

**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:** 25 March 2024

**Language:** English

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**Public Redacted Version of Selimi Defence Reply to Prosecution Response to  
F02166**

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## I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“the Defence”) hereby files its reply to the Prosecution response to Selimi Defence Motion for the Exclusion of Evidence of W04846<sup>1</sup> (“the Response”). The Response mischaracterizes the relevant admissibility tests, is abundant in paradoxical representations and attempts to establish groundless connections between the evidence challenged in the Motion<sup>2</sup> with the case against the Accused and/or other aspects of W04846’s evidence.
2. These submissions reply to one issue arising out of the Response, namely the proposition that the challenged evidence is relevant.

## II. SUBMISSIONS

### A. The Anticipated Testimony is not relevant

#### 1. The SPO failed to demonstrate the relevance of the [REDACTED]

3. The SPO avers that the Trial Panel has determined that extra-temporal evidence may be relevant to, *inter alia*, “proof and context of events falling within the temporal scope of the Indictment.”<sup>3</sup> Indeed, the admissibility of such evidence hinges on its relevance to *events*,<sup>4</sup> or, as already explained in the Motion, *specific acts* that occurred during the Indictment period.<sup>5</sup>

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<sup>1</sup> KSC-BC-2020-06/F02187, Prosecution response to Selimi Defence Motion for the Exclusion of Evidence of W04846, 18 March 2024.

<sup>2</sup> KSC-BC-2020-06/F02166, Selimi Defence Motion for the Exclusion of Evidence of W04846, 6 March 2024 (“Motion”).

<sup>3</sup> Response, para. 4.

<sup>4</sup> KSC-BC-2020-06/F01705, Third Decision on Specialist Prosecutor’s Bar Table Motion, 27 July 2023, para. 18; KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154. 16 March 2023, para. 118.

<sup>5</sup> 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.

4. In this instance, the SPO has failed to identify any specific act or event featuring in the Indictment corroborated or otherwise contextualised by the [REDACTED]. Instead, the SPO merely contends that the [REDACTED] is connected to such general averments in the Indictment as the common purpose or a consistent pattern that the charged crimes supposedly followed.<sup>6</sup>
5. However, when an event is not heralded in an indictment, the seized chamber has the power to not admit the related evidence, “even if there are general averments in the indictment that may in some way encompass the unheralded event”.<sup>7</sup> In that respect, evidence that “is of a very specific nature”, and where the Prosecution had ample opportunity to include the related allegations in its indictment, has been excluded notwithstanding that a remote connection between that evidence and the general averments of the indictment could be established.<sup>8</sup> In similar circumstances, evidence of uncharged allegations was excluded despite submissions made by the Prosecution that the impugned evidence supported *mens rea* and provided background information on the charged crimes.<sup>9</sup>
6. The SPO has likewise failed to connect the [REDACTED] to any material fact referred to in the Indictment beyond the general averments recounted in paragraph 7 of its Response. Indeed, if the SPO was permitted to lead highly detailed accounts such as this by merely drawing analogies with the general elements of its case, then the rigorous pleading requirements that it must satisfy would be entirely superfluous.

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<sup>6</sup> Response, para. 7.

<sup>7</sup> ICTY, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para. 12. See also *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Accused’s Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*, para. 8.

<sup>8</sup> *Ibid*, para. 17.

<sup>9</sup> ICTR, *Prosecutor v. Simba*, Case No. ICTR-01- 76-T, Judgment and Sentence, 13 December 2005, para. 30.

7. Additionally, the SPO further conflates pattern evidence and similar fact or bad character evidence.<sup>10</sup> Uncharged pattern evidence has been found admissible only in those remote instances where it was introduced “to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.”<sup>11</sup> As such, pattern evidence requires an inextricable link between a charged and an uncharged offence which would make the possibility that they occurred coincidentally “an affront to common sense.”<sup>12</sup> Absent such link, the prosecution is not entitled to lead uncharged pattern evidence as independent evidence to prove the specific elements of its case, such as the contributions to the common purpose.<sup>13</sup>
8. In the instant case, the SPO has failed to identify any link between the [REDACTED] and any other incident with which Mr. Selimi is otherwise charged. Therefore, the SPO is introducing this evidence to allege Mr. Selimi’s propensity to commit the charged crimes yet absent any evidentiary foundation in favour of such propensity, “which is impermissible, in view of the low probative value of such a demonstration and its prejudicial effect.”<sup>14</sup>
9. In addition, the prejudice inherent in any attempt to establish a pattern by means of adducing evidence of uncharged events must always be balanced against whether the prosecution may prove its case through less prejudicial evidence.<sup>15</sup> Given the magnitude of its witness and exhibit list, the SPO should be expected

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<sup>10</sup> ICTR, *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment, 28 November 2007, footnote 759.

<sup>11</sup> ICTY, *Prosecutor v. Kupreskic et al*, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 321.

<sup>12</sup> ICTR, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Witness DBY, 18 September 2003, para. 13.

<sup>13</sup> IRMCT, *Prosecutor v. Stanisic and Simatovic*, Case No. MICT-15-96-A, Appeal Judgment, 31 May 2023, para. 398.

<sup>14</sup> ICTR, *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment, 28 November 2007, footnote 759.

<sup>15</sup> ICTR, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Witness DBY, 18 September 2003, para. 14.

to plead this putative pattern without recourse to inherently prejudicial evidence of this nature.

