

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 6 March 2024

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**Public Redacted Version of Selimi Defence Motion for the Exclusion of
Evidence of [REDACTED] with Confidential Annex 1**

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I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi hereby files its motion to exclude the evidence of [REDACTED] in relation to two allegations stemming from the witness' Rule 95 summary, namely with respect to the [REDACTED] in (i) [REDACTED] ("First Allegation"); and (ii) [REDACTED] ("Second Allegation") (collectively, "the Two Allegations"). The Two Allegations fall outside the scope of the charges as pled in the Indictment and are marred by incurable reliability concerns that render [REDACTED] evidence on these allegations severely outweighed by its prejudicial effect.
2. The Defence therefore requests that the SPO be ordered not to lead any evidence related to the above two allegations during his expected *viva voce* testimony and that [REDACTED] be cautioned not to proffer that evidence voluntarily.

II. SUBMISSIONS

A. The two allegations contained in [REDACTED] Rule 95 summary are not relevant to the charges

3. The First Allegation in [REDACTED] Rule 95 summary provides that [REDACTED]. The SPO further confirmed that it intends to examine [REDACTED] on this allegation.¹
4. The Second Allegation in the Rule 95 summary, on which the SPO intends to elicit evidence,² refers to a "different incident, [where] the witness saw [REDACTED]"
5. These Two Allegations feature neither explicitly in the Indictment, nor in the SPO's Pre-Trial Brief. Nor are [REDACTED] listed as victims in the Indictment,

¹ KSC-BC-2020-06/F02007/A01, ANNEX 1 to Prosecution submission of list of witnesses for 15 January to 4 April 2024, 14 December 2023, p. 49.

² *Id.*

and the respective incidents are not linked to any crime site charged therein. They are wholly irrelevant to the case as pled [REDACTED].

6. Evidence is only relevant insofar as it relates to matters that are properly to be considered by the Panel in its evaluation of the charges, as validly pled in the Indictment.³ The Panel has the power to exclude as irrelevant evidence of allegations that are not adequately pled as such.⁴
7. The Indictment is the sole accusatory instrument, and it is only through this instrument that adequate notice of any allegation material to the Prosecution's case may be served.⁵ The SPO's Rule 95 summaries are not capable of complementing the charges or curing a defective indictment.⁶ Additionally, mere service of witness statements pursuant to disclosure requirements will not suffice to inform an Accused of the material facts that the Prosecution intends to prove at trial.⁷
8. Indeed, international criminal tribunals have routinely excluded evidence on specific incidents when neither the substance of the allegations concerned, nor

³ KSC-BC-2020-06/F01623, Decision on Taçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 20; 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.

⁴ KSC-BC-2020-06/F01623, Decision on Taçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 20.

⁵ *Ibid*, para. 21.

⁶ KSC-BC-2020-06/F01623, Decision on Taçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 24; ICTY, *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment, 23 February 2001, para. 13; *Prosecutor v. Mrksic*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 13.

⁷ 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; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 23; ICTR, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the form of the Amended Indictment, Rule 72 (A) (ii) of the Rules of Procedure and Evidence, 15 July 2004, para. 51.

the witness called to testify on those allegations, has been explicitly mentioned in either the indictment or the prosecution's pre-trial brief – and when the prosecution has had ample opportunity to seek amendment of the indictment to include such evidence.⁸

9. The SPO concedes that the Two Allegations are not charged in the Indictment.⁹ At most, the SPO claims that they represent “a highly incriminating account accusing [REDACTED] with serious crimes mirroring the objectives of the joint criminal enterprise charged.”¹⁰ But these allegations fall directly outside the scope of the charged JCE, as they are said merely to “mirror” the conduct as charged.
10. In line with prior findings of this Panel, which declined to admit evidence that did not result from the alleged JCE, and which is neither determinative of a widespread or systematic attack against opponents nor otherwise materially connected to the armed conflict charged in the Indictment,¹¹ there is no basis to hear the evidence of the Two Allegations.
11. Further, the SPO's intention to lead evidence on events “mirroring” those charged in the Indictment, or those showing the Accused's “commitment to the policy underlying the joint criminal enterprise in the confirmed indictment”¹² constitutes an attempt to use unsupported analogies to the Indictment as a subterfuge for leading uncharged evidence intended to blacken the character of the Accused. International jurisprudence has confirmed that such analogies “do

⁸ ICTY, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006.

⁹ KSC-BC-2020-06/F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and *ex parte* Annexes 1-2, 2 September 2022, para. 6 (“SPO Request”).

¹⁰ *Ibid*, para. 8.

¹¹ Oral Order of 17 April 2023, Transcript Page 2863 Line 13 to Page 2866 Line 8.

