

**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:** 8 July 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Selimi Defence Response to Prosecution request  
for leave to appeal Decision F02393**

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## I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“the Defence”) hereby files its Response to the Prosecution request for leave to appeal Decision F02393<sup>1</sup> (“Request”). The Request should be rejected. Decisions related to the admission of evidence pursuant to Rule 138, including those related to the exclusion of evidence, are generally treated as discretionary, and appellate intervention in that respect is warranted only in very limited circumstances.<sup>2</sup> The SPO’s submissions fall short of identifying any discernible errors deriving from the Decision<sup>3</sup> that would exceptionally warrant such intervention.
2. Instead, the Request is rife with (i) unsubstantiated and belated criticisms addressing the entire applicable legal framework concerning the exclusion of evidence; (ii) distortions of the Trial Panel’s assessment of the evidence challenged; and (iii) biased, unsupported reinterpretations of the requirements of Rule 138.

## II. SUBMISSIONS

### A. The SPO failed to identify any discrete and appealable issues

#### 1. First Issue

3. The SPO avers that the Trial Panel “improperly pre-judged the reliability and probative value of the witness’ anticipated live testimony” by basing its assessment on statements not offered for admission.<sup>4</sup> The SPO’s submissions

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<sup>1</sup> KSC-BC-2020-06/F02410, Prosecution request for leave to appeal Decision F02393, 26 June 2024.

<sup>2</sup> KSC-BC-2020-06/IA030/F00009, Decision on Krasniqi and Selimi Appeals against “Decision on Prosecution Motion for Admission of Accused’s Statements”, 31 May 2024, para. 6; KSC-BC-2020-06/F02357, Decision on Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155, 3 June 2024, para. 15.

<sup>3</sup> KSC-BC-2020-06/F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, 19 June 2024 (“Decision”).

<sup>4</sup> Request, para. 7.

therefore challenge the entire procedure for seeking to exclude a witness' evidence, developed by the Trial Panel in previous rulings that the SPO did not seek to challenge at the material time.

4. Shortly after the commencement of the trial, the Panel determined, in response to a motion to strike from the record an extract of testimony, that "there is no legal basis foreseen in the law or the rules that would allow the Panel to strike from the record certain passages with which the parties take issue."<sup>5</sup> Subsequently, the Trial Panel clarified that "an objection regarding the admissibility of *viva voce* evidence be made in principle before or at the time that the witness gives evidence."<sup>6</sup> On that basis, the Trial Panel has previously excluded evidence<sup>7</sup> following a request by the Defence made on the basis of a witness' prior statements that were not put forward for admission and which relied, in part, on the reliability and probative value of the assertions contained therein.<sup>8</sup>
5. Furthermore, in *Gucati and Haradinaj*, the SPO requested the very same relief in relation to Defence witnesses on grounds that the expected testimony of several such witnesses would not comport with the requirements of Rule 138, and relied, in part, on the contents of witness statements for which there is no indication that they were offered for admission.<sup>9</sup> Neither the Trial Panel, nor the Appeals Panel seized in that instance, identified any impropriety in the SPO's invitation

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<sup>5</sup> Oral Order of 10 May 2023, transcript page 3396 line 9 to page 3397 line 1.

<sup>6</sup> 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. 13.

<sup>7</sup> Oral Order of 17 April 2023, transcript page 2863 line 13 to page 2866 line 8.

<sup>8</sup> KSC-BC-2020-06/F01438, Selimi Defence Motion for Exclusion of Evidence of Witness W02652, 6 April 2023.

<sup>9</sup> KSC-BC-2020-07/F00312, Prosecution requests in relation to Defence witnesses, 15 September 2021, para. 14; KSC-BC-2020-07/F00466, Prosecution further requests in relation to Defence witnesses, 1 December 2021, paras. 7-9.

to assess the merits of its request on the basis of such statements, but instead duly carried out the requested assessment.<sup>10</sup>

