



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
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: Acting Specialist Prosecutor

Date: 24 April 2023

Language: English

Classification: Public

Public Redacted Version of 'Prosecution response to 'Selimi Defence Motion for Exclusion of Evidence of Witness W02652'', KSC-BC-2020-06/F01447, dated 12 April 2023

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Trial Panel should reject the request by the SELIMI Defence to exclude anticipated testimony of W02652 concerning, *inter alia*, [REDACTED] ('Anticipated Testimony').¹

2. The Anticipated Testimony satisfies the requirements of Rules 137-138 of the Rules.² To foreclose the witness's testimony on such matters would not only deprive the Panel of relevant evidence, as set out below, but would also deprive this victim of the opportunity, and artificially limit his ability to, adequately describe the impact of events during and after the Indictment period, [REDACTED].

3. The Defence fails to establish that the probative value of such evidence is outweighed by its prejudicial effect, in particular considering that the Trial Panel is composed of professional judges who are fully competent to hear relevant testimony and later attribute the appropriate weight, if any, thereto.

4. Defence submissions are deficient, ignoring the plain language of the Rules, relevant prior rulings by the Trial Panel, and assurances that the SPO, being acutely aware of the need for efficiency of proceedings, will focus SPO witness testimony on the Indictment period and intends to spend limited time on the evidence the Defence seeks to preclude the Panel from receiving.

II. SUBMISSIONS

5. As a preliminary matter, the Defence has been on notice of the SPO's intention to elicit the Anticipated Testimony since at least 1 February 2023.³ This matter could

¹ Selimi Defence Motion for Exclusion of Evidence of Witness W02652, KSC-BC-2020-06/F01438, Confidential, 6 April 2023 ('SELIMI Motion'). *See also* Thaçi Joinder to 'Selimi Defence Motion for Exclusion of Evidence of Witness W02652', KSC-BC-2020-06/F01439, Confidential, 6 April 2023; Krasniqi Defence Joinder to Selimi Defence Motion for Exclusion of Evidence of Witness W02652, KSC-BC-2020-06/F01440, Confidential, 6 April 2023.

² 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.

³ *See* Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243/A01, 1 February 2023, Confidential, p.4/33. Similar information is contained in Annex 2 to Prosecution submissions pursuant to Decision F01229, Lesser Redacted List of Witnesses, KSC-BC-2020-06/F01296/A02, 15 February 2023, Confidential, p.163/553.

and should have been raised well in advance of the 20 March 2023 status conference, the first time the Defence raised this issue,⁴ which would have avoided the need for litigation on the eve of W02652's testimony.

A. THE ANTICIPATED TESTIMONY IS ADMISSIBLE

6. Defence Submissions ignore the clear language of Rules 137-138, which establish that evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. The Anticipated Testimony fully satisfies these criteria.

7. Evidence concerning attacks against the LDK and its members, persons who fall within the category of Opponents as set out in the Indictment,⁵ is relevant to the charged crimes even when such attacks took place outside the temporal scope of the Indictment. Such evidence is relevant to the common criminal purpose⁶ and to establishing a consistent pattern of conduct, which, *inter alia*, pertains to the systematic nature of the charged crimes as set out in the Confirmation Decision.⁷

8. Although the incidents included in the Anticipated Testimony fall outside of the charged timeframe, they took place shortly thereafter, namely, in 1999 and 2000 in Kosovo.⁸ Further, the Anticipated Testimony is clearly linked to similar events which feature or took place during the temporal scope of the charges and which W02652 is expected to testify about.

⁴ KSC-BC-2020-06, Transcript, 20 March 2023, pp.2055-2058.

⁵ Annex 1 to Submission of Confirmed Amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022 ('Indictment'), para.32.

⁶ Annex 1 to Prosecution submissions pursuant to Decision F01229, KSC-BC-2020-06/F01296/A01, 15 February 2023 ('Pre-Trial Brief'), para.113.

⁷ Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, para.54, stating: 'The term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.'

⁸ These events fall within the temporal and geographic jurisdiction of the court. *See* Articles 7-8 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

9. The fact that, unlike rules governing certain other international or hybrid courts, the Rules contain no specific reference to pattern evidence⁹ only means that the relevant test for this and any other kind of evidence at the KSC is that provided in Rule 138. Indeed, jurisprudence from the very courts referred to by the Defence as having such a specific rule¹⁰ establishes that this rule does not create an exception to the more general rules on admission of evidence.¹¹ Further, other international or hybrid courts which, like the KSC, do not have a specific provision concerning pattern evidence, have nevertheless recognised the admissibility thereof.¹²

10. Defence Submissions also ignore relevant prior rulings by this Trial Panel. In *Gucati and Haradinaj*, the Panel found that evidence is relevant if it is connected, directly or indirectly, to elements of the offences or modes of liability pleaded in the Indictment or other facts and circumstances material to the case of a Party, and that evidence pertaining to a period of time that preceded or followed the Indictment period is not automatically excluded.¹³

11. Defence references to the absence of the Anticipated Testimony in the SPO's Pre-Trial Brief, and the suggestion that the SPO should have pleaded the material facts

⁹ SELIMI Motion, KSC-BC-2020-06/F01438, para.8.

¹⁰ SELIMI Motion, KSC-BC-2020-06/F01438, para.8.

¹¹ See, e.g. ICTR, *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 (stating 'Rule 93 does not create an exception to Rule 89(C,) but rather is illustrative of a specific type of evidence which may be admitted'). Rule 93 of the ICTR Rules of Procedure and Evidence provided, *inter alia*, that '[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.' ICTR Rule 89(C) provided that '[a] Chamber may admit any relevant evidence which it deems to have probative value'.

