

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: 25 June 2024
Language: English
Classification: Public

**Public Redacted Version of Selimi Defence Second Motion for Exclusion of
Evidence of W04846 with Confidential Annex 1**

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I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“the Defence”) hereby files its Second Motion for Exclusion of Evidence of W04846. The present motion concerns two allegations that the SPO has indicated it intends to elicit evidence from W04846 in the course of recent *inter partes* communication.¹ The two allegations concern the alleged arrest and mistreatment of [REDACTED] (“First Allegation”), and the alleged arrest and detention of [REDACTED] (“Second Allegation”). The two allegations are devoid of any probative value and their relevance to the case against the Accused is, at the very best, tenuous. The SPO has furthermore failed to provide adequate notice in respect of its intention to rely on the above two allegations and their marginal probative value, if any, is severely outweighed by their prejudicial effect.
2. The Defence respectfully requests the Trial Panel to (i) order the SPO not to elicit any evidence in relation to the two allegations; and (ii) caution the witness not to offer any evidence in relation to those allegations voluntarily.

II. SUBMISSIONS

A. Timeliness

3. While the Defence has already filed a motion for the exclusion of evidence of W04846,² the Defence would not have been in a position to make submissions in relation to the First and Second Allegations addressed in the present motion at the stage when its original motion was filed. Concerning the First Allegation, W04846’s evidence on that aspect is exclusively contained in one statement³ that has only been disclosed to the Defence on 26 March 2024, 20 days after the

¹ Annex 1 to the present Motion.

² KSC-BC-2020-06/F02166, Selimi Defence Motion for the Exclusion of Evidence of W04846 with Confidential Annex 1, 6 March 2024.

³ SPOE00347362-SPOE00347368-ET.

Defence has filed its original motion. Furthermore, as outlined below, it is only in the course of *inter partes* communications following W04846's preparation session that the SPO communicated its intention to elicit evidence in that regard. Concerning the Second Allegation, as outlined below, the evidence has acquired new significance in light of the representations made by the SPO in the course of *inter partes* communications following W04846's preparation session.

4. Therefore, the Defence raises the issues addressed in these submissions at the earliest opportunity and, in conformity with paragraph 7 of the Order on the Conduct of Proceedings, following consultations with the SPO.

B. First Allegation

5. [REDACTED], the SPO carried out a preparation session with W04846. During that preparation session, the SPO referred W04846 to his 2019 statement⁴ wherein he, in very general terms, referred to [REDACTED] as having allegedly saved a person from execution. No follow-up questions were posed by the interviewer in 2019 and no further inquiry was made by the SPO as to the meaning of this answer. However, during his preparation session, W04846 proceeded to claim that two persons (neither of whom are SPO witnesses) allegedly told [REDACTED] to intervene in an incident where [REDACTED].⁵
6. This allegation does not feature in any of W04846's prior statements besides his 2005 [REDACTED] Statement,⁶ disclosed to the Defence on 26 March 2024, one year and a half after the SPO filed its request to add W04846 to its list of witnesses,⁷ and almost two years after the deadline for disclosure pursuant to

⁴ 102761-TR-AT Part 3 Revised-ET, p. 25.

⁵ 121715-121728, p. 121726.

⁶ SPOE00347362-SPOE00347368-ET, p. SPOE00347365.

⁷ KSC-BC-2020-06/F00947 KSC-BC-2020-06/F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and ex parte Annexes 1-2, 2 September 2022.

Rule 102(1)(b) set by the Pre-Trial Judge.⁸ In the course of that 2005 statement, W04846 alleged that [REDACTED].⁹

7. Notwithstanding that W04846's preparation note does not record the witness offering the same evidence in the course of his preparation session, given the fact that W04846 has made that claim in the past, there is a manifest risk that, with the last few days to cogitate on the events that he will testify to, W04846 will seek to [REDACTED] back into the allegation during his *viva voce* testimony. The fact that the witness was informed that the Trial Panel has excluded large portions of W04846's evidence related to Mr. Selimi¹⁰ further augments the risk that the witness will proffer that evidence. Allowing the witness to do so will occasion a clear unfairness whereby the Defence will be required to confront allegations not properly notified, and whose marginal probative value is severely outweighed by their prejudicial effect.
8. As to whether the Defence has been put on notice of this allegation, the alleged arrest and mistreatment of [REDACTED] is neither charged in the Indictment, nor is it addressed in the SPO's Pre-Trial Brief. There are no conclusive references to this incident anywhere in the entire evidentiary record disclosed by the SPO. The SPO did not indicate that it intends to rely on this incident either when it requested the addition of W04846 to its witness list and made submissions as to the relevance of his evidence, or in its subsequent Rule 95 summary of the

⁸ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 60.

⁹ SPOE00347362-SPOE00347368-ET, p. SPOE00347365.