10. Finally, the SPO argues that the Anticipated Testimony would amount to instances of personal participation of Mr. Selimi in the crimes charged in furtherance of the common purpose.<sup>16</sup> However, if the two incidents constitute instances of personal participation in the charged crimes, then they amount to instances of the Accused's significant contribution to the JCE.<sup>17</sup>
11. That being the case, and given that the Accused's significant contribution constitutes the *actus reus* of participation in a JCE, then those incidents should have been specifically pled in the Indictment.<sup>18</sup> However, the SPO acknowledges that these crimes are not charged and "the Accused cannot be found guilty in relation to these specific incidents."<sup>19</sup> Put simply, it cannot be that a course of conduct is part of the alleged *actus reus* of an offence but is simultaneously not charged. If the Anticipated Testimony is part of the alleged *actus reus*, then it was incumbent upon the SPO to plead it as such if it intended to rely on it for these purposes.

**2. The SPO failed to substantiate the relevance of the [REDACTED]**

12. The [REDACTED] is equally uncharged and unconnected to any other event or specific fact otherwise pled. The submissions above<sup>20</sup> concerning the relevance of the [REDACTED] apply similarly to the relevance of the [REDACTED].

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<sup>16</sup> Response, para. 7.

<sup>17</sup> See KSC-BC-2020-06/F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 206.

<sup>18</sup> ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeal Judgment, 27 November 2007, para. 63; *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-T, Trial Judgment, 25 February 2004, para. 34.

<sup>19</sup> Response, para. 18.

<sup>20</sup> *Supra* paras. 5-11.

**a. W04846's belief about [REDACTED] is irrelevant**

13. If the SPO is not inviting the Trial Panel to conclude that a murder was committed,<sup>21</sup> and, as correctly argued in the Motion,<sup>22</sup> neither W04846, nor any other witness, possess evidence which could even show that [REDACTED] death was at the hand of another person, then W04846's "belief"<sup>23</sup> on the matter is of no relevance and therefore inadmissible.
14. Furthermore, the SPO's insistence that W04846's "belief" is limited to an allegation that [REDACTED]<sup>24</sup> is directly contradicted by a recent communication from W04846 referred to in the Response, wherein the witness, relying on pure conjecture, now accuses [REDACTED].<sup>25</sup> The simple fact made clear by this contradiction is that neither the SPO, nor indeed W04846 himself, are able to define what it is exactly that the witness believes. Contrary to the SPO's plea,<sup>26</sup> it is exactly this kind of prejudicial moving target which it should be precluded from presenting in court.

**b. There is no inextricable link between [REDACTED]**

15. At the outset, the Defence notes that evidence of uncharged events *may* be admissible when not hearing that evidence would render another charged account either "incomplete or incomprehensible."<sup>27</sup> The SPO has failed to

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<sup>21</sup> Response, para. 18.

<sup>22</sup> Motion, paras. 21-31

<sup>23</sup> Response, para. 6.

<sup>24</sup> *Id.*

<sup>25</sup> 119379-119383, p. 119383. This letter is also replete with blatant falsehoods and misrepresentations in describing Defence team members and their interactions with relevant persons. In particular, those taking part in the meetings described were limited to officially appointed Selimi Defence team members, identified at the very beginning of the meetings clearly by name and position; none of whom are related to Mr. Selimi, or even resemble those family members named by W04846.

<sup>26</sup> Response, para. 19.

<sup>27</sup> ICTR, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Witness DBY, 18 September 2003, para. 10.

establish how not hearing the evidence of [REDACTED] would render W04846's evidence on the [REDACTED] incomplete or incomprehensible.

16. In fact, it is clear that the SPO's intention is to, absent any evidence other than unsupported insinuation, create a false impression of a causal link between these alleged altercations and [REDACTED]. The very fact that the SPO now asserts that on the one hand that, "given W04846's extent and basis of knowledge in relation to the [REDACTED], the SPO does not intend to address the matter at length", yet on the other argues in favour of its "relevance and inextricable connection to W04846's other evidence" is illustrative of this point.<sup>28</sup>
17. With respect to W04846's claim to have been told by [REDACTED] about an allegedly overheard conversation between [REDACTED], setting aside the third-hand hearsay nature of the evidence; if the SPO is not inviting the Trial Panel to conclude that a murder was committed, and there is nothing to show that [REDACTED] was at the hand of another person, then the irrelevance of this evidence is manifest and its "inextricable link" to the death is non-existent.
18. The alleged intervention by [REDACTED] forms part of the [REDACTED] and, for the reasons set out above, should be excluded. Additionally, there is no apparent, let alone inextricable, link between his death and this alleged "intervention" with the individuals concerned.
19. In a similar vein, regarding the alleged [REDACTED], if the SPO wishes to call W04846 to allege that the witness overheard words spoken during an argument, it is free to do so, but not to improperly suggest an inextricable link to [REDACTED].

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<sup>28</sup> Response, para. 19.

### III. CLASSIFICATION

20. These submissions are filed confidentially pursuant to Rule 82(4). A public redacted version will be filed shortly.

### IV. CONCLUSION

21. The SPO's submissions demonstrate its motivation to lead uncharged bad character evidence in deference to W04846's exclusive motivation "to talk about [REDACTED] and to find out who did it" for he indicated that "if he is not able to discuss [REDACTED], he might not testify."<sup>24</sup> The mere fact that this witness conditions his entire testimony on being allowed to do so is not an appropriate basis to allow the leading of evidence that does not satisfy the requirements of Rule 138. Therefore, the Trial Panel should REJECT the Response and GRANT the Motion.

Word count: 1999

Respectfully submitted on 25 March 2024,



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