

In: KSC-BC-2020-06

**The 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

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Language: English

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**Public Redacted Version of “Selimi Defence Motion for Exclusion of Evidence
of Witness W02652”**

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I. INTRODUCTION

1. Pursuant to Rules 75 and 138 of the Rules,¹ the Defence for Mr. Rexhep Selimi hereby requests the Trial Panel to exclude the evidence of W02652 pertaining to a number of incidents of [REDACTED] (“impugned evidence”).
2. As will be further explained, the Defence objects to such evidence on the basis that it is not relevant to any material facts pleaded in the Indictment, and its prejudicial effect outweighs its probative value.

II. SUBMISSIONS

A. Background

3. The last paragraph of the Rule 95 summary of W02652’s evidence reads as follows: “[REDACTED].” His prior statements allege that in one such instance, [REDACTED] (“Incident 1”).²
4. Additionally, the evidence of W02652 alleges a number of other similar incidents, including [REDACTED] (together, “other incidents”).
5. With respect to Incident 1, following the submissions made orally during the status conference on the 20th of March 2023, the Defence has engaged *inter partes* with the SPO as to whether it still intends to lead this evidence during the examination-in-chief of W02652. The SPO replied on the 21st of March 2023, stating the following:

¹ 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.

² See, for example, 051954-TR-ET Part 2, p. 12, 051955-TR-ET Part 6, p. 11, 051954-TR-ET Part 3, pp. 13-14.

In line with Annex 1 to F01243 and Annex 2 to F01078, we confirm that the scope of W02652's testimony will include [REDACTED]. However, while we intend to briefly discuss [REDACTED].

6. The SPO has supplemented this on the 22nd of March 2023:

[REDACTED] before and after the indictment period is connected to like evidence within the indictment period and relevant to establish the pattern of such intimidation and attacks indicated in para. 113 of our Pre-Trial Brief. Obviously, we will focus our evidential efforts and courtroom time mostly on the Indictment Period, and will be briefer when soliciting evidence of incidents outside it.

B. Arguments in Favour of Exclusion

1. Incident 1

7. As is apparent from their communication of 22nd of March 2023, the SPO intends to lead evidence pertaining to W02652's [REDACTED] for the purposes of establishing the existence of a consistent pattern of conduct as specified in paragraph 113.
8. At the offset, it must be noted that, in contrast to the ICTY, ICTR and SCSL Rules of Procedure and Evidence, which specifically provide for the admission of pattern evidence in Rule 93 common to the above rules, the KSC Rules do not contain such provision. The SPO has likewise failed to explain at any point whether the admission of such evidence is legally permissible under the KSC legal framework.
9. Nevertheless, international jurisprudence is clear that contextual evidence of this nature which concerns acts that occurred outside the Indictment Period ("extra-

temporal evidence”) does not form part of the charges³ and cannot be relied upon to establish the guilt of the Accused.⁴ Furthermore, such evidence must nonetheless comply with the requirements of Rule 138 and cannot be used to circumvent the admissibility requirements therein.⁵ In that respect, Chambers have explicitly recognized that the Defence is entitled to challenge the admission of extra-temporal evidence falling outside the scope of the Indictment,⁶ and such evidence has been routinely excluded when it fell short of the requirements of relevance and probative value.⁷

10. The Defence objects to the relevance of the evidence in question. Evidence is relevant insofar as it relates to a material issue that must be pled in the indictment.⁸ With regards to the impugned evidence, no material issue on the continuation of the alleged JCE against Opponents beyond the Indictment Period is pled in the Indictment or anywhere else in the SPO’s case. The paragraph of the SPO Pre-Trial Brief referred to by the SPO in the correspondence with the Defence speaks of a purported pattern of conduct against Opponents “which began before and was ongoing during the Indictment Period”,⁹ without

³ ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Admissibility of Evidence and Other Procedural Matters, 8 June 2014, para. 30.

⁴ SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 37; ICTR, *Igze and Nahimana v. The Prosecutor*, ICTR-99-52.A, Decision on the Interlocutory Appeals, 13 September 2000, p. 5 (related to contextual evidence outside the temporal jurisdiction of a tribunal).

⁵ ICTR, *The Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 13.

⁶ ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000, para. 147.

⁷ ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Decision Granting In Part The Prosecution’s Bar Table Motion And Granting The Prosecution’s Supplemental Bar Table Motion, 1 February 2011, para. 21; *Prosecutor v. Popović et al.*, IT-05-88-5T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006, para. 73.

⁸ ICTY, *Prosecutor v. Prlić*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 17.

⁹ F01296/A01, Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’, 15 February 2023, para. 113.

specifying or allowing for the inference that such pattern extended beyond the Indictment Period. Additionally, the SPO has not cited to any evidence pertaining to the allegation in question at any point throughout its Pre-Trial Brief, further making the purpose of the impugned evidence impossible to ascertain. Therefore, the SPO must have pleaded the material facts underlying the impugned evidence sufficiently should it have wished to lead evidence on this issue.¹⁰

11. However, should the Trial Panel consider the impugned evidence to constitute extra-temporal pattern evidence relevant to the alleged JCE against [REDACTED] that is plead in the SPO's case throughout the Indictment Period, it is submitted that the impugned evidence does not in any way support the assertion that W02652 [REDACTED], or that it is connected to any such incidents alleged throughout the SPO's case.
12. In addition to the issue of relevance, the probative value of the impugned evidence is outweighed by its prejudicial effect. The probative value of the evidence in question is, from the offset, conspicuously limited. Said evidence is entirely based on hearsay, it is uncorroborated by any other accounts of witnesses on the SPO's list and is likewise devoid of any direct evidence as to the identification of the persons involved in the incident and their relationship with the Accused.
13. If at all, the impugned evidence constitutes an attempt by the SPO to effectively enter evidence of bad character against Rexhep Selimi by implication, whereby Chambers have recognized that character evidence as such which is "introduced merely to blacken the character of the Accused and show a propensity and

