

**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:** 22 August 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Selimi Defence Motion for Exclusion of Evidence  
of W04735 with Confidential Annex 1**

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## I. INTRODUCTION

1. Pursuant to Rule 138(1), the Defence for Mr. Rexhep Selimi (“the Defence”) hereby files its motion for the exclusion of certain evidence related to W04735. The Motion seeks the exclusion of W04735’s evidence on four issues falling outside the scope of the witness’ Rule 154 Statement and which do not feature in any of the charging instruments, namely, allegations that (i) Mr. Selimi was involved in the [REDACTED]; (ii) Mr. Selimi was involved in [REDACTED]; and (iii) a conversation purportedly took place between W04735 and Hashim Thaçi [REDACTED] in which Mr. Selimi was alleged to have been responsible for [REDACTED]. Two of these allegations have already been the subject of previous exclusion of evidence orders, whereby the evidence of two previous SPO witnesses in relation to the same allegations has been excluded on grounds that their probative value is outweighed by their prejudicial effect. For this reason, and as further set out below, the Defence requests that the exclusion orders previously issued by the Trial Panel be extended to W04735’s evidence on the same allegations.
2. Concerning the purported meeting between W04735 and Hashim Thaçi [REDACTED], in which Mr. Selimi was alleged to have been responsible for [REDACTED], the marginal, if any, probative value of this evidence is substantially outweighed by its prejudicial effect and thus its exclusion is warranted to protect the rights of the Accused.

## II. SUBMISSIONS

### A. Previous *inter partes* communications

3. On 29 July 2024, in aim of expediting W04735’s upcoming testimony, the Defence wrote to the SPO with a view to reaching an *inter partes* agreement limiting the scope of W04735’s direct examination to the facts and circumstances contained

in the witness' Rule 95 summary and referred to in the SPO's Pre-Trial Brief.<sup>1</sup> On 30 July 2024, the SPO responded stating that "[i]t is currently foreseen that W04735's direct examination will be limited to the evidence detailed in the Rule 95 Summary, in the Pre-Trial Brief, Notification filing and in the Rule 154 Motion."<sup>2</sup> Considering that the SPO has not agreed to the Defence proposal to caution the witness to not volunteer any evidence that falls outside the scope of the charges, and that the notification filing indicates that documents where the allegations concerned are being addressed will be used during W04735's upcoming testimony, the Defence hereby seeks recourse to the Trial Panel so that W04735's testimony is limited to facts and circumstances relevant to the charges as properly notified in the charging instruments.

## **B. Extension of previous exclusion orders**

### **1. [REDACTED]**

4. W04735's previous statements and one contact note from late 2020 contain several references to an alleged involvement of Mr. Selimi in the [REDACTED]. The witness alleges, in particular, that [REDACTED] at Mr. Selimi's behest,<sup>3</sup> and that Mr. Thaçi purportedly alleged to him that Mr. Selimi [REDACTED].<sup>4</sup> In that respect, one of the documents that the SPO has notified as a proposed exhibit to be used in the course of W04735's direct examination makes specific reference to [REDACTED] as an individual killed during the war.<sup>5</sup>
5. On 6 March 2024, the Defence filed a motion for the exclusion of evidence in relation to [REDACTED], arguing that the two allegations fall outside the scope of the charges in the Indictment and are marred by incurable reliability concerns

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<sup>1</sup> Annex 1.

<sup>2</sup> *Id.*

<sup>3</sup> 083218-TR-ET Part 4, p. 20; 083218-TR-ET Part 9, p. 5; See also 083218-TR-ET Part 4, p. 8.

<sup>4</sup> 085835-058367, p. 085836.

