



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06

**The 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: Fidelma Donlon

Date: 12 February 2024

Language: English

Classification: Public

**Public Redacted Version of
Decision on Prosecution Motion for Admission of Evidence of W01453, W03878,
W04446, W04575, and W04651 Pursuant to Rule 154 (F02005)**

Specialist Prosecutor

Kimberly P. West

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

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TRIAL PANEL II (“Panel”), pursuant to Articles 21 and 37 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 137-138, 141(1), and 154 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 March, 9 June, 10 July, 24 July, 10 October, 2 November and 1 December 2023, and 8 January 2024, the Panel issued decisions on motions of the Specialist Prosecutor’s Office (“SPO”) pursuant to Rule 154 in respect of 54 witnesses.¹
2. On 14 December 2023, the SPO filed a Rule 154 motion in relation to five additional witnesses (“Motion”).²

¹ F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* (“First Rule 154 Decision”), 16 March 2023, confidential (a public redacted version was filed on 7 November 2023, F01380/RED); F01593, Panel, *Decision on Urgent Prosecution Updates and Related Requests Concerning Witnesses in the Next Evidentiary Block*, 9 June 2023, confidential (a public redacted version was filed on 31 October 2023, F01593/RED); F01595, Panel, *Decision on Second Prosecution Motion Pursuant to Rule 154*, 9 June 2023, confidential (a corrected version was issued on 10 August 2023, F01595/COR) (a public redacted version was filed on 9 November 2023, F01595/COR/RED); F01664, Panel, *Decision on Prosecution Motion for Admission of Evidence of W00072, W02153 and W04586 Pursuant to Rule 154*, 10 July 2023, confidential (a public redacted version was filed on 27 November 2023, F01664/RED); F01700, Panel, *Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154*, 24 July 2023, confidential (a public redacted version was filed on 7 November 2023, F01700/RED); F01848, Panel, *Decision on Prosecution Motion for Admission of Evidence of W00208, W02082, W02475, W04147, W04325, W04491 and W04753 Pursuant to Rule 154 (F01788)* (“Fifth Rule 154 Decision”), 10 October 2023, confidential (a public redacted version was filed on 14 November 2023, F01848/RED); F01901, Panel, *Decision on Prosecution Motion for Admission of Evidence of W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Request (F01830)*, 2 November 2023, confidential (a public redacted version was filed on the same day, F01901/RED); F01976, Panel, *Decision on Prosecution Motion for Admission of Evidence of W00498, W01140, and W01763 Pursuant to Rule 154* (“F01976”), 1 December 2023, confidential (a public redacted version was filed on the same day, F01976/RED); F02044, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request*, 8 January 2024, confidential (a public redacted version was filed on the same day, F02044/RED).

² F02005, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154*, 14 December 2023, confidential, with Annexes 1-5, confidential (a public redacted version was filed on the same day, F02005/RED).

3. On 8 January 2024, following an extension of time to respond,³ the Defence for all four Accused (collectively, “Defence”) jointly responded to the Motion (“Response”).⁴

4. On 15 January 2024, the SPO replied to the Response (“Reply”).⁵

II. SUBMISSIONS

5. The SPO requests admission of the statements, together with associated exhibits (respectively, “Statements” and “Associated Exhibits”; collectively, the “Proposed Evidence”) of five witnesses: W01453, W03878, W04446, W04575, and W04651 (“Witnesses”).⁶ The SPO submits that the Proposed Evidence meets the requirements of Rules 138(1) and 154 and that admission thereof pursuant to Rule 154 is in the interests of justice.⁷

6. The Defence objects to the admission of parts of the Proposed Evidence on the basis that: (i) the SPO has failed to substantiate its relevance; (ii) the documents tendered as associated exhibits do not constitute an indispensable or inseparable part of the statements to which they relate; (iii) the probative value of some of the Statements and Associated Exhibits is outweighed by their prejudicial effect; (iv) the time-saving function of admission pursuant to Rule 154 is overshadowed by the lengthy *viva voce* testimony sought by the SPO; and (v) some of the evidence sought to be tendered concerns matters of pivotal importance to the SPO’s case, the admission of which would prove highly prejudicial for the rights of the Accused.⁸

³ F02029, Panel, *Decision on Joint Defence Request for Extensions of the Time Limit to Respond to Certain Filings*, 20 December 2023, paras 12, 13(b).