¹² *Ibid*, para. 6.

not entitle the Prosecution to lead very detailed evidence of crimes that are not charged in the indictment.”¹³

12. Furthermore, similar fact evidence or bad character evidence employed to demonstrate an accused’s propensity to act in conformity with unindicted acts is inadmissible as a general principle of criminal law.¹⁴ Evidence of this nature is inadmissible given its potential to “so severely blacken the reputation of the accused as to make acquittal virtually impossible, even though the direct evidence of the commission of the offence is weak.”¹⁵
13. Finally, the First Allegation is irrelevant to the contextual elements of the offences charged. [REDACTED].¹⁶ Nor was [REDACTED].
14. The Second Allegation furthermore falls outside the Indictment period, as it is alleged to have occurred in [REDACTED]. Extra-temporal evidence is, by its very nature, not part of the charges and cannot be relied upon to establish the guilt of the Accused.¹⁷ Evidence of this nature has been routinely excluded by international tribunals when it failed to meet the requirements of relevance and probative value.¹⁸

¹³ ICTY, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para. 17.

¹⁴ ICTY, *Prosecutor v. Kupreskic et al*, Case No. IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999; ICTR, *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 12; UK, *R v. Handy*, [2002] 2 SCR 908, paras. 37, 39.

¹⁵ ICTR, *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 12.

¹⁶ 102761-TR-AT Part 2 Revised-ET, pp. 15, 29.

¹⁷ ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Admissibility of Evidence and Other Procedural Matters, 8 June 2014, para. 30.

¹⁸ 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.

15. While such evidence may still be relevant insofar as it relates to a relevant fact occurring during the Indictment period,¹⁹ the Second Allegation, due to its individuality and remoteness, bears no such connection. In that respect, extra-temporal evidence has been excluded when the prosecution was unable to identify any connection between that evidence and *any specific acts* pled in the Indictment.²⁰ Absent any such connection, the admission of evidence of past conduct is unduly distracting and time-consuming.²¹
16. In this regard, while the Defence notes that the Pre-Trial Judge granted the SPO's request to add [REDACTED] to its witness list and his materials to the exhibit list based on, *inter alia*, the *prima facie* relevance of his evidence,²² the standard employed in this determination is markedly lower than that required for admission by the Trial Panel pursuant to Rule 138. In particular, the standard for additions to the witness and exhibit lists requires only that *obviously irrelevant* items be excluded.²³ A chamber, when seized upon a request to amend the prosecution's witness and exhibit list, need not assess the authenticity, relevance, and probative value of the proposed evidence in the same way as it would when determining its admission at trial.²⁴ The Trial Panel is not therefore bound by the Pre-Trial Judge's limited determinations of the relevance of [REDACTED] anticipated testimony and materials.

¹⁹ KSC-BC-2020-06/F01700, Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154, 24 July 2023, para. 43.

²⁰ ICTR, *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004, para. 18.

²¹ ICTR, *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 28.

²² KSC-BC-2020-06/F01058, Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 October 2022, para. 26.

²³ *Ibid*, para. 26.

²⁴ *Id.*

17. The conspicuous refusal by the SPO over the last eighteen months to seek an amendment to the Indictment to include the Two Allegations is also determinative of this issue. Having elected to rely on the evidence of [REDACTED] and having been granted leave to add [REDACTED] to its Witness List, at no point did the SPO seek to amend its Indictment to include these allegations, despite both evidently concerning alleged instances of personal participation on the part of [REDACTED], which constitute material facts. Had the SPO sought such amendments, they would have been required to demonstrate to the Trial Panel that the inclusion of these “new charges”, which are both factually and legally distinct from any allegations otherwise pled,²⁵ did not cause unfair prejudice to the Accused, a test that they would not have met. The SPO cannot use to its advantage its failure to pursue this routine procedural avenue.
18. Considering the foregoing, the Two Allegations are uncharged and not relevant to any material fact pled in the Indictment. On this basis alone, [REDACTED] evidence relating to either should be excluded by the Trial Panel.

B. The probative value of the Two Allegations is outweighed by their prejudicial effect

19. The Panel has previously excluded evidence where, in addition to being insufficiently connected to the material facts pled in the Indictment, that evidence was also marred by issues of reliability, credibility, and probative value, and where the acts alleged have not been attributed to the Accused, or

²⁵ KSC-BC-2020-06/F00635, Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 23 December 2021, para. 22; ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 30; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Motion to Amend the Amended Indictment, 12 January 2007, para. 16.

where the reliability of the evidence makes such attribution otherwise doubtful.²⁶ Furthermore, for evidence to be excluded on grounds that its probative value is outweighed by its prejudicial effect, there must arise an unfairness unconnected to the evidential value of the evidence, such as an inability to challenge it fairly and effectively.²⁷ Bearing in mind the above, the Two Allegations are not only replete with incurable credibility and reliability issues, but the Defence is further prevented from being able to challenge that evidence in a manner that comports with the Accused's confrontational rights.