<sup>5</sup> 058504-058528-ET, p. 058527; KSC-BC-2020-06/F02451/A01, ANNEX 1 to Prosecution submission of list of witnesses for 19 August to 7 November 2024, 16 July 2024, pp. 19-20.

that render W04846's evidence on these allegations severely outweighed by its prejudicial effect.<sup>6</sup> On 19 June 2024, the Trial Panel granted the motion, finding, *inter alia*, in relation to the [REDACTED] allegation, that (i) the *prima facie* relevance, reliability and probative value of W04846's evidence in relation to this allegation is remote at best;<sup>7</sup> (ii) that the evidence in question amounts to largely inconsistent hearsay accounts;<sup>8</sup> and (iii) that the limited probative value of that evidence is outweighed by its prejudicial effect on the Accused.<sup>9</sup> Concerning the [REDACTED] allegation, the Trial Panel determined that, notwithstanding that this allegation is *prima facie* relevant and sufficiently connected to material facts in the Indictment, W04846's evidence in that regard is clearly inconsistent or appears speculative and bears "low and questionable probative value but substantial prejudicial effect on the Accused."<sup>10</sup>

6. Considering the above, W04735's evidence related to [REDACTED] is equally marred by the reliability, probative value and relevance issues that the Trial Panel has identified in respect of W04846's evidence on these two allegations. Furthermore, there is no indication that W04735's evidence on these two allegations would be capable of dispelling the prejudice recognized by the Trial Panel as inherent to the same allegations as set out in W04846's evidence. For these reasons, the Defence reiterates its submissions on the relevance, probative value and prejudicial effect of the allegations in question<sup>11</sup> and submits that they are equally pervasive in the context of W04735's evidence.

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

<sup>7</sup> KSC-BC-2020-06/F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, 19 June 2024, para. 22

<sup>8</sup> *Id.*

<sup>9</sup> *Ibid*, para. 23.

<sup>10</sup> *Ibid*, para. 28.

<sup>11</sup> KSC-BC-2020-06/F02166, Selimi Defence Motion for the Exclusion of Evidence of W04846 with Confidential Annex 1, 6 March 2024.

7. In addition, there is virtually no foundation for the witness' evidence that Mr. Selimi was involved [REDACTED], beyond the claim that Mr. Thaçi allegedly informed him of Mr. Selimi's role in the incidents.<sup>12</sup> There is no indication in the witness' prior statements as to the purported basis of knowledge for making these allegations, if they were indeed made, and considering that the Defence is not in a position to cross-examine Mr. Thaçi on the matter unless he elects to testify, there is no other avenue through which the Defence could challenge the foundation for the claims in question, in particular as W04735 clarified that nobody else participated in the meeting in question.<sup>13</sup>
8. Whereas hearsay evidence is only admissible to the extent that it does not disproportionately interfere with the rights of the Accused,<sup>14</sup> the admission of evidence which relies on hearsay allegedly originating from a Co-Accused enjoying testimonial privilege which only that individual can verify and provide further evidence in respect of would profoundly prejudice the Accused. The Defence further notes that no attempt was made by the SPO to interview Mr. Thaçi in relation to these allegations, which would have allowed the Defence to further ascertain the basis for and investigate the allegations concerned.
9. In addition, W04735's evidence is further replete with inaccuracies, mistakenly referring to [REDACTED],<sup>15</sup> seemingly mistaking him with [REDACTED],<sup>16</sup> or as [REDACTED],<sup>17</sup> yet again seemingly mistaking him with another individual who is alleged to have died in 2000.<sup>18</sup> The witness further inaccurately identifies

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<sup>12</sup> 085835-058367, p. 085836.

<sup>13</sup> *Ibid*, p. 085835.

<sup>14</sup> KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023, paras. 21, 47; KSC-BC-2020-06/F02489, Decision on Prosecution Motion for Admission of Evidence of Witnesses W03871, W04735, and W04868 Pursuant to Rule 154 and Related Requests (F02450), 13 August 2024, para. 45.

<sup>15</sup> 085835-058367, p. 085836.

<sup>16</sup> 058504-058528-ET, p. 058521.

<sup>17</sup> 083218-TR-ET Part 4, p. 4.

