

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 Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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**Public Redacted Version of Joint Defence Response to Prosecution request to
amend the Exhibit List and admit video following W04410's testimony**

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I. INTRODUCTION

1. The Defence for Messrs. Thaçi, Veseli, Selimi and Krasniqi (“the Defence”) hereby files its Response to the Prosecution request to amend the Exhibit List and admit video following W04410’s testimony¹ (“SPO Request”). The Request should be rejected. The SPO has failed to demonstrate good cause for the addition of the recently published video² (“Video”) to its exhibit list pursuant to Rule 118(2), and has further failed to demonstrate that the requirements of Rule 138(1) have been met in respect of its offer for admission.
2. The SPO’s submissions on the relevance of the Video fail to account for the nature of the video as an edited clip rather than uninterrupted footage. In addition, the SPO misrepresents the evidence it offers as both corroborative and also as proof of relevance, while concomitantly failing to provide any indication as to the provenance or authorship of the Video.

II. SUBMISSIONS

A. The SPO has failed to establish the *prima facie* relevance of the Video

3. The SPO erroneously avers that the Video is relevant to [REDACTED], a few weeks prior to an incident where [REDACTED].³ As such, it argues that, in light of the fact that the Video contains footage duplicative of an already admitted video⁴ depicting Mr. Veseli being part of a group escorting the wounded on the 8th April 1999, the Video depicting Mr. Selimi alongside Mr. Veseli further

¹ KSC-BC-2020-06/F02399, Prosecution request to amend the Exhibit List and admit video following W04410’s testimony, 21 June 2024.

² 121386-01.

³ Request, para. 2.

⁴ 2D00022.

demonstrates Mr. Selimi's presence in the same group, thereby corroborating [REDACTED].⁵

4. The SPO's submissions conspicuously fail to address the fact that the Video is an edited clip rather than uninterrupted and continuous footage, and consists of several separate pieces of footage collated together in one video. As such, the Video contains several distinct clips depicting events that are isolated in terms of location and substance from the footage contained in 2D00022 – as is evident from the various locations and individuals depicted therein.⁶ In essence, the only overlap between the two videos is a 20-second portion of the Video,⁷ yet the Video contains another minute and a half of separate footage. The SPO has offered nothing in support of its contention that the remaining independent footage, and in particular the portions of the Video depicting Mr. Selimi,⁸ are connected to the overlapping footage which, according to the voice-over in 2D00022, purports to describe events that occurred on the 8th of April 1999 in Baicë/Banjica.
5. In that respect, the only apparent connection between the relevant new portion in the Video depicting Mr. Selimi⁹ and 2D00022 is that, in that portion, Mr. Selimi features alongside Mr. Veseli, who appears to be wearing similar clothing as in 2D00022, yet in an entirely different setting from the one where Mr. Veseli is depicted in 2D00022. The SPO is therefore inviting the Trial Panel to draw the implausible inference that the mere presence of Mr. Selimi together with Mr. Veseli in this new clip is demonstrative of Mr. Selimi's presence during the exact same event depicted in 2D00022. The Panel has already heard evidence from W04410 that the KLA would be wearing the same clothing for several days due

⁵ *Id.*

⁶ See, for example, Video, timestamps 00:00-00:15; 00:41-01:54,

⁷ Video, timestamp 00:16-00:38.

⁸ Video, timestamp 01:01-01:15.

⁹ *Id.*

to the war conditions at the time,¹⁰ thereby clearly undermining this speculative assertion.

6. In addition, the fact that the article from which the Video originates refers to Mr. Selimi removing the wounded and the civilians from war zones is insufficient for the purposes of establishing the Video's relevance, since there is no indication of the basis upon which the claim in question was made. As the SPO fails to provide any evidence as to the authorship of the Video and the article; the mere fact that the article proffers such a claim absent any support to that effect, and absent the Defence's ability to investigate and challenge its accuracy, falls short of establishing the veracity of that description.
7. As such, the only fact of which the Video is probative is that Messrs. Selimi and Veseli would have been in each other's company on an unknown date, at an unknown location, and in the context of an unknown course of events. In that context, the Trial Panel has previously denied the admission of materials merely depicting the Accused and/or other individuals on grounds that the relevance of such materials is uncertain in the absence of further details, such as the date of the event in question, location or contextualisation by a witness.¹¹ Similarly, other chambers have established that the relevance of audio or video material depends on the date and/or location of recording, and that evidence must be provided in this regard for such evidence to be admissible.¹² In the present instance, no evidence has been adduced by the SPO in support of the contention that the two videos depict the same course of events, and that the evidence

¹⁰ Transcript of 5 June 2024, p. 16762.

¹¹ KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, paras. 15, 124; KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 18; Transcript of 5 June 2024, p. 16799.

¹² ICC, *The Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Prosecutor's Bar Table Motions, 17 December 2010, para. 24(d).

related to the date and location of the events described in 2D00022 would simultaneously contextualize the events depicted in the Video.