¹² See, e.g., ECCC, Case 002/02 Trial Judgement, 002/19-09-2007/ECCC/TC, 16 November 2018, para.60; ECCC, Case 002/02 Appeal Judgement, 002/19-09-2007-ECCC/SC, 23 December 2002, para.666. See also ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-795, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, para.7.

¹³ *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-BC-2020-07, Trial Judgment, 18 May 2022, paras 21-22; See also *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Slobodan Praljak's Motion for Clarification of the Time Frame of the Alleged Joint Criminal Enterprise, 15 January 2009, p.9.

underlying the attacks referred to in the Anticipated Testimony if it wished to leave evidence on them¹⁴ are erroneous and ignore the First Rule 154 Decision.¹⁵

12. Contrary to the Defence assertion,¹⁶ the SPO Pre-Trial Brief explicitly refers to [REDACTED], including outside the temporal scope of the Indictment.¹⁷ Regardless, in the Rule 154 Decision, the Trial Panel accepted evidence concerning a killing incident not charged in the Indictment and not cited in the SPO Pre-Trial Brief as relevant, authentic and probative.¹⁸ The Panel noted that evidence concerning an incident not charged in the Indictment could, *inter alia*, be admissible since it describes a crime allegedly committed by the same individuals who allegedly mistreated the witness in detention.¹⁹

13. Consistent with this ruling by the Panel, evidence of incidents not charged in the Indictment cannot result in a finding of guilt in respect of any of the Accused for such uncharged incidents.²⁰ Nevertheless, the Anticipated Testimony is relevant and admissible. It is important evidence for the Panel to hear, in particular in relation to its eventual finding on the common criminal purpose and to fully appreciate the circumstances of this victim, the context of the alleged crimes, and their impact.

B. THE DEFENCE FAILS TO ESTABLISH UNDUE PREJUDICE

14. The Defence fails to establish how the Trial Panel's authorisation of the Anticipated Evidence would lead to the probative value of this evidence being outweighed by its prejudicial effect. In particular, the Trial Panel is composed of professional judges, not lay jurors, and is fully capable of receiving W02652's testimony on these matters and assessing whether, and if so to what extent, to credit it in its final determination on the charges.

¹⁴ SELIMI Motion, KSC-BC-2020-06/F01438, para.10.

¹⁵ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential ('First Rule 154 Decision').

¹⁶ SELIMI Motion, KSC-BC-2020-06/F01438, para.10.

¹⁷ See Pre-Trial Brief, KSC-BC-2020-06/F01296/A01, para.[REDACTED].

¹⁸ First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113.

¹⁹ First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113.

²⁰ First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113.

15. Defence submissions concerning the weight, not admissibility, of the Anticipated Testimony²¹ are premature and speculative. They should be dismissed. The Defence will have every opportunity to make such arguments at the end of the case. The extensive Defence submissions concerning the credibility of [REDACTED]²² are particularly inapposite, selective and far better suited to the Defence's response to the SPO's eventual request to admit this witness' evidence pursuant to Rule 155.

16. During his testimony, W02652 will be asked to provide his basis of knowledge, including in relation to the Anticipated Testimony as relevant. Hearsay evidence is admissible. While corroboration is not required,²³ the Anticipated Testimony is capable of corroboration. The Defence will also have an opportunity to cross-examine the witness in relation to this part of his testimony, thereby negating any potential prejudice.²⁴

17. Crucially, as communicated to the Defence and acknowledged in the SELIMI Motion,²⁵ the SPO intends to spend limited time on the Anticipated Testimony. The brevity with which the SPO intends to address these issues does not mean it should entirely be precluded from doing so. The SPO's courtroom time with this witness will focus primarily on the Indictment period.

18. As also communicated to the Defence, the SPO will not seek to elicit information concerning [REDACTED] incident concerning W02652. To exclude the Anticipated Testimony based on the possibility that W02652 may, unprompted, refer to [REDACTED] would be to put the cart before the horse. If such testimony were to be provided the Panel would be perfectly capable of assessing the weight to give thereto, if any, at a later stage.

²¹ SELIMI Motion, KSC-BC-2020-06/F01438, paras 11-12, 17-21.

²² SELIMI Motion, KSC-BC-2020-06/F01438, paras 17-22.

²³ *Contra* SELIMI Motion, KSC-BC-2020-06/F01438, paras 12, 17; Rule 139(3).

²⁴ *See* First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113.

²⁵ SELIMI Motion, KSC-BC-2020-06/F01438, paras 5-6.

19. [REDACTED]²⁶ are inapposite. Further, the Defence confuses evidence relevant to the common criminal plan with supposed evidence that [REDACTED]. [REDACTED].²⁷ Rather, the SPO intends to lead this evidence to demonstrate a consistent pattern of intimidation and attacks against a specific type of Opponent, namely, LDK supporters.

20. The fact that other SPO witnesses will address other instances of alleged targeting of LDK members during the Indictment period²⁸ is irrelevant. W02652 is uniquely placed to provide evidence [REDACTED].

III. CONFIDENTIALITY

21. This filing is classified as confidential pursuant to Rule 82(4). The SPO will file a public redacted version.

IV. CONCLUSION

22. The Trial Panel should not deprive itself of the opportunity to hear the Anticipated Evidence. Rather, it should authorise it, and then determine the weight, if any, to give to it at the end of the trial. The Defence fails to provide sufficient reason to proceed otherwise.

Word count: 1921



Alex Whiting

Acting Specialist Prosecutor

Monday, 24 April 2023

At The Hague, the Netherlands.

²⁶ SELIMI Motion, KSC-BC-2020-06/F01438, para.13.

²⁷ See SELIMI Motion, KSC-BC-2020-06/F01438, para.13.

²⁸ SELIMI Motion, KSC-BC-2020-06/F01438, para.13.