6. Therefore, the SPO's objections do not identify discrete issues arising from the Decision, but instead are an attempt to selectively disapply the established procedure for excluding evidence not comporting with the requirements of Rule 138 in the present instance.
7. In addition, the SPO argues that "any minor inconsistencies or speculation in W04846's prior statements, or lack of corroboration of his primarily first-hand, eyewitness evidence concerning the Second Allegation could have been adequately addressed during testimony and at the conclusion of the trial."<sup>11</sup> The SPO is thus seeking to artificially fragment the Trial Panel's assessment of the evidence in arriving at its decision.
8. The Panel did not rely on the above two factors as the sole basis warranting exclusion. Rather, the Trial Panel determined, *inter alia*, that the Second Allegation (i) is not charged in the Indictment;<sup>12</sup> (ii) occurred before the Indictment period and is not linked to a charged crime site;<sup>13</sup> and (iii) is highly prejudicial as it purports to detail Mr. Selimi's involvement in acts similar to those charged in the Indictment yet which are not pled as such.<sup>14</sup> It is in this context that the existence of inconsistencies and speculation, and the concomitant lack of corroboration, were also identified as compounding factors of the evidence's unsuitability for admission.

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<sup>10</sup> KSC-BC-2020-07/F00470, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021, para. 80; KSC-BC-2020-07/1A006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022, para. 19.

<sup>11</sup> Request, para. 9.

<sup>12</sup> Decision, para. 16.

<sup>13</sup> *Ibid*, para. 26.

<sup>14</sup> *Ibid*, para. 28.

9. While the SPO indicates that the relevant finding constitutes “a significant departure from the Panel’s prior decisions concerning other testimonial evidence”,<sup>15</sup> it conspicuously fails to identify any decision where the factors outlined above would have also formed part of the factual scenario before the Trial Panel – and where the Trial Panel would have granted admission in similar circumstances. Instead, the presence of inconsistencies and speculation, and the lack of corroboration, while not independently capable of warranting exclusion, have been previously identified as relevant considerations.<sup>16</sup> The Trial Panel adopted the same position in the Decision by asserting that “while inconsistencies within a witness’s proposed evidence do not make such evidence inadmissible, they are factors that the Panel has considered when assessing the First Allegation”.<sup>17</sup> The Trial Panel’s reasoning is therefore entirely consonant with its previous findings.

## 2. Second Issue

10. First, the SPO avers that the Trial Panel gave undue weight to the nature of the Second Allegation, arguing that the witness’s evidence was not being proposed as ‘bad character’ evidence, but instead, to prove the elements of the offences and modes of liability pleaded.<sup>18</sup> That the Trial Panel found that the evidence was *prima facie* relevant<sup>19</sup> establishes that it was evidently cognisant of this fact when it proceeded to assess the conjunctive element of whether the probative value of the evidence was not outweighed by its prejudicial effect.
11. Furthermore, the mere fact that the Panel found the evidence to be relevant does not automatically render immaterial the other defects present, such as the

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<sup>15</sup> Request, para. 5.

<sup>16</sup> Oral Order of 17 April 2023, transcript page 2863 line 13 to page 2866 line 8; KSC-BC-2020-06/F02013, Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155, 15 December 2023, paras. 56-57.

<sup>17</sup> Decision, para. 2..

<sup>18</sup> Request, para. 12.

<sup>19</sup> Decision, para. 27.

uncorroborated nature of the evidence, the presence of inconsistencies and speculative assertions, and the uncharged and extra-temporal nature of the incident concerned. The SPO erroneously argues that the Panel should have ignored the above particularities of the evidence which clearly diminish its probative value by relying exclusively on whether the evidence is connected to the material facts in the Indictment.

12. Second, the SPO argues that “the Panel gave undue weight to the timing of the Second Allegation, without any acknowledgement of its close temporal connection the Indictment period”.<sup>20</sup> The SPO fails to point to any authority in support of its contention that the Trial Panel would have been required to specifically identify this arbitrary factor as enhancing the probative value of the evidence. Additionally, the Trial Panel is not required to address all of the arguments raised by the Parties provided that it indicated with sufficient clarity the basis for its decision.<sup>21</sup> Therefore, the SPO fails to substantiate any basis for why the Trial Panel, in the exercise of its discretion, would have been specifically required to outline this argument and analyse its merits.
13. For the foregoing reasons, the Second Issue does not constitute a discrete issue deriving from the Decision but rather an attempt to re-litigate the issue by reiterating previously made arguments.

### **3. Third Issue**

14. The SPO avers that the Trial Panel failed to take into account that the witness would be available for cross-examination and that the trial is being conducted by professional Judges.<sup>22</sup> The SPO fails to provide any substantiation for the

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<sup>20</sup> Request, para. 13.

<sup>21</sup> KSC-BC-2020-07/F00114, Appeal Judgment, 2 February 2023, para. 33; KSC-BC-2020-06/F01300, Decision on Krasniqi Defence Request for Certification to Appeal the “Order on the Conduct of Proceedings”, 16 February 2023, para. 15.