<sup>18</sup> *Ibid*, p. 058524.

the location where the [REDACTED]<sup>19</sup>, and claims that [REDACTED] (erroneously referred to as [REDACTED]) spent [REDACTED]<sup>20</sup> as opposed to [REDACTED].<sup>21</sup> The above inaccuracies demonstrate that W04735 possesses no independent knowledge of the allegations at issue. Therefore, no basis exists for allowing W04735 to air the allegations in question, and the Trial Panel's exclusionary order concerning the same allegations which have been excluded in the context of W04846's evidence should apply *mutatis mutandis* with respect to W04735.

### **The W02652 Allegation**

10. W04735 makes numerous references to an alleged involvement of Mr. Selimi in an [REDACTED].<sup>22</sup> The allegation in question also surfaces in two documents that the SPO notified as proposed exhibits.<sup>23</sup> None of these allegations are accompanied by any foundation, besides W04735's uncorroborated claim that Mr. Thaçi presented him with a UNMIK case file [REDACTED] which implicates Mr. Selimi.<sup>24</sup>
11. On 6 April 2023, the Defence filed its motion for the exclusion of evidence of W02652, including *vis-à-vis* [REDACTED] supposedly carried out by Mr. Selimi's [REDACTED], arguing that the evidence in question, dealing with incidents which occurred outside the Indictment period, is not relevant to the charges, is uncorroborated and marred by several reliability concerns.<sup>25</sup> On 17 April 2023, the Trial Panel issued an oral order granting the motion, finding, *inter alia*, that

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<sup>19</sup> 083218-TR-ET Part 4, p. 20.

<sup>20</sup> *Id.*

<sup>21</sup> [REDACTED].

<sup>22</sup> 083218-TR-ET Part 2, p. 4; 083218-TR-ET Part 4, p. 20; 085835-058367, pp. 085835-085836; 104364-104365, p. 104365; 107023-107023.

<sup>23</sup> 058504-058528-ET, p. 058528; 058273-01-TR-ET; KSC-BC-2020-06/F02451/A01, ANNEX 1 to Prosecution submission of list of witnesses for 19 August to 7 November 2024, 16 July 2024, p. 20.

<sup>24</sup> 085835-058367, pp. 085835-085836.

<sup>25</sup> KSC-BC-2020-06/F01438, Selimi Defence Motion for Exclusion of Evidence of Witness W02652, 6 April 2023.

(i) the SPO has failed to demonstrate the *prima facie* relevance of this incident; (ii) there are issues with the reliability, credibility and probative value of the evidence related to Mr. Selimi's involvement in that incident; and (iii) the marginal, if any, probative value of that evidence is outweighed by its prejudicial effect, and its admission would place the Accused in a position of challenging allegations that are, in effect, unverifiable.<sup>26</sup>

12. As is the case for the [REDACTED], there is no added detail, specificity or additional information in W04735's evidence in relation to W02652 that would mitigate the prejudice that the Trial Panel has identified as inherent to the admission of W02652's evidence on the same event. Nor is W04725's evidence to that effect capable of augmenting the relevance and probative value of the evidence concerned such that it would offset the prejudice identified.
13. In fact, W04735's repeated claims that Mr. Selimi [REDACTED] are almost verbatim retellings of the account proffered by W02652 in his SPO interview<sup>27</sup> and also by W02652's brother.<sup>28</sup> As such, and considering further that W02652 claimed that [REDACTED],<sup>29</sup> and absent any further foundation for the claims in question, the only reasonable inference to be drawn in this matter is that W04735's evidence in relation to W02652 is mere hearsay originating from the latter. In that regard, there is no basis for admitting hearsay evidence where the evidence that it originates from has been excluded, including on account of it being uncorroborated hearsay itself.
14. With respect to the alleged transmission of the UNMIK case file to W04735, the Defence notes the material in question<sup>30</sup> was disclosed to the Defence in February

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<sup>26</sup> Oral Order on Selimi Defence Motion for Exclusion of Evidence (F01438), 17 April 2023, Transcript Page 2863 Line 13 to Page 2866 Line 8.

