



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Public Redacted Version of 'Prosecution response to Selimi Defence Motion for the Exclusion of Evidence of W04846'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Trial Panel should reject the SELIMI Motion to exclude anticipated testimony of W04846 concerning Rexhep SELIMI's alleged involvement in the [REDACTED] beating and killing of [REDACTED] ('[REDACTED] Incident') and in the [REDACTED] death of [REDACTED] ('[REDACTED] Incident').¹ The Anticipated Testimony is relevant to numerous facts and circumstances pleaded in the Indictment,² and its probative value is not outweighed by its prejudicial effect.³ In this respect, the Anticipated Testimony is inextricably linked to other parts of W04846's evidence, including that in [REDACTED] ('[REDACTED] Incident').⁴

2. The SELIMI Motion ignores the plain language of the Rules, relevant jurisprudence, and the fact that the Panel is composed of professional judges. It also ignores the Defence's ability to investigate issues it considers relevant and to cross-examine W04846, and erroneously conflates factors relevant to weight with those going to admissibility.

¹ Selimi Defence Motion for the Exclusion of Evidence of W04846 with Confidential Annex 1, KSC-BC-2020-06/F02166, Confidential, 6 March 2024 ('SELIMI Motion'). The [REDACTED] Incident and the [REDACTED] Incident are collectively referred to as the 'Anticipated Testimony'.

² Annex 1 to Submission of confirmed amended Indictment, KSC-BC-2020-06/F00999/A01, Confidential, 30 September 2022 ('Indictment').

³ See Rules 137-138 of the 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; Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, Confidential, 23 June 2023 ('June 2023 Decision'), para.12.

⁴ 102761-TR-AT Part 1 Revised-ET, pp.28-35; 095407-095413 RED, paras 10-14.

II. SUBMISSIONS

A. THE ANTICIPATED TESTIMONY IS RELEVANT

3. The Anticipated Testimony is *prima facie* relevant: it concerns statements and acts against alleged Opponents [REDACTED] before and during the Indictment Period, including by Accused Rexhep SELIMI [REDACTED]⁵ [REDACTED].

4. The Indictment alleges that, between at least March 1998 through September 1999, the Accused and other JCE members shared the common purpose to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be Opponents, *inter alia*, persons who were or were perceived to be collaborators and persons associated with the LDK.⁶ As alleged in the Indictment, acts in furtherance of the common purpose, such as public statements and actions on the ground, including the intimidation, vilification, and removal of Opponents, commenced as early as 1994.⁷ Thus, events that occurred outside the Indictment Period are not per se irrelevant to the case; nor is evidence going to prove those events inadmissible merely because they go to prove a fact outside of the Indictment Period.⁸ Indeed, the Panel has already admitted evidence of, *inter alia*, statements and acts against Opponents that fall outside the Indictment period and/or are not charged in the Indictment, finding such evidence is relevant to, for example, proof and context of events falling within the

⁵ Joint criminal enterprise ('JCE').

⁶ See Indictment, KSC-BC-2020-06/F00999/A01, para.32 (defining the term 'Opponents').

⁷ Indictment, KSC-BC-2020-06/F00999/A01, para.36. See also para.59 (alleging that the persecutory acts described in the Indictment are demonstrative of a wider campaign of persecution against Opponents implemented throughout Kosovo *before*, during, and after the Indictment period).

⁸ See Transcript, 17 April 2023, p.2864, Ins 17-21; *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022 ('*Gucati and Haradinaj* Trial Judgment'), para.22; See also ICTY, *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 ('*Prlić* Decision'), p.9.

temporal scope of the Indictment, including a pattern of conduct, and the Accused's intent and contributions to the pleaded JCE.⁹

5. In relation to the [REDACTED] Incident, W04846 states that [REDACTED].¹⁰ [REDACTED].¹¹ [REDACTED].¹² [REDACTED],¹³ [REDACTED],¹⁴ [REDACTED]. The [REDACTED] Incident is neither individual, nor remote and it is clearly connected to relevant facts during the Indictment Period.¹⁵

6. The [REDACTED] Incident, which falls within the temporal scope of the Indictment, concerns [REDACTED].¹⁶ The latter is inextricably linked to W04846's other evidence concerning [REDACTED]. [REDACTED].¹⁷ [REDACTED].¹⁸

