



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: 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: Specialist Prosecutor's Office

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Public Redacted Version of 'Prosecution response to 'Selimi Defence Motion for the Exclusion of Evidence of W04445 with confidential Annex 1'

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I. INTRODUCTION

1. The Trial Panel should dismiss the SELIMI Motion¹ and allow the Specialist Prosecutor's Office ('SPO') to elicit W04445's anticipated, first-hand testimony concerning the presence of Rexhep SELIMI during [REDACTED] ('Anticipated Testimony'). Relying largely on undeveloped and generalised assertions of prejudice, the Defence seeks an extreme remedy, namely, exclusion, where other measures counterbalancing any purported prejudice are available and sufficient.² Following the witness's testimony, including any cross-examination, the Panel, composed of professional Judges, would be fully able to assess the Anticipated Testimony and assign it appropriate weight. The Defence has therefore failed to demonstrate that the probative value of the Anticipated Testimony is outweighed by any prejudicial effect.

II. SUBMISSIONS

2. As transparently recorded in Preparation Note 2, the SPO – in the regular course of the preparation session and in good faith³ – sought clarification concerning W04445's statement in his [REDACTED] that '[REDACTED]',⁴ and the witness provided the details comprising the Anticipated Testimony. These details clarify and complement the witness's prior statement concerning his [REDACTED], corroborate and complement other evidence in this case, and are relevant to proof of numerous, pleaded allegations in the Indictment and Pre-Trial Brief. Thus, contrary to the Defence's assertion otherwise, the Anticipated Testimony does not constitute new

¹ Selimi Defence Motion for the Exclusion of Evidence of W04445, KSC-BC-2020-06/F02414, Confidential, 28 June 2024 ('SELIMI Motion').

² See e.g. ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Motion for Exclusion of Rebuttal Witnesses, 13 September 2011, para.6. See also IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para.103.

³ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.86 (providing, *inter alia*, that witness preparation is for the calling Party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings). *Contra* SELIMI Motion, KSC-BC-2020-06/F02414, paras 10, 12.

⁴ [REDACTED]. [REDACTED] was notified to the Defence on 14 July 2023.

material facts,⁵ and the Defence will have the opportunity to, *inter alia*, cross-examine the witness, challenge the Anticipated Testimony, and present its own version of events.

A. THE ANTICIPATED TESTIMONY IS *PRIMA FACIE* RELEVANT, RELIABLE, AND PROBATIVE

3. The Anticipated Testimony concerns Rexhep SELIMI's presence at [REDACTED]. The Anticipated Testimony is therefore relevant to numerous, pleaded allegations in the Indictment and Pre-Trial Brief, *inter alia*:⁶ (i) the common criminal purpose and Rexhep SELIMI's contributions thereto;⁷ (ii) Rexhep SELIMI's state of mind, including his shared intent with other JCE members⁸ and knowledge of detentions, including at [REDACTED];⁹ (iii) Rexhep SELIMI's presence and authority at detention sites, including in [REDACTED];¹⁰ (iv) his personal involvement in the detention and/or interrogation of Opponents, including at or connected with [REDACTED];¹¹ and (v) a consistent pattern of conduct.¹² The evidence is also relevant to an assessment of W04445's evidence as a whole, and corroborative evidence – including SELIMI's own statements¹³ – concerning SELIMI's presence [REDACTED],¹⁴

⁵ Defence submissions about the scope of the charges and notice of material facts are therefore inapposite. *See e.g.* SELIMI Motion, KSC-BC-2020-06/F02414, paras 6-7.

⁶ *See, similarly*, Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, Confidential, 23 June 2023 ('June 2023 Decision'), para.35; Transcript, 10 July 2023, pp.5320-5321.

⁷ *See e.g.* Amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022, Confidential ('Indictment'), paras 32-40, 52(b)-(c). *See also* paras 54-57 (concerning, *inter alia*, aiding and abetting, and superior responsibility).

⁸ *See e.g.* Indictment, KSC-BC-2020-06/F00999/A01, para.32.

⁹ *See e.g.* Indictment, KSC-BC-2020-06/F00999/A01, paras 17, 56, 58, 176; Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', KSC-BC-2020-06/F01594/A03, 9 June 2023, Confidential ('Pre-Trial Brief'), paras 11-17.

¹⁰ *See e.g.* Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 15, 16(c), [REDACTED].

¹¹ *See e.g.* Indictment, KSC-BC-2020-06/F00999/A01, paras [REDACTED]. The Anticipated Testimony generally corroborates the evidence of these incidents, which are specified in the Indictment. *See also* fn.15 below (concerning related evidence).

¹² *See e.g.* Indictment, KSC-BC-2020-06/F00999/A01, paras 17, 59; Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 113, 267, 704.

¹³ *See e.g.* [REDACTED].

¹⁴ *See e.g.* [REDACTED]. *See also* [REDACTED].

and/or personal involvement in the targeting of Opponents, including at or in connection with [REDACTED].¹⁵

4. Further, as it is first-hand, limited in scope, corroborated, and will be elicited live, with the Defence having the opportunity to cross-examine the witness and the Panel having the opportunity to hear the Anticipated Testimony and observe the witness's demeanour, the Anticipated Testimony is, in addition to being relevant, also *prima facie* reliable and probative.