<sup>27</sup> 051955-TR-ET Part 7, pp. 24-25.

<sup>28</sup> 108786-108797, p. 108792.

<sup>29</sup> Transcript of 19 April 2023, p. 3134.

<sup>30</sup> 085835-085867 RED.

2023. The Trial Panel would have therefore had the information contained therein at its disposal when it issued the Oral Order. In addition, the contents of that material refer exclusively to individuals who are not on the SPO's witness list, and who the Defence is no position to cross-examine in order to challenge to allegations contained therein. For these reasons, the order excluding the evidence of W02652 in relation to the [REDACTED] implicating Mr. Selimi should *mutatis mutandis* extend to the evidence of W04735 on the same issue.

### C. The Alleged Conversation between W04735 and Mr. Thaçi

15. In his SPO interview, the witness details a conversation he claims to have had with Mr. Thaçi [REDACTED] where Mr. Thaçi allegedly confirmed to W04735 that Mr. Selimi was [REDACTED].<sup>31</sup>
16. The SPO averred that evidence related to W04735's [REDACTED] is relevant to W04735's own arrest and mistreatment and the targeting of his family,<sup>32</sup> whereas the Trial Panel determined that the evidence in question could be relevant to, *inter alia*, explaining the reasons for W04735's alleged arrest and mistreatment.<sup>33</sup> In that respect, W04735's evidence concerning the alleged [REDACTED] conversation falls outside the scope of the evidence deemed admissible by the Trial Panel with respect to the [REDACTED] for, in the witness' evidence, at no point in that conversation did Mr. Thaçi volunteer any information relevant to the motivation behind W04735's alleged arrest and mistreatment, nor did he allude to any [REDACTED]. There is therefore no discernible connection between this alleged conversation and the charged incident of W04735's arrest and mistreatment, yet the alleged implication of Mr. Selimi being involved in

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<sup>31</sup> 083218-TR-ET Part 2, p. 4.

<sup>32</sup> KSC-BC-2020-06/F02483, Prosecution reply relating to response F02477, 2 August 2024, para. 6.

<sup>33</sup> KSC-BC-2020-06/F02489, Decision on Prosecution Motion for Admission of Evidence of Witnesses W03871, W04735, and W04868 Pursuant to Rule 154 and Related Requests (F02450), 13 August 2024, para. 26.



[REDACTED] in context of this meeting is manifestly prejudicial and bears little to no probative value.

17. None of the charging instruments contain any reference to Mr. Selimi's involvement in [REDACTED], notwithstanding 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.<sup>34</sup> The SPO did not notify its intention to elicit evidence in relation to this allegation either in the Rule 95 Summary of the witness' evidence, or in the notification of the facts and circumstances on which the witness will be examined.<sup>35</sup> The 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,<sup>36</sup> and as such no adequate notice has been served that this allegation forms part of the SPO's case.
18. The probative value and reliability of the allegation concerned are furthermore entirely obscure. First, the witness states that Mr. Taçi did not provide any further detail concerning Mr. Selimi's supposed involvement [REDACTED], but merely confirmed W04735's already held (and publicly stated) belief to that effect.<sup>37</sup> Furthermore, W04735 provides no basis for his own belief prior to this alleged meeting that Mr. Selimi was involved [REDACTED], beyond the

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<sup>34</sup> 8 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.

<sup>35</sup> KSC-BC-2020-06/F02451/A01, ANNEX 1 to Prosecution submission of list of witnesses for 19 August to 7 November 2024, 16 July 2024, p. 19.

<sup>36</sup> 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.

<sup>37</sup> 083218-TR-ET Part 3, p. 24.

speculative claims that Mr. Selimi's [REDACTED],<sup>38</sup> and the baseless hypotheses that Mr. Selimi's alleged public appearances<sup>39</sup> and/or his alleged involvement in the uncharged crimes described above<sup>40</sup> would demonstrate his propensity to commit the crime in question.