⁹ See Third Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01705, 27 July 2023, para.18; Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, Confidential, 16 March 2023 ('First Rule 154 Decision'), para.113; Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595/COR, Confidential, 9 June 2023, para.47; Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154, KSC-BC-2020-06/F01700, Confidential, 24 July 2023 ('24 July 2023 Decision'), paras 26-27, 40, 43; Decision on Prosecution Motion for Admission of Evidence of W00072, W02153 and W04586 Pursuant to Rule 154, KSC-BC-2020-06/F01664, Confidential, 10 July 2023 ('10 July 2023 Decision'), paras 28, 33; Decision on Prosecution Motion for Admission of Evidence of W00208, W02082, W02475, W04147, W04325, W04491 and W04753 Pursuant to Rule 154 (F01788), KSC-BC-2020-06/F01848, Confidential, 10 October 2023, para.54; Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, Confidential, 14 June 2023 ('Rule 155 Decision'), para.157. The Panel has also taken judicial notice of adjudicated facts concerning events prior to the Indictment period, see ANNEX 2 to Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534/A02, Public, 17 May 2023, e.g. adjudicated facts 20, 21, and 24; Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023, paras 10, 18, 27(b). See also ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para.1352; *Gucati and Haradinaj* Trial Judgment, KSC-BC-2020-07/F00611/RED, para.22; ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2004.

¹⁰ 102761-TR-AT Part 2 Revised-ET, pp.28-34, 37.

¹¹ 102761-TR-AT Part 2 Revised-ET, pp.38-44, Part 3 Revised-ET, pp.4-7; 095407-095413 RED, paras 17-21.

¹² 102761-TR-AT Part 2 Revised-ET, pp.44-45.

¹³ 102761-TR-AT Part 2 Revised-ET, pp.27-28.

¹⁴ See 032287-032344; 032345-032363.

¹⁵ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.15.

¹⁶ 102761-TR-AT Part 1 Revised-ET, p.33; 102761-TR-AT Part 2 Revised-ET, pp.1-2; 095407-095413 RED, para.4.

¹⁷ 102761-TR-AT Part 1 Revised-ET, pp.28-35; 095407-095413 RED, paras 10-14.

¹⁸ 102761-TR-AT Part 2 Revised-ET, pp.3-4, 24-26; 095407-095413 RED, paras 23-24.

7. Accordingly, the Anticipated Testimony – which must be assessed in light of W04846’s evidence as a whole – is relevant to establishing, *inter alia*:¹⁹ (i) the common criminal purpose;²⁰ (ii) the consistent pattern that the charged crimes followed;²¹ (iii) Rexhep SELIMI’s shared intent for the commission of the charged crimes with other JCE members,²² including the other Accused and [REDACTED]; (iv) [REDACTED] contribution to achieving the common purpose;²³ (v) that from 1994 onwards, and throughout the Indictment Period, the General Staff, of which Rexhep SELIMI was a member,²⁴ legitimised and encouraged attacks against and killings of Opponents and explicitly threatened other Opponents with the same fate;²⁵ (vi) Rexhep SELIMI’s personal participation in the intimidation, interrogation, mistreatment, and detention of Opponents;²⁶ (vii) Rexhep SELIMI participating in, facilitating, condoning, encouraging, and/or otherwise aiding in the crimes in furtherance of the common purpose;²⁷ and (viii) the wider campaign of attacks against Opponents implemented throughout Kosovo before, during, and after the Indictment Period.²⁸

¹⁹ Notably, the Pre-Trial Judge, while explicitly acknowledging that the events W04846 addresses are uncharged, found W04846’s evidence to be *prima facie* relevant, noting his evidence may nonetheless be relevant to establish [REDACTED] commitment to the policy underlying the JCE in the Indictment, *see* Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01058/CONF/RED, Confidential, 27 October 2022, para.26.

²⁰ Indictment, KSC-BC-2020-06/F00999/A01, para.32. *See also* Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’ [...], KSC-BC-2020-06/F01594/A03, Confidential, 9 June 2023 (‘SPO Pre-Trial Brief’), para.2; Confidential redacted version of Prosecution request to add two witnesses and associated materials [...], KSC-BC-2020-06/F00947/CONF/RED, Confidential, 2 September 2022, para.6. Both [REDACTED] (*see, e.g.* 102761-TR-AT Part 2 Revised-ET, pp.39, 46-47; 102761-TR-AT Part 3 Revised-ET, pp.3, 17-19; 095407-095413 RED, para.19), and [REDACTED] (*see, e.g.* 102761-TR-AT Part 1 Revised-ET, pp.8, 11-12, 27-28; 095407-095413 RED, paras 6-7), would fall within the category of Opponents set out in the Indictment.

²¹ Indictment, KSC-BC-2020-06/F00999/A01, para.17.

²² Indictment, KSC-BC-2020-06/F00999/A01, para.33; *See also* SPO Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 3, 11.

²³ [REDACTED].

²⁴ Indictment, KSC-BC-2020-06/F00999/A01, para.8.

²⁵ Indictment, KSC-BC-2020-06/F00999/A01, para.36.

²⁶ Indictment, KSC-BC-2020-06/F00999/A01, paras 40-42, 45-47, 49; *See also* SPO Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 7, 112, 232, 278.