<sup>22</sup> Request, para. 15.

contention that the Trial Panel would have somehow lost sight of the fact that the trial is conducted by professional Judges. Furthermore, the Trial Panel has specifically outlined the SPO's argument to the effect that the Defence is able to cross-examine the witness.<sup>23</sup>

15. The possibility for the Defence to challenge any evidence through cross-examination, or for the Panel to assess the results of that cross-examination, does not constitute an absolute safeguard against the existence of prejudice. The safeguards of Rule 138 would, in this alternative scenario, become meaningless should the sole fact that the Trial Panel is composed of professional Judges dispel any concern for prejudice, or would otherwise only be applicable to cases where evidence is submitted absent cross-examination – a position for which the SPO offers no support. While the above factors may be relevant, among others, to the assessment of prejudice, as explained above, the Trial Panel was evidently cognisant of these factors when issuing its ruling.
16. The SPO's argument that the Trial Panel did not accord these factors overall primacy, while concomitantly failing to substantiate why the Trial Panel would have been required to do so, constitute mere disagreements with the Decision.

#### **4. Fourth Issue**

17. In addition to repeating the contentions addressed above, the SPO argues that “[i]n relation to reliability, the Panel did not provide any citation, discussion, or explanation of which inconsistencies or speculations in the witness's evidence it considered”.<sup>24</sup> In its motion, the Defence alerted the Trial Panel to numerous instances of the witness (i) providing speculation in relation to the Second Allegation; (ii) attesting to facts whose reliability is undermined by his geographical remoteness from the events described; and (iii) otherwise

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<sup>23</sup> Decision, para. 10.

<sup>24</sup> Request, para. 18.

proffering evidence that is inconsistent with [REDACTED] or other materials in the evidentiary record.<sup>25</sup> In its response, the SPO made no attempt to contest the accuracy of the factual arguments made by the Defence, beyond merely stating that “W04846’s prior statements are generally consistent, including in relation to the Anticipated Testimony”<sup>26</sup> and that “during his testimony, W04846 will, naturally, be asked to provide his basis of knowledge, including in relation to the Anticipated Testimony.”<sup>27</sup>

18. In the present circumstances, the SPO is now belatedly objecting that the Trial Panel did not provide an individualized assessment on the issues advanced by the Defence, when the SPO failed to provide any specific submissions signalling that the above issues are in dispute. The SPO did not provide any individual submissions refuting those issues which may have required the Trial Panel to carry out such assessment.
19. The Trial Panel has previously rejected arguments made by the SPO to the effect that an impugned decision issued by the Pre-Trial Judge did not contain a case specific determination when “the SPO, in its original submission, does not appear to have requested the Pre-Trial Judge to undertake an individualized assessment of such material before making such an order, nor did it provide specific information that would have enabled the Pre-Trial Judge to conduct such a review.”<sup>28</sup> Similarly, having not raised any objections in its original submissions in the present instance, the SPO has failed to identify an issue deriving from the Decision.

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<sup>25</sup> KSC-BC-2020-06/F02166, Selimi Defence Motion for the Exclusion of Evidence of W04846 with Confidential Annex 1, 6 March 2024, paras. 38-43.

<sup>26</sup> KSC-BC-2020-06/F02187, Prosecution response to Selimi Defence Motion for the Exclusion of Evidence of W04846, 18 March 2024, para. 12.

<sup>27</sup> *Ibid*, para. 15.

<sup>28</sup> KSC-BC-2020-06/F01206, Decision on SPO Request for Reconsideration and/or Leave to Appeal of F01149, Suspensive Effect and Request for Time Extension, 13 January 2023, para. 26.



20. With respect to the SPO's contention that the Panel did not address the corroborative and complementary evidence cited in the Response,<sup>29</sup> the SPO failed to explain how the mere existence of that material would have mitigated the prejudice inherent to the admission of the evidence and further, how it would have invalidated the considerations outlined by the Panel in determining the existence of such prejudice. In particular, the SPO failed to demonstrate how the material cited by the SPO,<sup>30</sup> namely [REDACTED], would corroborate the specific account provided by the W04846 so as to bolster its probative value to such extent that it would offset the substantial prejudice identified by the Panel.
21. The SPO thus fails to show how a cursory reference to that material in its original submissions, bereft of any specific arguments on its relevance *vis-à-vis* the issues flagged by the Defence, would have required the Trial Panel to enter a specific finding in its respect. Additionally, the Appeal Panel has already determined that if a trial panel did not refer to a specific piece of evidence in its findings, it is to be presumed that it assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.<sup>31</sup> The SPO's arguments do nothing in the way of rebutting that presumption.

