Defence been put on notice of the New Allegation at the appropriate time, it could have been in a position to adjust its strategy and verify aspects of W04445's account, both in relation to the New Allegation and his credibility generally. By its lack of diligence, the SPO has prevented the Defence from doing so.
14. Due to the failure of the SPO to investigate and notify the Defence of the facts of the New Allegation in a timely manner, due to the aggravated nature of the personal New Allegation against Mr. Selimi it is highly prejudicial to Mr. Selimi to allow the SPO to lead evidence in relation to the New Allegation at this advanced stage of the development of the case and to further be allowed to rely on it for the purpose of its case.

**C. New Allegation is neither reliable nor credible**

15. Throughout his SPO Interview, W04445 made no allegation of Mr. Selimi's personal attendance at [REDACTED] during W04445's [REDACTED] despite constantly being asked, whether he recognised any of the persons whom he encountered in [REDACTED].<sup>12</sup> At no stage did W04445 claim to have seen Mr. Selimi.
16. W04445 described in detail the [REDACTED] which he allegedly had [REDACTED]. W04445 claimed that [REDACTED] happened immediately after [REDACTED]<sup>13</sup> and that after the [REDACTED] was over [REDACTED].<sup>14</sup> In

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<sup>11</sup> Including, but not limited to the following witnesses: [REDACTED].

<sup>12</sup> See, for example, 066665-TR-ET Part 1, p.10-11, 19, 21-22.

<sup>13</sup> 066665-TR-ET Part 2, p. 16.

<sup>14</sup> 066665-TR-ET Part 2, p. 19.

response to the explicit question whether anyone came to check on him after [REDACTED], W04445 responded negatively adding that the [REDACTED] by somebody whom he was again not able to identify for the SPO.<sup>15</sup> Moreover, when asked directly whether he saw Mr. Selimi while [REDACTED], W04445 provided no answer to that regard.<sup>16</sup>

17. During W04445's preparation session he specifically reviewed his SPO Interview and made no amendments or clarifications in relation to the New Allegation.<sup>17</sup> Instead, it was only when W04445 was specifically prompted by the SPO to provide additional information regarding Mr. Selimi and shown his VPP Application and asked about what he meant by providing that [REDACTED]<sup>18</sup> that W04445 suddenly proffered the New Allegation.
18. W04445 must have known that his excuse that he thought he had offered such evidence earlier to the SPO, even though the New Allegation was conspicuously absent from the SPO interview he had just reviewed, lacked all credibility. Indeed, it beggars belief to suggest that had W04445 indeed genuinely remembered seeing Mr. Selimi, [REDACTED]<sup>19</sup>, he would simply have forgotten to mention it to the SPO when reviewing his interview.
19. Even though the inconsistencies within a witness's proposed evidence do not make such evidence inadmissible, they are factors that the Trial Panel has previously considered when assessing whether to exercise its discretion to allow the evidence to be presented.<sup>20</sup>

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<sup>15</sup> 066665-TR-ET Part 2, p. 21.

<sup>16</sup> 066665-TR-ET Part 2, p. 26.

<sup>17</sup> Preparation Note 1.

<sup>18</sup> Preparation Note 2, para.13.

<sup>19</sup> Preparation Note 2, para. 13.

<sup>20</sup> F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, para.22, 19 June 2024.

20. Therefore, the New Allegation proffered by W044445 is clearly inconsistent with previous statements, appears to have no corroboration, lacks credibility and therefore highly prejudicial to the Accused in case the SPO is allowed to elicit evidence in court with the purpose of further relying on them.

### III. CLASSIFICATION

21. This motion is filed confidentially as it contains information concerning witnesses with protective measures. A public redacted version of the motion will be filed as soon as possible

### IV. CONCLUSION AND RELIEF REQUESTED

22. Considering the foregoing reasons, the Defence respectfully requests the Trial Panel to
- (i) ORDER the SPO not to elicit evidence on the New Allegation from W04445 during the course of his direct examination; and
  - (ii) CAUTION W04445 not to voluntarily proffer any evidence in relation to the New Allegation.
  - (iii) ORDER the SPO to respond to this Motion by Monday, 1 July 2024, 4:00 pm.

Word count: 2107

Respectfully submitted on 28 June 2024,





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