¹⁰ KSC-BC-2020-06/F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, 19 June 2024.

witness' evidence,¹¹ or in its original notification of the facts and circumstances on which the witness will be examined.¹²

9. Upon raising the above issues with the SPO in *inter partes* communication, the SPO responded that the Defence has been on notice of the W04846's evidence on this allegation by virtue of W04846's evidence that [REDACTED] saved people from execution since the disclosure of W04846's SPO interview, and that the allegation in question "merely adds detail thereto".¹³ In addition, the SPO claims that the fact that the witness "addresses the incident in his 2005 statement only adds to the notice that has been provided to the Defence. Further, this information clearly relates to the background of [REDACTED], which was set out as one of the issues, facts and circumstances in relation to which W04846 will be examined".¹⁴
10. Mere service of witness statements or potential exhibits pursuant to disclosure requirements will not suffice to inform an accused of the material facts that the Prosecution intends to prove at trial.¹⁵ As the Indictment is the sole accusatory instrument, it is only by virtue of the facts pleaded therein that the Accused may be placed on notice of the case it has to respond to.¹⁶ By contending that the mere fact that an allegation features in a witness statement is sufficient to place the

¹¹ KSC-BC-2020-06/F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and ex parte Annexes 1-2, 2 September 2022.

¹² KSC-BC-2020-06/F02007/A01, ANNEX 1 to Prosecution submission of list of witnesses for 15 January to 4 April 2024, 14 December 2023, p. 50.

¹³ Annex 1. In light of the representations made by the SPO during the hearing of 25 June 2024 (provisional transcript pages 124-125), the Defence understands that the position communicated by the SPO in the course of *inter partes* communications contained in Annex 1 to be the SPO's definitive and comprehensive position on this issue.

¹⁴ *Id.*

¹⁵ ICTR, *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment, 15 January 2010, para. 13; *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-IOA & ICTR-96-17A, Appeal Judgement, 13 December 2004, para. 27.

¹⁶ KSC-BC-2020-06/F01623, Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 21.

Accused on notice, the SPO is essentially arguing that the rigorous requirements attached to the form of the Indictment are superfluous.

11. Furthermore, the SPO's assertion that W04846's reference in his SPO interview to "people who were saved from execution because of" [REDACTED],¹⁷ or it signalling its intention to elicit evidence related to [REDACTED] "background", would adequately place the Accused on notice of the specific incident concerning the alleged arrest of [REDACTED] is simply implausible. The core rationale for providing notice to the Accused is that the latter may have adequate time and facilities to confront the evidence against them and mount an effective defence.
12. However, in the case at hand, the Defence could not have anticipated that it would be expected to confront this specific allegation concerning Mr. Selimi's personal participation simply by virtue of the overly generic assertion recorded in W04846's SPO interview, or by the SPO indicating that it intends to elicit evidence as to [REDACTED] "background". It is precisely to avoid situations of this nature that the proximity of the Accused to the events alleged requires all the more specificity in the pleading instruments in order to put the Defence on adequate notice.¹⁸
13. In that respect, the witness made the generic claim concerning "executions" referred to by the SPO in its email in his interview in August 2021 – over a year before the SPO sought to add him to the witness list. The SPO therefore had more than sufficient time to investigate the specifics of that answer and to take the

¹⁷ 102761-TR-AT Part 3 Revised-ET, p. 25.

¹⁸ KSC-BC-2020-07/IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 43; ECCC, *Prosecutor v. Nuon Chea et al*, Case No. 002/19-09-2007-ECCC/TC, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, fn. 40; ICTY, *Prosecutor v. Kvočka et al*, Case No. IT-98-3011-A, Judgement, Appeal Chamber, 28 February 2005, para. 65.

necessary steps to adequately notify the Defence of this allegation by amending its Indictment, had it been minded to rely on it.

14. The SPO's claim that "[t]he fact [that] W04846 addresses the incident in his 2005 statement only adds to the notice that has been provided to the Defence"¹⁹ ignores the fact that the SPO has not sought to add the statement concerned to its exhibit list at any point. As the sole purpose of the SPO's exhibit list is to place the Accused on notice of the evidentiary foundations of its case, the SPO cannot claim that by disclosing a statement without providing any indication of its intention to rely on the events described therein may in any way serve as sufficient notice.
15. Not only is disclosure of the statement insufficient in itself for notice purposes, but the fact that the SPO subsequently signalled no intention to use the information contained there as part of its case further compounds the lack of notice evident in the present circumstances. It is important to consider in this respect that the late disclosure by the SPO of the statement in question in March 2024 was in spite of the witness alerting the SPO several times in 2021, including in his very first contact note,²⁰ to the fact that he had provided evidence to [REDACTED] in the past.
16. Furthermore, the relevance and probative value of this evidence is highly questionable. On the one hand, there is no indication in the witness' evidence as to the alleged purpose for which [REDACTED] was allegedly arrested. Therefore, no conclusion can be made that the alleged arrest would have been conducted in furtherance of the common purpose as pled in the Indictment.

¹⁹ Annex 1.

²⁰ 095407-095413, p. 095412.