¹⁰ ICTY, *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para. 15.

capacity to commit the crimes charged, is improper”, precisely due to the imbalance between its probative value and prejudicial effect.¹¹ The prejudice is further amplified by the fact that the Defence has only learned of such allegation very recently and has had inadequate time to investigate the allegation in question on account of its redaction. Furthermore, the SPO has identified a number of other witnesses as being able to testify on [REDACTED]. Whereas “whether the [Prosecution] can prove its point with less prejudicial evidence”¹² is a factor in balancing the probative value of a piece of evidence against its prejudicial effect, it is submitted that evidence related to [REDACTED] should be put to such witnesses and be confined to the Indictment Period.

14. While mindful that some of these particularities of the impugned evidence might be relevant to the assessment of its weight rather than admissibility, authorising this evidence to be led in court and therefore entertaining a discussion as to its weight would be “unduly distracting and time-consuming, leading to an unfocused trial that undermines the truth-finding function”.¹³ That is so by reason of the fact that the admission of such evidence may establish a precedent whereby the SPO would be allowed to solicit and tender evidence of such a nature in the future, which creates the manifest risk of burdening the already bloated trial record with circumstantial evidence that cannot even be used for reaching findings on the charges as set out in the Indictment. This prospect is all the more concerning in light of the numerous suggestions from the Trial Panel to the SPO to reduce the scope of its case.¹⁴ As Chambers have recognized, “hearing extensive examination and cross-examination on [extra-temporal]

¹¹ ICTR, *The Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 17.

¹² *Ibid*, para. 38.

¹³ *Ibid*, para. 28.

¹⁴ KSC-BC-2020-06, Specialist Chambers, Specialist Prosecutor’s Preparation Conference, 15th February 2023, p. 1907, line 16 – p. 1908, line 6.

evidence [...] would distract the Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.”¹⁵

15. In the present case, notwithstanding the SPO’s representation that it will not solicit evidence as to the involvement of Mr. Selimi in this alleged incident, such representation does not establish sufficient safeguards against the highly prejudicial yet likely possibility that this evidence will be proffered nonetheless during the examination-in-chief of said witness. The only appropriate remedy is exclusion.

2. Other Incidents

16. The Defence also objects to the evidence of W02652 in relation to his allegation of a [REDACTED]. While it is difficult to identify from the confused statements and interviews of W02652 when this occurred, it appears to have been around [REDACTED] (“Incident 2”).¹⁶
17. While Incident 2 occurred [REDACTED], nothing actually happened to the witness. Instead, he was informed in 2002, almost three years after the end of the Indictment Period, [REDACTED]. There is no other evidence to corroborate this alleged incident, nor is there any link between it and the JCE which allegedly occurred three years prior.
18. Further, while the Defence accepts that hearsay may be admissible in certain circumstances, the underlying credibility issues concerning [REDACTED] testimony are vital to assessing the probative value, if any, of the evidence the SPO intends to lead to support this allegation.

¹⁵ ICTY, *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para. 19; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 28.

¹⁶ See, for example, 051955-TR-ET Part 6, pp. 6-7, 9-10.

19. [REDACTED].
20. [REDACTED].¹⁷
21. The Court of Appeals upheld this ruling and [REDACTED].¹⁸ In these circumstances, leading hearsay evidence originating from an individual who is known to be an unreliable witness and who cannot be confronted in open court, would be unduly prejudicial to the Accused.
22. If the SPO wishes to rely on evidence from [REDACTED] in relation to [REDACTED], it must seek the admission of [REDACTED] statements through a Rule 155 application, rather than seeking to circumvent this provision and admit such evidence through W02652. The Defence's ability to test the credibility of W02652, does not compensate for its inability to do so in relation to [REDACTED]. Second-hand hearsay in relation to *any* incident (contextual or crime-base) should be approached with caution. In this instance, however, second-hand hearsay resulting from an interaction between an unreliable witness and one whose testimony on this issue is inherently contradictory and unsubstantiated, renders the admissibility of evidence related to this incident, particularly problematic. Allowing [REDACTED] complete absence of credibility to infect this trial at such an early stage of proceedings, when this evidence has such little demonstrable link to relevant issues in this trial and runs the risk of further overloading the already massive trial record, would be highly prejudicial to the Accused.
23. Finally, W02652 also appears to identify at least one other [REDACTED] ("Incident 3")¹⁹ and also alleges that [REDACTED] ("Incident 4").²⁰ While the

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ 051955-TR-ET Part 6, p. 11; 058273 01 TR ET, p. 14.

²⁰ 051955-TR-ET Part 6, pp. 28-30.

Defence would expect the SPO not to lead such evidence, given how vague, unsubstantiated and irrelevant to the Indictment it appears to be, the Accused's rights are better protected through the exclusion of the relevant portions of the evidence, for the same reasons set out above. The SPO simply has no legitimate justification for leading such evidence.

C. Confidentiality

24. These submissions are filed confidentially pursuant to Rule 82 for they relate to potentially identificatory information of a protected SPO witness. The Defence will file a public redacted version of the present submissions in due course.

III. CONCLUSION AND RELIEF REQUESTED

25. For the reasons set out above, the Defence for Mr. Selimi requests the Trial Panel to exclude the impugned evidence of W02652 from the trial record.

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Respectfully submitted on 24 April 2023,



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