⁴ F02046, Specialist Counsel, *Joint Defence Response to Prosecution Motion for Admission of Evidence of Witnesses W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154 (F02005)*, 8 January 2024, confidential (a public redacted version was filed on 22 January 2024, F02046/RED).

⁵ F02062, Specialist Prosecutor, *Prosecution Reply Relating to Rule 154 Motion F02005*, 15 January 2024, confidential (a public redacted version was filed on the same day, F02062/RED).

⁶ Motion, paras 1, 40.

⁷ Motion, paras 10-11, 16, 24, 29-31, 38; *See also* Annexes 1-5 to the Motion.

⁸ Response, para. 2.

7. The SPO replies that the Motion should be granted as the Response is based on misconceptions of the scope of evidence relevant to this case and the *prima facie* nature of admissibility assessments, in the context of Rule 154, where the witnesses will be available for cross-examination.⁹

III. APPLICABLE LAW

8. The Panel incorporates by reference the applicable law as set out in its First Rule 154 Decision.¹⁰

IV. DISCUSSION

A. W01453

9. The SPO submits that the proposed evidence of W01453¹¹ is: (i) relevant;¹² (ii) *prima facie* authentic and reliable;¹³ and (iii) suitable for admission under Rule 154.¹⁴

10. The Defence responds that the Panel should exercise its discretion not to admit W01453's Statements under Rule 154 as his evidence is central, noting that his evidence concerns the acts and conduct of the Accused and that, in light of his position at the time, is a vital link in the SPO's proposed evidence connecting the Accused with the alleged crime base.¹⁵ The Defence also objects to the admission

⁹ Reply, paras 1, 9.

¹⁰ First Rule 154 Decision, paras 11-35.

¹¹ The proposed evidence of W01453 ("W01453's Proposed Evidence") consists of: (i) [REDACTED] (with corresponding Albanian version) ("W01453's Interview"); (ii) [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] (with corresponding Albanian version) ("W01453's Transcript") (collectively, "W01453's Statements"); (iii) [REDACTED]; (iv) [REDACTED]; (v) [REDACTED]; and (vi) [REDACTED] (with corresponding Albanian version) (collectively "W01453's Associated Exhibits"). The Panel notes that the SPO does not tender items 5 to 8 for admission. *See generally*, Annex 1 to the Motion.

¹² Motion, paras 3-7.

¹³ Motion, para. 8.

¹⁴ Motion, paras 10-11.

¹⁵ Response, paras 8-12 referring to First Rule 154 Decision, para. 20; International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Vlastimir Đjordžević*, IT-05-87/1-T, Trial Chamber II, KSC-BC-2020-06

of W01453's Statements on other grounds, namely that: (i) W01453's Interview and W01453's Transcript, both before another jurisdiction, contain fundamental inconsistencies which go to key issues of W01453's evidence;¹⁶ (ii) it would not enhance the efficiency of the proceedings;¹⁷ and (iii) the Defence has prepared for W01453's evidence being heard *viva voce* as notified on 22 October 2021, noting that the SPO only recently changed the witness to Rule 154.¹⁸ Lastly, the Defence objects to the admission of one of the Associated Exhibits, as it concerns W04741 who is better placed to authenticate the item.¹⁹

11. The SPO replies that the limited divergence in the witness's account does not render it unsuitable for admission under Rule 154 and that is in the interest of justice to transparently provide interrelated statements to the Panel to allow a fair assessment.²⁰

12. *W01453's Statements*. Regarding relevance, W01453 was a member of the People's Movement for Kosovo ("LPK") and crossed into Kosovo in early 1998 where he helped organise Kosovo Liberation Army ("KLA") units in various locations and was later appointed to a position of command.²¹ The SPO relies upon W01453's Proposed Evidence in respect of, *inter alia*: (i) the creation of the KLA; (ii) the structure of, and reporting lines within, the KLA and, in particular, how the KLA obtained weapons and other supplies in a relevant zone; (iii) the release of persons detained by KLA members; and (iv) meetings with, and information provided to, members of the KLA General Staff, including Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi.²² The Panel is satisfied that W01453's Proposed

[Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92ter](#), 10 February 2009, para. 10; *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Trial Chamber III, [Decision on Prosecution Motion to Apply Rule 92ter of the Rules of Procedure and Evidence to Witness Sulejman Tihic](#), 20 November 2008, p. 3.