²⁷ Indictment, KSC-BC-2020-06/F00999/A01, para.52(b).

²⁸ Indictment, KSC-BC-2020-06/F00999/A01, para.59.

8. For all these reasons, the Anticipated Testimony is connected, directly or indirectly, to elements of the offences and modes of liability pleaded in the Indictment, and provides the Panel with useful background or contextual information.²⁹

B. THE ANTICIPATED TESTIMONY'S PROBATIVE VALUE IS NOT OUTWEIGHED BY ITS PREJUDICIAL EFFECT

9. The Anticipated Testimony's probative value is not outweighed by any prejudice.³⁰ The fact it is, or might be, incriminating does not render it prejudicial.³¹

10. First, the Panel is composed of professional judges, not lay jurors, and is fully capable of hearing the Anticipated Testimony and, should it later determine that any aspect thereof is not relevant to the determination of the charges, disregarding it.³²

11. Second, it is trite law that the question of admissibility is distinct from that of weight to be accorded to a particular piece of evidence at the judgement phase.³³ Accordingly, the extensive, misleading,³⁴ speculative and irrelevant submissions concerning the reliability of the Anticipated Testimony³⁵ should be dismissed. The Defence will have every opportunity to cross-examine the witness and to make such arguments at the end of the case. At this stage, the Panel need only determine whether the evidence is admissible, not the weight, if any, it will attribute thereto at the end of the trial.

²⁹ See *Gucati and Haradinaj* Trial Judgment, KSC-BC-2020-07/F00611/RED, para.21; June 2023 Decision, KSC-BC-2020-06/F01623, paras 20, 22, 30; SCSL, *Prosecutor v Sesay et al.*, SCSL-04-15-T, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 2008 ('*Sesay* Decision'), paras 16, 20; *Prlić* Decision, p.9.

³⁰ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, paras 1, 19-45.

³¹ June 2023 Decision, KSC-BC-2020-06/F01623, para.36.

³² Rule 155 Decision, KSC-BC-2020-06/F01603, para.157.

³³ *Sesay* Decision, para.17.

³⁴ By way of example, see SELIMI Motion, KSC-BC-2020-06/F02166, para.43, fn.83, citing to 117824-117824 in which, contrary to the Defence assertion, W04846 makes no mention of the 'Second Allegation' and which contains no indication of an attempt by W04846 to 'gain leverage with the SPO'.

³⁵ SELIMI Motion, KSC-BC-2020-06/F02166, paras 21-45.

12. Further, contrary to the Defence assertion,³⁶ W04846 does not provide multiple versions of events. Rather, he has merely continued to provide the SPO with information he has received concerning [REDACTED]. W04846's prior statements are generally consistent, including in relation to the Anticipated Testimony, with W04846 providing clarifications to the note of his [REDACTED] conversation with the SPO³⁷ during his [REDACTED] SPO interview.³⁸

13. Third, while the SELIMI Motion is replete with lamentation about information the SELIMI Defence considers relevant but does not possess,³⁹ there has been no 'non-disclosure of evidence crucial to the Defence's ability to prepare and challenge' the Anticipated Testimony.⁴⁰ The SPO cannot disclose that which it does not possess, has, where justified, sought information from third parties at the Defence's request, and has made it repeatedly clear it will consider any future disclosures when scheduling W04846's testimony.⁴¹

14. There is no valid reason why the SELIMI Defence cannot itself seek to obtain information it deems relevant to its preparation as it is authorised, and expected, to do. Notably, as far back as September 2022, the SELIMI Defence provided extensive detail of the investigations into the Anticipated Testimony that it would have to undertake should W04846 be added to the SPO's witness list 'regardless of whether he ultimately testifies and, if he does, whether he testifies on all aspects of his

³⁶ SELIMI Motion, KSC-BC-2020-06/F02166, para.24.

³⁷ 095407-095413 RED.

³⁸ 102761-TR-AT Parts 1-3 Revised-ET.

³⁹ See, e.g., SELIMI Motion, KSC-BC-2020-06/F02166, paras 19-20, 22-29, 31, 33, 39, 41.

⁴⁰ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.20.