20. In this regard, the present submissions concern, in part, the non-disclosure of evidence crucial to the Defence's ability to prepare and challenge the Two Allegations. However, the SPO has indicated that it intends to request and disclose some of these materials²⁸ following an extensive and timely disclosure request made by the Defence. Nevertheless, in order for the issues raised in the present filing to be fully litigated prior to [REDACTED] scheduled testimony, and considering that the SPO has declined to offer an assurance that [REDACTED] testimony will be postponed until the disclosure process is completed and the Defence has had adequate time to review the disclosed materials, if any, the Defence is forced to file the present submissions in the absence of a final response from the SPO regarding its disclosure request. Therefore, the Defence has indicated below, where applicable, when such materials have not been disclosed *at this stage*, and undertakes to file further submissions should the need arise if these materials will be subsequently disclosed.²⁹

²⁶ Oral Order of 17 April 2023, Transcript Page 2863 Line 13 to Page 2866 Line 8.

²⁷ 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. 36.

²⁸ Annex 1.

²⁹ The Defence notes that the SPO should have been well aware of the existence and importance of these materials since the records indicating their existence have been in SPO's possession since [REDACTED].

1. The First Allegation

21. At the outset, [REDACTED] evidence on the First Allegation consists exclusively of (i) rumours originating from individuals that [REDACTED] himself labels as unreliable; (ii) [REDACTED] baseless speculation regarding demeanour of a now deceased individual with supposedly first-hand knowledge of the event; (iii) rumours heard by the [REDACTED] arising in the media many years after the event; (iv) anonymous hearsay; and (v) [REDACTED] own unsubstantiated theories as to how an event he did not witness unfolded, made in defiance of the accounts of the individuals present at the scene and which are otherwise devoid of any foundation.
22. [REDACTED]
23. [REDACTED]
24. [REDACTED]
25. [REDACTED]
26. [REDACTED]
27. [REDACTED]
28. [REDACTED]
29. [REDACTED]
30. [REDACTED]
31. Entertaining this evidence would be unduly distracting to the judicial process and would frustrate any consideration of admissibility. The SPO is inviting the Trial Panel to conclude that a murder has been committed based on the speculations of a lay person that are based exclusively on [REDACTED]. The Defence is further unable to effectively challenge this evidence given both the

non-disclosure of the requisite evidence and the unavailability of the individuals concerned to appear as witnesses.

32. The fundamental defects inherent in [REDACTED] evidence suggesting that [REDACTED] death was the result of an assassination plot are further replicated in respect of his evidence on [REDACTED] involvement therein. [REDACTED] has offered contradictory and speculative accounts on this issue, ranging from alleging that [REDACTED] is responsible for giving the order to kill [REDACTED],³⁰ to stating that he is not accusing [REDACTED] for being responsible for the killing, but that he knows who is.³¹ In a communication with the SPO, the witness noted that his main interest behind his testimony “[REDACTED].”³² That very assertion demonstrates that the witness possesses no determinative knowledge as to [REDACTED] responsibility, but that he instead intends to use his forthcoming testimony as a fishing expedition to air wild theories about [REDACTED] involvement in [REDACTED].
33. In addition to the above, [REDACTED] reinforces his theories on [REDACTED] death through suppositions drawn from alleged events from which no reasonable inference may be drawn as to either [REDACTED] involvement or knowledge. Such incidents concern, *inter alia*, an alleged conversation between [REDACTED] and [REDACTED], (no statement disclosed, not appearing as a witness in this case), allegedly witnessed by [REDACTED] (no statement disclosed, not appearing as a witness in this case), and allegedly told to [REDACTED].³³ If indeed this conversation ever took place, [REDACTED] cannot either recount exactly the words spoken at this alleged meeting, or the

³⁰ 102761-TR-AT Part 1 Revised-ET, pp. 22, 32; 102761-TR-AT Part 2 Revised-ET, p. 1; 114694-114695, p. 114694; 095407-095413, p. 095407.

³¹ 111174-111175, p. 111174.

³² 117824-117824 RED.

³³ 102761-TR-AT Part 2 Revised-ET, pp. 3, 25-27.

demeanour of [REDACTED] participants, or, crucially, provide evidence as to a causal link between that alleged conversation and the First Allegation.