19. Additionally, W04735 repeatedly stated that during this alleged meeting, Mr. Thaçi provided no basis for confirming Mr. Selimi's involvement, and did not adduce any evidence in support.<sup>41</sup> As nobody else was present during this alleged conversation who could independently corroborate the details of the conversation,<sup>42</sup> and considering that the Defence would only be in a position to challenge the accusations in question should Mr. Thaçi elect to testify, the admission of this evidence would occasion the manifest prejudice whereby the Defence would be required to challenge entirely unverifiable allegations. For these reasons, the SPO should be ordered not to elicit this evidence during the W04735's supplemental Rule 154 questioning and the witness should be cautioned not to proffer such evidence voluntarily.
20. The Defence further notes that Victims' Counsel notified its intention to elicit evidence in relation to [REDACTED].<sup>43</sup> Victims' Counsel further averred that his cross-examination on that issue will relate to [REDACTED]."<sup>44</sup> [REDACTED]. However, considering that W04735 has consistently expressed his desire to challenge Mr. Selimi in relation to his involvement in [REDACTED],<sup>45</sup> and

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<sup>38</sup> 083218-TR-ET Part 2, p. 3; 058273-01-TR-ET, p. 9; 083218-TR-ET Part 12, p. 9

<sup>39</sup> 083218-TR-ET Part 2, p. 9.

<sup>40</sup> *Ibid*, p. 20.

<sup>41</sup> *Ibid*, pp. 3, 5, 17.

<sup>42</sup> *Ibid*, p. 21

<sup>43</sup> KSC-BC-2020-06/F02470, Victims' Counsel's Sixteenth Notification of Wish to Cross-Examine Witnesses, 24 July 2024, p. 5.

<sup>44</sup> KSC-BC-2020-06/F02492, Victims' Counsel's response to "Defence Notice of Objection to Victims' Counsel Cross-examination of W04295, W04278 and W04735", 14 August 2024, para. 29.

<sup>45</sup> 121902 -121903, p. 121903.

considering further the extremely limited, if any, [REDACTED],<sup>46</sup> cross-examining W04735 on this issue bears the imminent risk that the witness will use this opportunity to air the above allegations that are borne entirely out of conjecture and untestable hearsay. For these reasons, the requested exclusionary order should extend to the proposed questioning by Victims' Counsel.

### III. CLASSIFICATION

21. The present submissions are filed confidentially as they contain information related to witnesses benefitting from protective measures. A public redacted version will be filed in due course.

### IV. CONCLUSION

22. As previously argued, the introduction of highly prejudicial evidence that bears no semblance of a connection to the charges against the Accused and which is of marginal probative value constitutes a manifest obstacle to the expeditious conduct of the present proceedings.<sup>47</sup> At present, the Defence indicated that it will require 2,5 hours to cross-examine W04735, yet it is anticipated that, following the resolution of the issues raised in the present submissions, this estimate will be further reduced to one hour or less. Therefore, ensuring that W04735's forthcoming testimony is exclusively limited to matters relevant to the present proceedings as properly notified in the charging instruments will be conducive to maximizing courtroom time and expediting W04735's evidence.
23. For the reasons above, the Defence respectfully requests the Trial Panel to:

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<sup>46</sup> 083218-TR-ET Part 8, pp. 39-40. [REDACTED].

<sup>47</sup> KSC-BC-2020-06/F02475, Selimi Defence Response to Prosecution submissions concerning the completion of its case, 25 July 2024, paras. 25-27.

(i) EXTEND the exclusion orders made in the context of W02652's and W04846's evidence to W04735's evidence;

(ii) ORDER the SPO and Victims' Counsel not to elicit any evidence related to the alleged conversation between W04735 and Mr. Thaçi described above; and

(iii) CAUTION W04735 not to proffer evidence related to that conversation voluntarily.

Word count: 3348

Respectfully submitted on 22 August 2024,



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