¹⁶ Response, paras 15-22 referring to [REDACTED].

¹⁷ Response, paras 23-25.

¹⁸ Response, para. 26.

¹⁹ Response, para. 28.

²⁰ Reply, paras 2-3.

²¹ Motion, para. 3.

²² Motion, paras 4-6. F01594/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief* ("Amended List of Witnesses"),

Evidence is relevant to the charges in the Indictment.²³

13. Regarding authenticity and probative value, W01453's Statements consist of: (i) W01453's interview with another jurisdiction; and (ii) W01453's transcript of testimony before that same jurisdiction.²⁴ Each of them contains multiple indicia of authenticity and reliability, including: (i) transcription of the audio-video recorded interview; (ii) the date (and time) of the interview; (iii) the attendees; (iv) the witness's personal details; (v) the stamp and signature of authorised officials; and/or (vi) the fact that the interview was given under oath.²⁵

14. The Panel notes that the Defence objects to the admission of W01453's Statements pursuant to Rule 154 as it says there are material differences between the two statements.²⁶ The Panel agrees with the Defence that there appears to be a number of contradictory statements in W01453's Statements, which renders ascertaining the probative value of those pages uncertain ("Pages").²⁷ While alleged inconsistencies and contradictions are not in principle an obstacle to admissibility under Rule 154, the Panel, nonetheless, considers that these parts of W01453's Statements are not appropriate for admission under Rule 154. In these circumstances, the Panel will exercise its discretion to not admit the Pages from W01453's Statements and directs the SPO to lead W01453's evidence in respect of relevant issues in the Pages *viva voce*. This is without prejudice to the possibility for the SPO, if necessary, to rely upon the witness's earlier accounts to refresh his memory and/or to impugn the account given in court.

9 June 2023, strictly confidential and *ex parte*, pp. [REDACTED] (a confidential redacted version was filed on the same day, F01594/A02); F00709/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of Corrected Pre-Trial Brief and Related Request* ("SPO Pre-Trial Brief"), 24 February 2022, strictly confidential and *ex parte*, in particular, paras [REDACTED] (a public redacted version was filed on 3 April 2023, F01415/A01; a confidential lesser redacted version was filed on 9 June 2023, F01594/A03).

²³ F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment* ("Indictment"), 30 September 2022, confidential, paras [REDACTED] (a public lesser redacted version was filed on 27 February 2023, F01323/A01).

²⁴ Motion, para. 8; *See* Annex 1 to the Motion.

²⁵ W01453's Statements; *See* Annex 1 to the Motion.

²⁶ Response, paras 15-20 *referring to* [REDACTED].

²⁷ *See* [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

15. Lastly, while the Panel agrees that the SPO (and the Defence) has an ethical obligation not to tender for the truth of its content evidence which it knows or suspects to be false, and shall not knowingly permit the giving of false evidence nor rely upon it,²⁸ a party is not prohibited from tendering varying accounts from a witness if it makes clear that it will not seek to rely on one or more of those accounts for the truth of its content but for credibility. This will ensure that the Panel has all the information before it to assess the witness's credibility and the evidence's reliability.

16. Based on the above, except for the Pages, the Panel is satisfied of the *prima facie* authenticity and probative value of W01453's Statements.

17. Regarding the suitability of W01453's Statements, excluding the Pages, for admission pursuant to Rule 154, the Defence objects to the admission under Rule 154 as the centrality of W01453's evidence requires it to be heard live.²⁹ The Panel agrees that W01453's Statements goes to a number of important issues in this case, including, as highlighted by the Defence,³⁰ W01453's roles and responsibilities during the relevant time. However, the centrality of a witness's proposed evidence is not, in and of itself, a ground which compels the Panel to refuse its admission. Instead, Rule 154 specifically allows the Panel to admit evidence which goes to the "acts and conduct of the Accused". Rather, the centrality of the evidence is one factor that the Panel takes into consideration when deciding whether to exercise its discretion to admit evidence under Rule 154.³¹ In addition, the Defence's reliance upon the Panel's oral order of 10 July 2023 is misplaced.³² The Panel refused to admit W04746's proposed evidence pursuant to Rule 154 primarily because the SPO's application was late, it failed to justify good cause for the late application, and as the late change of W04746's evidence would

²⁸ Response, para. 21.