17. Additionally, no conclusion can be drawn as to whether [REDACTED] is a civilian or a combatant. There is as such no indication that this evidence is relevant to the existence of a widespread or systematic attack against the civilian population. The witness' evidence on this allegation does not provide enough particularity to conclude that the specific elements of the crime against humanity of unlawful imprisonment or the war crime of illegal or arbitrary arrest and detention have been met either.
18. While the probative value of this evidence is severely limited, it nevertheless carries substantial prejudicial effect. In the present instance, the allegation is essentially hearsay supposedly originating from a deceased individual who the Defence naturally has no opportunity to cross-examine. None of the other individuals alleged to have knowledge of – or be involved in – the allegation are on the SPO's witness list. The SPO has neither carried out an interview with these individuals, nor has it disclosed any of their prior statements in relation to this incident. The witness provides virtually no particulars as to this incident – such as its date and precise location – thereby precluding any meaningful Defence investigations. In these circumstances, not only is there virtually no corroboration of the account proffered by W04846, but the Defence cannot adequately confront the substance of this allegation either.

C. Second Allegation

19. In addition to the allegation concerning [REDACTED], the SPO indicated that it intends to elicit evidence in relation to “[h]is and [REDACTED] knowledge of the detention of [REDACTED]”. Similarly, [REDACTED] detention is not charged in the Indictment, nor is he a witness in this case. The SPO Pre-Trial Brief likewise makes no mention of this incident and it does not feature in the Rule 95 summary of the witness, or in the notification scheduling W04846's upcoming testimony.

20. In his evidence, W04846 identifies this incident as one of his several speculative motives in support of his contention that [REDACTED].²¹ As the witness' evidence on that front has been excluded, allowing the witness to provide this evidence engenders the immediate risk that the witness will use this opportunity to adduce evidence in respect of which the Trial Panel has determined is irrelevant and that its marginal probative value is outweighed by its substantial prejudicial effect.
21. Furthermore, on the issue of notice, the SPO averred that "[t]he SPO would have elicited information in relation to the [REDACTED] incident in the context of its examination of the witness concerning [REDACTED], given that the [REDACTED] incident took place the day immediately prior to such [REDACTED]. Further, the incident is referred to in W04846's prior statements and was referenced in SPO filings (F02187, para.6). Detention of Opponents (as defined in the Indictment) are clearly relevant to the SPO's case, particularly, where, as here, the alleged detention took place at a charged site and during the charged timeframe."²² This assertion demonstrates that, while the SPO originally only intended to adduce evidence in relation to this incident inasmuch as it connects to [REDACTED]; one day before W04846's scheduled testimony, the SPO signals that it now intends to plead [REDACTED] detention as substantive evidence of a widespread or systematic attack directed against Opponents.
22. In that respect, the SPO is expected to know the evidentiary foundations of its case prior to the commencement of the trial and is not entitled to mould its case based on how the evidence develops without seeking to amend its Indictment.²³ If it had intended to prove at trial that [REDACTED] falls under its definition of Opponents and concomitantly is a victim of the crimes charged, then it was

²¹ 102761-TR-AT Part 1 Revised-ET, p. 26.

²² Annex 1.

²³ ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 92.

incumbent upon it to seek to amend its Indictment and include the latter's arrest as part of the charges. The SPO cannot circumvent its failure to plead the above material facts in its Indictment by claiming that the incident features in W04846's prior statements and the SPO's cursory references to that incident in previous litigation amount to proper notice of material facts.

23. As to the relevance and probative value of the incident itself, the witness provides little to no evidence on the purpose behind [REDACTED] alleged arrest. While he claims that [REDACTED],²⁴ he provides no foundation for this claim. The account is furthermore hearsay originating from individuals that the Defence is not in a position to cross-examine, namely [REDACTED] – the former being deceased and the latter not being included on the SPO's witness list. Notwithstanding that W04846 indicated that [REDACTED] is alive, no attempts appear to have been made by the SPO to interview him, or at least none of his statements have been disclosed. The witness' only other claimed basis for knowledge with respect to this allegation is unattributed hearsay, stemming from "people [who] would talk about it."²⁵
24. The witness' evidence is furthermore devoid of any particularity. There is no indication as to the period during which [REDACTED] would have been detained or as to the identity of the individuals involved in his detention. Therefore, not only is this incident equally uncharged and the SPO failed to provide adequate notice of its intention to rely on it as part of its case, but the probative value and reliability of the evidence related to this incident remains obscure. The prejudicial effect that leading this evidence will have on the Accused – of having to confront an entirely new substantive allegation that has only been notified as such on the eve of the witness' testimony and in the absence

²⁴ 102761-TR-AT Part 1 Revised-ET, p. 26.

²⁵ Prep Note, para. 38.

of any particulars required to properly investigate that allegation – conspicuously outweighs the impugned evidence’s marginal, if any, probative value.

III. CLASSIFICATION

25. The present submissions are filed confidentially as they refer to confidential information pertaining to witnesses who have been granted protective measures. A public redacted version of this filing will be filed in due course

IV. CONCLUSION

26. Considering the foregoing, the Defence respectfully requests the Trial Panel to (i) order the SPO not to elicit any evidence in relation to the two allegations; and (ii) caution the witness not to offer any evidence in relation to those allegations voluntarily.

Word count: 3007

Respectfully submitted on 25 June 2024,



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