**B. The SPO failed to demonstrate that the issues significantly affect the fair and expeditious conduct of the proceedings and that appellate intervention would significantly advance the proceedings.**

22. The SPO misleadingly argues that excluding the relevant parts of W04846's testimony undermines the trial truth-seeking function.<sup>32</sup> Furthermore, the SPO claims that the Decision allows the Defence to "make further requests to artificially segment and exclude relevant testimony based on the same grounds

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<sup>29</sup> Request, para. 18.

<sup>30</sup> SPOE00226527-SPOE00226613-ET Revised, pp.SPOE00226588-90, SPOE00226593.

<sup>31</sup> KSC-CA-2023-02/F00038, Appeal Judgment, 14 December 2023, para. 34.

<sup>32</sup> Request, para. 21.

concerned by the Issues”, which will “further limit the truth-seeking function of this trial.”<sup>33</sup> The SPO is thus arguing that the well-established mechanism for exclusion of evidence, deployed under the same iterations as established by the Trial Panel before several other international tribunals,<sup>34</sup> and by the SPO itself in parallel proceedings before the KSC,<sup>35</sup> would somehow be at odds with the truth-seeking functions of this trial.

23. It has been established that objections seeking to exclude a witness’ evidence “play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused.”<sup>36</sup> They are therefore instrumental to ensuring that only evidence comporting with the admissibility requirements is considered by the Trial Panel in the determination of the Accused’s guilt. Such objections are therefore essential to the truth-finding function of a trial by ensuring that highly prejudicial or fundamentally unreliable evidence is not introduced into the proceedings. The SPO’s broad criticism of this procedure constitutes an attempt to rewrite the relevant admissibility requirements in its own favour. As such, the SPO is essentially arguing that the mere fact that it is not given *carte blanche* to lead prejudicial evidence is frustrating the fair and expeditious conduct of proceedings.
24. The SPO’s description of the exclusion of evidence being “an extreme and exceptional remedy”<sup>37</sup> rely on an inapposite reading of the jurisprudence cited.

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<sup>33</sup> *Ibid*, para. 22.

<sup>34</sup> See, e.g. ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion for Exclusion of Evidence, 2 June 2011; *Prosecutor v. Ndayambaje et al*, Case No. ICTR-98-42-T, Decision on Ndayambaje’s Motion for Exclusion of Evidence, 1 September 2006; ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23 & 23/1, Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000

<sup>35</sup> *Supra* para. 5.

<sup>36</sup> ICTR, *Prosecutor v. Bagosora et al.*, Case No, ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence, 4 September 2006, para. 9; *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. 14.

<sup>37</sup> Request, paras. 1, 19, 22.

The findings referenced by the SPO<sup>38</sup> exclusively attest to the fact that exclusion should be considered as an exceptional relief in situations where the prejudice is occasioned solely by late disclosure and insufficient notice. The SPO has failed to adduce any jurisprudential support for the contention that exclusion should be the last resort in respect of evidence where, as in the present the case, the prejudice is compounded by a multitude of factors, as detailed above, and where exclusion is the only remedy capable of obviating such prejudice.

25. Furthermore, as outlined above,<sup>39</sup> the extant procedure for exclusion of evidence was progressively developed through several rulings of the Trial Panel. The SPO did not seek certification to appeal any of these earlier rulings, and did not raise any objections to such procedure at the time the litigation which generated them was ongoing. Thus, not only has the SPO failed to identify appealable issues deriving exclusively from the Decision, but it further failed to explain why appellate resolution would materially advance proceedings only at this stage when it did not consider such intervention to be warranted in previous instances when the exclusion procedure was delineated and applied.

### III. CLASSIFICATION

26. The Present submissions are filed confidentially pursuant to Rule 82(4).

### IV. CONCLUSION

27. Considering the foregoing, the Defence respectfully requests the Trial Panel to REJECT the Request.

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<sup>38</sup> Request, footnote 4.

<sup>39</sup> *Supra* para. 4.

Word count: 3000

Respectfully submitted on 8 July 2024,



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