²⁹ Response, para. 9.

³⁰ Response, paras 10-14.

³¹ First Rule 154 Decision, para. 20.

³² Response, para. 13 referring to Transcript of Hearing, 10 July 2023, p. 5354, line 25 to p. 5355, line 14.

prejudice the Accused, the importance of the evidence was only one further factor taken into account by the Panel.³³ These factors are not applicable here.

18. Furthermore, the fact that the evidence offered by the SPO is not reflective of all of W01453's evidence³⁴ is not a reason to reject W01453's Statements as a Party should only offer prior statements that are considered relevant to its case or to the establishment of the truth and that meet the other requirements of Rules 138(1) and 154. If the Defence considers that there is relevant information in the witness's other statements, it can put that information to the witness during cross-examination and, as the case may be, seek the admission of additional records.

19. Regarding the Defence's argument that it was initially foreseen that this witness will give his evidence *viva voce*,³⁵ the Panel agrees with the Defence that there should be a degree of foreseeability of the mode of testimony of a witness, but this factor must be balanced against other relevant considerations, including the need to ensure the expeditious conduct of the proceedings.³⁶ A calling party should give timely notice to the opposing party, and to the Panel, of any decision to change the manner of presentation of a witness as soon as it has taken a decision to that effect. A Panel must verify that such a change does not unfairly prejudice the opposing side. In the present case, the Panel notes that the Defence was notified of the SPO's intention to tender this witness's evidence pursuant to Rule 154 no later than 14 December 2023.³⁷ The SPO did not explain why this change of approach could not have been notified to the Defence earlier. At the same time, under the current schedule,³⁸ W01453 is unlikely to testify until the second half of March 2024, around three months after the Defence was notified of

³³ Transcript of Hearing, 10 July 2023, p. 5354, line 25 to p. 5355, line 14.

³⁴ Response, para. 23.

³⁵ Response, para. 26.

³⁶ Article 40(2); Rule 116(1).

³⁷ Motion, paras 3-11.

³⁸ F02007/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submissions of List of Witnesses for 15 January to 4 April 2024*, confidential ([REDACTED]).

the SPO's intention to offer W01453's evidence pursuant to Rule 154. While a change of a witness's mode of testimony may require additional preparation for the opposing side, the timeframe noted will be sufficient to ensure that the Defence has enough time to prepare and that the Accused's right to adequate time to prepare his defence is not negatively affected.

20. Lastly, contrary to the Defence's submissions,³⁹ the Panel is satisfied that the admission of part of W01453's Statements pursuant to Rule 154 would materially enhance the efficiency of proceedings as, even if allowing the SPO one extra hour for the exclusion of the Pages, it would shorten the direct examination from nine to five hours.⁴⁰ In particular, this will reduce the amount of examination-in-chief necessary in respect of this witness. The suggestion that this will result in longer cross-examination does not stand up to scrutiny as the Panel has decided not to admit parts of W01453's Statements and, even if the remaining parts of W01453's Statements were not admitted under Rule 154, these statements and any other prior statements of W01453 would likely be explored during cross-examination.

21. In light of the above, the Panel is satisfied that the admission of W01453's Statements, excluding the Pages, under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) given that the Defence will have an opportunity to cross-examine the witness, would not cause unfair prejudice to the Defence. Except for the Pages, the Panel is also satisfied that the *prima facie* probative value of W01453's Statements is not outweighed by any prejudicial effect, and that, except for the Pages, W01453's Statements are suitable for admission pursuant to Rule 154. The Panel also directs the SPO to prepare updated versions of W01453's Statements where the Pages are excluded.

22. *W01453's Associated Exhibits*. The Panel observes that W01453's Associated

³⁹ Response, para. 23.

⁴⁰ Motion, para. 11 (where the SPO anticipates that, if W01453's Proposed Evidence is admitted under Rule 154, direct examination would be reduced from nine to four hours).