5. Even if it were being tendered for admission at this stage, which it is not, Preparation Note 2 does not give rise to any issue that would detract from the *prima facie* reliability or probative value of the Anticipated Testimony. W04445 was duly advised of his obligations, in particular, his obligation to tell the truth,¹⁶ and the note was read back to him before he confirmed its accuracy and truthfulness.¹⁷ Moreover, contrary to Defence arguments otherwise, the Anticipated Testimony – which clarifies information in W04445's [REDACTED] and provides additional detail concerning his detention – is not inconsistent with his SPO interview.¹⁸ In any event, the Defence's arguments relating to the reliability and credibility of the Anticipated Testimony¹⁹ are matters pertaining to weight, not admissibility,²⁰ particularly as the Anticipated Testimony will be elicited entirely *viva voce*.²¹

¹⁵ See e.g. [REDACTED].

¹⁶ 121682-121690, para.4.

¹⁷ 121691-121694, para.19.

¹⁸ *Contra* SELIMI Motion, KSC-BC-2020-06/F02414, paras 16, 19-20.

¹⁹ *Contra* SELIMI Motion, KSC-BC-2020-06/F02414, paras 15-20.

²⁰ See Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential, para.113; Decision on Prosecution Motion for Admission of Evidence of W00072, W02153 and W04586 Pursuant to Rule 154, KSC-BC-2020-06/F01664, 10 July 2023, Confidential, para.28; Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154, KSC-BC-2020-06/F01700, 24 July 2023, Confidential, para.27.

²¹ See also Decision on Taçi Defence Request Related to W03170, KSC-BC-2020-06/F02350, Confidential, 31 May 2024, para.28 (noting, *inter alia*, that for exclusion under Rule 138, there must arise an unfairness unconnected to the evidential value of the evidence, such as an inability to challenge it effectively and

B. THE ANTICIPATED TESTIMONY'S PROBATIVE VALUE IS NOT OUTWEIGHED BY ITS PREJUDICIAL EFFECT

6. Defence submissions about prejudice are general and unsupported, and do not address other available and adequate measures to remedy any purported prejudice, short of the extreme remedy requested.²²

7. That evidence is or might be incriminating does not render it prejudicial for purposes of Rule 138.²³ Further, the witness's recollection of the additional details comprising the Anticipated Testimony was identified during preparation and disclosed in advance, 'thereby reducing the prospect of the Defence being taken entirely by surprise' should such evidence have been elicited or volunteered during the witness's examination.²⁴ The Defence will be able to cross-examine the witness, and has already had and will have in future opportunities to investigate details of the Anticipated Testimony, and present evidence and make submissions challenging the Anticipated Testimony, as appropriate, during the remainder of the Prosecution case, during the Defence case, and at the conclusion of the trial.²⁵ Indeed, while it generally

fairly). As set out below, there is no unfairness unconnected to the evidential value of the evidence and the Defence will have the ability to challenge it fairly and effectively.

²² See e.g. Transcript, 10 July 2023, p.5321 (noting that the Defence could, after concluding its investigations into new information included in a preparation note, seek to recall the witness); Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.82 (providing that, where new material is of a significant nature, an opposing Party may seek an adjournment or other necessary relief to enable it to adequately review the material and effectively prepare for cross-examination).

²³ See e.g. June 2023 Decision, KSC-BC-2020-06/F01623, para.36. See also 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.

²⁴ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, p.2 ('Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise'). See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008, para.6.

²⁵ The Defence does not explain how it would have examined any previous witness differently, considering that – while some cited in the SELIMI Motion provide generally corroborative evidence about SELIMI's presence and involvement/knowledge of crimes in [REDACTED] – none provided evidence specifically about the subject-matter of the Anticipated Testimony. See SELIMI Motion, KSC-BC-2020-06/F02414, para.13.

asserts prejudice, the Defence does not specifically claim that it is not in a position to effectively cross-examine the witness now.²⁶ In this respect, when finding that other parts of the witness's evidence concerning SELIMI's knowledge of 'some of the charged crimes' were admissible, the Panel considered the nature and scope of the evidence, and that the Defence will have an opportunity to cross-examine the witness.²⁷ The same considerations apply to the Anticipated Testimony.

8. Accordingly, considering its *prima facie* relevance, reliability, and probative value, which is not outweighed by any prejudice, the Defence has failed to justify exclusion of the Anticipated Testimony. It should be allowed in the interests of justice and the determination of the truth.

III. CLASSIFICATION

9. This filing is confidential pursuant to Rule 82(4).

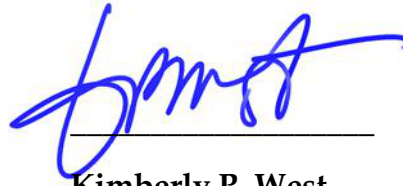
IV. RELIEF REQUESTED

10. For the reasons set out above, the Panel should dismiss the SELIMI Motion.

²⁶ The Defence's reference to an *inter partes* request for further postponement of W04445's testimony fails to acknowledge that it was made after the witness's initial, anticipated testimony date. The Defence did not claim that it was seeking further postponement because of an inability to effectively cross-examine the witness or specify any other relevant change in circumstances that might justify further postponement. Compare SELIMI Motion, KSC-BC-2020-06/F02414, para.10; with Annex 1.

²⁷ Decision on Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request, KSC-BC-2020-06/F02044, Confidential, 8 January 2024, para.49.

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Tuesday, 2 July 2024

At The Hague, the Netherlands.