⁴¹ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.20; See ANNEX 1 to Selimi Defence Motion for the Exclusion of Evidence of W04846, KSC-BC-2020-06/F02166/A01, Confidential, 6 March 2024, p.2/10 ('the SPO will disclose any such material should it be received, and the SPO will take this factor into account when scheduling W04846's testimony'), and p.3/10 ('the SPO confirms that it will not be calling W04846 during the March block and that, in scheduling W04846's testimony, it will take into account whether any further material relevant to this witness is received').

statement.’⁴² Information provided by W04846 indicates that the SELIMI Defence has been investigating the [REDACTED] Incident.⁴³ In sum, the Defence is fully able to challenge the Anticipated Testimony.⁴⁴ In this regard, the SPO notes that an item seized from Rexhep SELIMI contains multiple references to [REDACTED].⁴⁵

15. Fourth, during his testimony, W04846 will, naturally, be asked to provide his basis of knowledge, including in relation to the Anticipated Testimony. While the [REDACTED] Incident contains hearsay, this does not negate the *prima facie* probative value thereof nor does it render it inadmissible as such.⁴⁶ Rather, such matters can be addressed by the Defence during cross-examination and would pertain to the evidence’s weight, not admissibility.⁴⁷ The opportunity to cross-examine the witness in relation to the Anticipated Testimony negates any potential prejudice.⁴⁸

16. Indeed, the Panel has rejected similar Defence arguments that it is not in a position to effectively test the hearsay contained in a witness’ statement since the person who presumably overheard the relevant conversation is not a witness in this case, noting that the Defence will be able to cross-examine the witness who provides hearsay evidence on the matter and is free to call the person thought to have provided the primary evidence.⁴⁹

⁴² Selimi Defence Response to Confidential redacted version of Prosecution request to add two witnesses and associated materials, KSC-BC-2020-06/F00975, Confidential, 15 September 2022, paras 27-29.

⁴³ See 119826-119826; 119379-119383 RED.

⁴⁴ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, paras 19-20, 31, 39; See also Decision on Thaçi’s and Selimi’s Appeals against Decisions F01057 and F01058, KSC-BC-2020/IA025/F00007, Confidential, 18 April 2023, paras 7(d), 50-55, where a Panel of the Court of Appeals Chamber rejected Defence arguments concerning, *inter alia*, error in the assessment of the impact of the late addition of W04846 to the SPO’s witness list.

⁴⁵ See SPOE00226527-SPOE00226613-ET Revised, pp.SPOE00226588-90, SPOE00226593.

⁴⁶ 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.45.

⁴⁷ 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.45.

⁴⁸ See First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113; 10 July 2023 Decision, KSC-BC-2020-06/F01664, para.28; 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.27.

⁴⁹ 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.46.

17. Fifth, Defence submissions categorising the Anticipated Testimony as evidence of bad character or of a propensity to commit crimes of a similar nature to those charged⁵⁰ are inapposite. The SPO intends to elicit the Anticipated Testimony in light of its clear relevance to the charges in the Indictment, as set out above.⁵¹

18. Sixth, the SPO is not 'inviting the Trial Panel to conclude that a murder has been committed'⁵² and the fact the SPO has not sought to amend the Indictment to include the Anticipated Testimony is not 'determinative' of anything⁵³ other than the reality that, in line with the jurisprudence, the Accused cannot be found guilty in relation to these specific incidents.⁵⁴ The latter ensures that the Defence is not unduly prejudiced by the Anticipated Testimony and in no way detracts from the admissibility thereof.

19. Finally, there is no basis for the assertion that W04846 would be allowed 'to use his forthcoming testimony as a fishing expedition'.⁵⁵ The SPO intends to reduce the estimate for W04846's direct examination from four⁵⁶ to three hours, with appropriate time being spent on the Anticipated Testimony. In particular, given W04846's extent and basis of knowledge in relation to the [REDACTED] Incident, the SPO does not intend to address the matter at length. Nevertheless, the brevity with which the SPO intends to address the Anticipated Testimony does not mean it should be precluded from doing so, in particular given its relevance and inextricable connection to W04846's other evidence.

⁵⁰ SELIMI Motion, KSC-BC-2020-06/F02166, paras 11-12, 32.

⁵¹ *See, e.g.* para.7 (above).

⁵² *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.31.

⁵³ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.17. The right to adequate notice of the charges requires that the Prosecution should lay out in detail the material facts underpinning the charges, but not the evidence by which such facts are to be proved, *see* June 2023 Decision, KSC-BC-2020-06/F01623, para.23; 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.27.

⁵⁴ First Rule 154 Decision, KSC-BC-2020-06/F01380, para.113; 24 July 2023 Decision, KSC-BC-2020-06/F01700, para.27.

⁵⁵ *Contra* SELIMI Motion, KSC-BC-2020-06/F02166, para.32.

⁵⁶ *See* ANNEX 1 to Prosecution submission of list of witnesses for 15 January to 4 April 2024, KSC-BC-2020-06/F02007/A01, Confidential, 14 December 2023, p.50/82.

III. CONFIDENTIALITY

20. This request is confidential in accordance with Rule 82(4).

IV. RELIEF REQUESTED

21. For the aforementioned reasons, the Panel should reject the SELIMI Motion.

Word count: 3103



Kimberly P. West

Specialist Prosecutor

Monday, 18 March 2024

At The Hague, the Netherlands.