Exhibits comprise: (i) two maps annotated by W01453 (“Maps”);⁴¹ (ii) a diagram of KLA units drawn by W01453 during W01453’s Testimony (“Diagram”);⁴² and (iii) a decision from KLA appointing W04741 as commander (“KLA Decision”).⁴³

23. As regards the Maps and Diagram, the Panel notes that the Defence does not oppose their admission into evidence.⁴⁴ The Panel observes that the witness was shown, discussed and annotated or drew the Maps and the Diagram in W01453’s Statements.⁴⁵ Without the Maps and the Diagram, the relevant parts of W01453’s Statements would become incomprehensible or of lesser probative value. The Panel is satisfied that the Maps and the Diagram form an indispensable and inseparable part of W01453’s Statements. The Panel is also satisfied that the Maps and the Diagram are relevant since they concern the organisation of KLA units in relevant municipalities,⁴⁶ and the organisation of units in relevant locations.⁴⁷ The Panel is further satisfied that the Maps and the Diagram are *prima facie* authentic and reliable. Given that the Defence will be able to explore during cross-examination any relevant issues associated with these items, the Panel is also satisfied that any prejudicial effect of the Maps and the Diagram would not outweigh their *prima facie* probative value. Accordingly, the Panel finds the Maps and the Diagram appropriate for admission under Rules 138(1) and 154.

24. As regards the KLA Decision, the Panel notes that the Defence objects to the admission of this item as it concerns W04741, who is on the SPO Witness List, and, therefore, better placed, in their view, to authenticate the item.⁴⁸ That another witness can add to an item’s content, authenticity and/or probative value is not a

⁴¹ Maps: (i) [REDACTED]; and (ii) [REDACTED]. *See also* Annex 1 to the Motion, Items 1-2.

⁴² Diagram: [REDACTED]. *See also* Annex 1 to the Motion, Item 3.

⁴³ KLA Decision: [REDACTED] (with a corresponding Albanian version). *See also* Annex 1 to the Motion, Item 4.

⁴⁴ Response, para. 27.

⁴⁵ *See* [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; *See also* Annex 1 to the Motion, Items 1-3.

⁴⁶ [REDACTED]; [REDACTED]; *See* [REDACTED]; *See also* Annex 1 to the Motion, Items 1-2.

⁴⁷ [REDACTED]; *See* [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; *See also* Annex 1 to the Motion, Item 3.

⁴⁸ Response, para 28.

reason to reject its admission if the requirements of Rules 138(1) and 154 are met. The KLA Decision can also be shown to W04741. The Panel observes that W01453 was shown and discussed the KLA Decision in W01453's Transcript.⁴⁹ Without the KLA Decision, the relevant parts of W01453's Statements would become incomprehensible or of lesser probative value. The Panel is satisfied that the KLA Decision forms an indispensable and inseparable part of W01453's Statements. The Panel is also satisfied that the KLA Decision is relevant, *prima facie* authentic and reliable and that any prejudicial effect of the KLA Decision would not outweigh its *prima facie* probative value. Accordingly, the Panel finds that the KLA Decision is appropriate for admission under Rules 138(1) and 154.

25. In light of the above, the Panel finds that, except for the Pages, W01453's Proposed Evidence⁵⁰ is relevant, *prima facie* authentic, and has *prima facie* probative value which is not outweighed by any prejudicial effect, and is therefore appropriate for admission pursuant to Rules 138(1) and 154. The Panel also directs the SPO to lead W01453's evidence in respect of relevant issues in the Pages *viva voce* and to prepare updated versions of W01453's Statements where the Pages are excluded.

B. W03878

26. The SPO submits that the proposed evidence of W03878⁵¹ is: (i) relevant;⁵² (ii) *prima facie* authentic and reliable;⁵³ and (iii) suitable for admission under

⁴⁹ [REDACTED]; See [REDACTED]; See also, Annex 1 to the Motion, Item 4.

⁵⁰ Statements: (i) [REDACTED]; and [REDACTED] (with corresponding Albanian version); and (ii) [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] (with corresponding Albanian version); Associated Exhibits: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) [REDACTED] (with corresponding Albanian version).

⁵¹ The proposed evidence of W03878 ("W03878's Proposed Evidence") consists of: (i) 064732-TR-ET Parts 1-5 RED2 (with corresponding Albanian versions); and (ii) SITF00011014-00011027 RED2 ("W03878's Statements"). The Panel notes that the SPO is not tendering the associated exhibit for admission. See generally, Annex 2 to the Motion.

⁵² Motion, paras 12-14.