34. The same reliance on conjecture is evidenced by [REDACTED] reference to an alleged argument between [REDACTED] in [REDACTED].³⁴ The witness' reliance on this incident as a basis for alleging [REDACTED] involvement in the death of [REDACTED] is but his own speculation. Again, there is no evidence establishing a causal link between this supposed argument and the First Allegation.
35. While some of [REDACTED] have made similar assertions against [REDACTED] in relation to the Two Allegations, the vague and speculative nature of their evidence does not render [REDACTED] evidence more reliable. Instead, it simply demonstrates the belief within the [REDACTED], and seemingly within the SPO, that the repetition of rumours and unsubstantiated theories will transform baseless allegations into fact. In this regard, both [REDACTED] and [REDACTED] conclude that [REDACTED] and/or [REDACTED] were involved in the death of [REDACTED]³⁵ on the basis of, *inter alia*, (i) inferences drawn from events they did not personally witness,³⁶ (ii) generic assertions regarding [REDACTED] and [REDACTED] supposed authority, with no foundation offered in support;³⁷ and (iii) personal suspicions as to the circumstances in which the incident is alleged to have unfolded, which are likewise premised on the same conjecture and guesswork as [REDACTED].³⁸
36. In conclusion, neither [REDACTED], nor [REDACTED], can provide direct evidence as to the precise circumstances of [REDACTED] death, as the SPO itself

³⁴ 102761-TR-AT Part 1 Revised-ET, pp. 29-33.

³⁵ 102800-TR-ET Part 2, p. 31; 0917778-091790, p. 0917779, para. 5.

³⁶ 092039-092043, p. 092041, para. 12; 102800-TR-ET Part 2, p. 32.

³⁷ 102800-TR-ET Part 2, p. 35; 0917778-091790, p. 0917779, para. 5.

³⁸ 102800-TR-ET Part 1, pp. 34, 39-40; 102800-TR-ET Part 2, pp. 6, 21, 35.

has acknowledged.³⁹ In contrast, their evidence is an amalgamation of hearsay, conflicting accounts and baseless speculation bereft of any indicia of reliability and probative value. Contrary to the SPO's assertion, it is not "highly incriminating",⁴⁰ but extremely prejudicial. Therefore, the present situation is materially indistinguishable from the Trial Panel's ruling with respect to W02652, whose evidence as to [REDACTED] was equally speculative,⁴¹ thereby warranting its exclusion.

2. The Second Allegation

37. [REDACTED] evidence on the Second Allegation is also marred by speculative assertions, limitations to his knowledge and contradictions with other accounts and/or judicial pronouncements.

38. [REDACTED]

39. Furthermore, [REDACTED] relative distance of around 150 meters away from the scene of the alleged events further calls into question his recollection – in particular the extent to which the witness could have been able to make out the very specific words he claims to have heard between the individuals concerned from such distance.⁴² The fact that the SPO has elected neither to call, nor to interview any of the individuals that [REDACTED] alleges to have been present, and who are otherwise alive, further impedes the Defence's ability to challenge the veracity of his claims.

40. [REDACTED]

41. [REDACTED]

³⁹ 0917778-091790, p. 0917780, para. 17.

⁴⁰ SPO Request, para. 10.

⁴¹ Oral Order of 17 April 2023, Transcript Page 2863 Line 13 to Page 2866 Line 8.

⁴² 102761-TR-AT Part 3 Revised-ET, p. 4.

42. [REDACTED]
43. [REDACTED]
44. In this respect, the Second Allegation is likewise marred by fundamental reliability and credibility concerns, and at best constitutes another attempt by the witness to cast aspersions on [REDACTED] to buttress his unsubstantiated suspicion that he was involved in the First Allegation, which by the witness' admission, is the sole reason for which he wants to testify.
45. Therefore, allowing the SPO to lead evidence on the Two Allegations would be contrary to any considerations of expediency as it would require the allocation of valuable courtroom time and ample investigative resources to inherently unreliable allegations that fall outside the scope of the Indictment, and which would in no way assist the Panel in its determination of any other relevant issue in the present proceedings. Considering further the concerns raised by the Panel with respect to the pace at which the SPO's case advances⁴³ and its direction to the Parties to concentrate exclusively on issues of relevance to the trial judgment during the course of the presentation of evidence,⁴⁴ the exclusion of [REDACTED] evidence on the Two Allegations remains the only alternative to ensure the expeditious conduct of proceedings and to safeguard Mr. Selimi's rights.

III. CLASSIFICATION

46. This motion is filed confidentially as it contains information concerning witnesses with protective measures. A public redacted version of the motion will be filed as soon as possible.

⁴³ Transcript of 21 February 2024, p. 12771

⁴⁴ *Ibid*, p. 12780.

IV. CONCLUSION AND RELIEF REQUESTED

47. Considering the foregoing, the Defence respectfully requests the Trial Panel to (i) ORDER the SPO not to elicit evidence on the Two Allegations from [REDACTED] during the course of his direct examination; and (ii) CAUTION [REDACTED] not to voluntarily proffer any evidence in relation to the two allegations.

Word count: 5990

Respectfully submitted on 6 March 2024,



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