8. Furthermore, the Trial Panel denied the admission of photographic evidence submitted by the SPO as depicting certain locations where the veracity of those contentions was not self-evident from the content of the materials in question.¹³ In the present instance, in the absence of further contextualisation, it is equally far from self-evident that the footage depicting Mr. Selimi in the Video corresponds to the events and locations depicted in 2D00022.
9. Finally, even assuming *in arguendo* that the footage depicting Mr. Selimi in the Video is connected to the events described in 2D00022, the SPO's arguments in relation to the professed relevance of the Video would still fail in light of the [REDACTED].
10. [REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].
11. [REDACTED],¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰ Nor has the SPO endeavoured to call any of these individuals as witnesses with the aim of providing further particularity as to the date of the incident. As such, the SPO has failed to identify any basis suggesting a correlation between [REDACTED] and those depicted in the two videos.

¹³ KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 18.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ *Id.*

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ Transcript of 5 June 2024, p. 16822.

²⁰ [REDACTED].

12. For the above reasons, the SPO has failed to establish the purported relevance of the Video that would justify its addition to the exhibit list and its concomitant admission. As the Panel noted, leave to amend the Exhibit List should not be granted with respect to items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.²¹ A video depicting an interaction between two Accused devoid of any context, and taking into account the SPO's failure to point to any forthcoming witness who would be in a position to provide such context, falls squarely within the bounds of material that is irrelevant.

B. The SPO has failed to establish the *prima facie* authenticity of the Video

13. The Trial Panel previously determined that “[a]dmissibility of videos generally requires information regarding of their origin and integrity, and the relevance of the material is to be assessed based upon whether they relate to locations, people, and/or events that form part of the case.”²² It further noted that “the fact that the videos are not being tendered through the creator of those videos, the interviewee, or a relevant witness potentially inserts unfair prejudice into the proceedings.”²³ The SPO has failed to provide any information as to the exact provenance and authorship of the Video.

14. W04410 identified the footage contained in 2D00022 as it was used in a documentary on the war invalids.²⁴ However, he stated that he is not the author of the footage, as he was not present in the warzones at the relevant time.²⁵ The SPO neither made an attempt to re-examine the witness on the actual author of

²¹ KSC-BC-2020-06/F01656, Decision on Prosecution Request to Add Intercepted Communications to the Exhibit List, 7 July 2023, para. 16.

²² KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 26.

²³ *Ibid*, para. 28.

²⁴ Transcript of 5 June 2024, pp. 16822-16823.

²⁵ *Ibid*, p. 16825.

the footage, nor to elicit any further particularities in respect of the documentary on war invalids in which that footage was purportedly included.

15. It is incumbent upon the SPO to lay sufficient foundation during the course of a witness' *viva voce* testimony to satisfy the Trial Panel that the proposed exhibit is relevant and has probative value.²⁶ In the present instance, the SPO has made no such effort. The SPO's averment that W04410's limited commentary on 2D00022, which is devoid of any remarks as to its authorship or production process, would mutually authenticate the Video merely by virtue of the 20-second overlap between the two is without merit.
16. Similarly, the Nacionale article where the Video originates from provides no indication as to the purported authorship of the Video. There is likewise no indication in that article whether this footage was featured in the documentary on war invalids that W04410 referred to. The SPO has not disclosed any materials that demonstrate any attempts on its part to establish the exact provenance and authorship of the Video. Instead, in the course of *inter partes* communication, in response to a Defence inquiry as to the provenance of the Video, the SPO indicated that "the SPO has no further information about the provenance of this footage beyond the Nacionale article provided."²⁷
17. While definite proof of authorship is not required for admissibility or exhibit list amendment purposes, the mere fact that a video features on an internet website (from which it was subsequently removed) does not satisfy *any* standard of authenticity. The Trial Panel has previously denied admission of materials originating from the media where the author and date are not clearly

²⁶ SCSL, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-AR74, Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 6 February 2009, paras. 40-42; ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92bis (Witnesses for Sarajevo Municipality, 15 October 2009, para. 4.

²⁷ Email from the SPO on 12 June 2024 at 08:17.

identifiable, and where such materials provide no basis or origin for the information recorded.²⁸ Equally, in the present instance, the SPO's own failure to procure evidence as to the authorship or provenance of the Video cannot relieve it from its burden to plead the requisite conditions for the admissibility of the exhibits it intends to use at trial.

III. CLASSIFICATION

18. The present submissions are filed confidentially pursuant to Rule 82(4). A public redacted version will be filed in due course.

IV. CONCLUSION

19. For the foregoing reasons, the Defence respectfully requests the Trial Panel to REJECT the SPO's request to add the Video to its exhibit list and to have it admitted into evidence.

Word count: 2295

Respectfully submitted on 3 July 2024,



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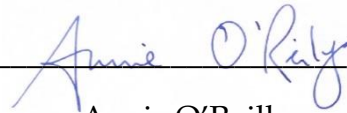
²⁸ KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 38.



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