⁵³ Motion, para. 15.

Rule 154.⁵⁴

27. The Defence does not object to W03878's Statements being tendered under Rule 154.⁵⁵

28. *W03878's Statements*. Regarding relevance, W03878 was a member of the KLA at a relevant location and was responsible for matters within the KLA of relevance to this case.⁵⁶ W03878 was allegedly arrested, detained and mistreated by the KLA.⁵⁷ The SPO relies upon W03878's Proposed Evidence in respect of, *inter alia*, W03878's alleged arrest, detention and mistreatment and the detention and mistreatment of others.⁵⁸ The Panel is, therefore, satisfied that W03878's Statements are relevant to the charges in the Indictment.⁵⁹

29. Regarding authenticity and probative value, W03878's Statements consist of: (i) the verbatim transcript of the audio-video recorded SPO interview with W03878; and (ii) the redacted European Union Rule of Law Mission in Kosovo ("EULEX") statement of W03878. Each of them contains multiple indicia of authenticity and reliability, including: (i) the date and place of the interview; (ii) the attendees; (iii) the witness's personal details; (iv) witness warnings, rights and/or acknowledgments; and/or (v) the signatures of the witness and the participants.⁶⁰ In addition, the witness confirmed that the content of W03878's Statements is true and accurate.⁶¹ The Panel is satisfied of the *prima facie* authenticity and probative value of W03878's Statements.

30. Regarding the suitability of W03878's Statements for admission pursuant to Rule 154, the Panel observes that W03878's Statements amounts to 139 pages (in

⁵⁴ Motion, para. 16.

⁵⁵ Response, para. 7.

⁵⁶ Motion, para. 12.

⁵⁷ Motion, para. 13.

⁵⁸ Motion, paras 12-14; Amended List of Witnesses, pp. [REDACTED]; SPO Pre-Trial Brief, paras [REDACTED].

⁵⁹ Indictment, paras [REDACTED].

⁶⁰ See W03878's Statements; Annex 2 to the Motion.

⁶¹ See 064732-TR-ET Part 5, p. 21; SITF00011014-00011027 RED2, p. 6.

English). Moreover, the Panel notes that the SPO intends to elicit two hours of additional oral testimony.⁶² The Defence does not object to the admission of W03878's Statements pursuant to Rule 154.⁶³ In light of the above, the Panel is satisfied that the admission of W03878's Statements under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) insofar as the Defence will have an opportunity to cross-examine the witness and conduct further investigations into this matter, would not cause unfair prejudice to the Defence. The Panel is also satisfied that the *prima facie* probative value of W03878's Statements is not outweighed by any prejudicial effect, and that W03878's Statements are suitable for admission pursuant to Rule 154.

31. In light of the above, the Panel finds that W03878's Statements⁶⁴ are relevant, *prima facie* authentic, and have *prima facie* probative value which is not outweighed by any prejudicial effect, and are therefore appropriate for admission pursuant to Rules 138(1) and 154.

C. W04446

32. The SPO submits that the proposed evidence of W04446⁶⁵ is: (i) relevant;⁶⁶ (ii) *prima facie* authentic and reliable;⁶⁷ and (iii) suitable for admission under Rule 154.⁶⁸

33. The Defence objects to the admission of W04446's Proposed Evidence pursuant to Rule 154 because: (i) it will not enhance the efficiency of the

⁶² Motion, para. 16.

⁶³ Response, para. 7.

⁶⁴ Statements: 064732-TR-ET Parts 1-5 RED2 (with corresponding Albanian versions); and (ii) SITF00011014-00011027 RED2.

⁶⁵ The proposed evidence of W04446 ("W04446's Proposed Evidence") consists of: (i) 066675-TR-ET Parts 1-2 RED2 (with corresponding Albanian version) ("W04446's SPO Interview"); (ii) 011022-011029 RED2 ("W04446's Transcript") (collectively "W04446's Statements"); and (iii) [REDACTED] ("W04446's Associated Exhibit"). See generally, Annex 3 to the Motion.

⁶⁶ Motion, paras 17-21.

⁶⁷ Motion, para. 22.

⁶⁸ Motion, para. 24.

proceedings;⁶⁹ and (ii) the SPO used leading questions during some parts of W04446's SPO Interview.⁷⁰ In the alternative, the Defence requests that the relevant portions of W04446's SPO Interview containing leading questions be redacted from the version tendered into evidence.⁷¹

34. *W04446's Statements.* Regarding relevance, W04446's brother was allegedly arrested by masked KLA members in early 1999 and thereafter detained.⁷² W04446 repeatedly went to a location named in the Indictment to inquire about his brother until he was transferred to an unknown place, after which he was not seen and his remains were never found.⁷³ The SPO relies upon W04446's Proposed Evidence in respect of, *inter alia*, the alleged arrest, detention and disappearance of his brother at the hands of members of the KLA.⁷⁴ The Panel is therefore satisfied that W04446's Proposed Evidence is relevant to the charges in the Indictment.⁷⁵

35. Regarding authenticity and probative value, W04446's Statements consist of: (i) a verbatim transcript of the audio-video recorded SPO interview of the witness; and (ii) the record of the witness's examination before another jurisdiction. Each statement or transcript contains multiple indicia of authenticity and reliability, including: (i) the date, place and time of the interview; (ii) the attendees; (iii) the witness's personal details; (iv) witness warnings, rights or acknowledgments; and/or (v) the signatures of the witness and the attendees.⁷⁶ In addition, the witness confirmed that the content of W04446's SPO Interview is true and accurate, was given voluntarily, and that he had no objections to the manner in which the statement was taken and that W04446's Transcript of evidence was a

⁶⁹ Response, para. 3.

⁷⁰ Response, para. 4 *referring to* 066675-TR-ET Part 1 RED2, p. 16, line 15 to p. 17, line 17; 066675-TR-ET Part 2 RED2, p. 11, line 25 to p. 12, line 10.

⁷¹ Response, para. 5.

⁷² Motion, paras 17-18.

⁷³ Motion, paras 18-20.

⁷⁴ Motion, paras 17-21; Amended List of Witnesses, pp. [REDACTED]; SPO Pre-Trial Brief, paras [REDACTED].

⁷⁵ Indictment, paras [REDACTED].

⁷⁶ See W04446's Statements; Annex 3 to the Motion.

true record of the testimony.⁷⁷ The Panel notes that the Defence objects to W04446's SPO Interview as it says it contains leading questions.⁷⁸ The Panel is of the view, however, that the use of leading questions during interviews does not render the resulting record inadmissible. Neither Rule 154, nor Rule 138, condition the admission of witness statements on the use of non-leading questions. The Panel considers that the Defence can adequately explore these questions during cross-examination of the witness and, in any event, the weight to be given to this witness's evidence is an issue to be decided at the end of the case in light of all relevant evidence. The Panel is satisfied of the *prima facie* authenticity and probative value of W04446's Statements.

36. Regarding the suitability of W04446's Statements for admission pursuant to Rule 154, the Panel observes that W04446's Proposed Evidence amounts to 35 pages (in English). It is thus limited in size and would only marginally increase the number of pages contained in the trial record. Moreover, the Panel notes that the SPO intends to elicit a maximum of one hour of additional oral testimony.⁷⁹ The Panel is satisfied that the admission of W04446's Statements under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) given that the Defence will have an opportunity to cross-examine the witness and conduct further investigations into this matter, would not cause unfair prejudice to the Defence. The Panel is also satisfied that the *prima facie* probative value of W04446's Statements are not outweighed by any prejudicial effect, and that W04446's Statements are suitable for admission pursuant to Rule 154.

37. *W04446's Associated Exhibit*. The Panel observes that W04446's Associated Exhibit consists of a sketch drawn by W04446 which shows a location where W04446's brother was allegedly detained ("Sketch").⁸⁰ The Defence does not

⁷⁷ 066675-TR-ET Part 2 RED2, p. 13 ; 011022-011029 RED2, p. 4.

⁷⁸ Response, para. 4 referring to 066675-TR-ET Part 1 RED2, p. 16, line 15 to p. 17, line 17; 066675-TR-ET Part 2 RED2, p. 11, line 25 to p. 12, line 10.

⁷⁹ Motion, para. 24.

⁸⁰ [REDACTED]. See also Annex 3 to the Motion.

present any specific objections to the Sketch.⁸¹ The Panel notes that the Sketch was discussed in one of W04446's Statements.⁸² The Panel considers that without this item, the relevant parts of one of W04446's Statements would be incomprehensible or of lesser probative value. The Panel is therefore satisfied that the Sketch forms an indispensable and inseparable part of W04446's Statements. The Panel is also satisfied that the Sketch is relevant, *prima facie* authentic and reliable. Accordingly, the Panel finds that the Sketch is appropriate for admission under Rules 138(1) and 154.

38. In light of the above, the Panel finds that W04446's Proposed Evidence⁸³ is relevant, *prima facie* authentic, has *prima facie* probative value which is not outweighed by any prejudicial effect, and is therefore appropriate for admission pursuant to Rules 138(1) and 154.

D. W04575

39. The SPO submits that the proposed evidence of W04575⁸⁴ is: (i) relevant;⁸⁵ (ii) *prima facie* authentic and reliable;⁸⁶ and (iii) suitable for admission under Rule 154.⁸⁷

40. The Defence does not object to the admission of W04575's Proposed Evidence under Rule 154.⁸⁸

41. *W04575's Proposed Evidence.* Regarding relevance, the SPO relies upon

⁸¹ Response, paras 3-5.

⁸² 066675-TR-ET Part 2 RED2, pp. 2-3, 11.

⁸³ Statements: (i) 066675-TR-ET Parts 1-2 RED2 (with corresponding Albanian version); and (ii) 011022-011029 RED2. Associated Exhibit: [REDACTED].

⁸⁴ The proposed evidence of W04575 ("W04575's Proposed Evidence") consists of: (i) SPOE00090690-00090698 RED2 ("W04575's UNMIK Statement"); (ii) 085716-085834 ("W04575's UNMIK Transcript"); and (iii) 088938-TR-ET Part 1 RED2; 088938-TR-ET Parts 2-3 (with corresponding Albanian version) ("W04575's SPO Interview") (collectively "W04575's Statements"). *See generally*, Annex 4 to the Motion.

⁸⁵ Motion, paras 25-27.

⁸⁶ Motion, para. 28.

⁸⁷ Motion, paras 29-31.

⁸⁸ Response, para. 29.

W04575's Proposed Evidence in respect of, *inter alia*: (i) W04575's alleged arrest, detention and mistreatment by KLA members; (ii) the alleged arrest and detention by KLA members and subsequent disappearance of a close relative; and (iii) W04575's co-detainees.⁸⁹ The Panel is satisfied that W04575's Proposed Evidence is relevant to the charges in the Indictment.⁹⁰

42. Regarding authenticity and probative value, W04575's Statements consist of: (i) the witness's statements to the United Nations Mission in Kosovo ("UNMIK"); (ii) minutes from the witness's testimony in an UNMIK trial; and (iii) a verbatim transcript of the audio-video recorded SPO interview of the witness. Each of them contains multiple indicia of authenticity and reliability, including: (i) the date, place and time of the interview; (ii) the attendees; (iii) the witness's personal details; (iv) witness warnings, rights and/or acknowledgments; and/or (v) the signatures of the witness and the other attendees.⁹¹ The witness also confirmed that the contents of W04575's SPO Interview, where his prior statements were also discussed, are true and accurate and that he gave the interview voluntarily.⁹² The Panel is satisfied of the *prima facie* authenticity and probative value of W04575's Statements.

43. Regarding the suitability of W04575's Statements for admission pursuant to Rule 154, the Panel observes that W04575's Statements amounts to 125 pages (in English). Moreover, the Panel notes that the SPO intends to elicit a maximum one hour of additional oral testimony.⁹³ In light of the above, the Panel is satisfied that the admission of W04575's Statements under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) insofar as the Defence will have an opportunity to cross-examine the witness and conduct further investigations

⁸⁹ Motion, paras 25-27; Amended List of Witnesses, p. [REDACTED]; SPO Pre-Trial Brief, paras [REDACTED].

⁹⁰ Indictment, paras [REDACTED].

⁹¹ See W04575's Statements; Annex 4 to the Motion.

⁹² See 088938-TR-ET Part 3, pp. 8-9.

⁹³ Motion, para. 31.

into this matter, would not cause unfair prejudice to the Defence. The Panel is also satisfied that the *prima facie* probative value of W04575's Statements is not outweighed by any prejudicial effect, and that W04575's Statements are suitable for admission pursuant to Rule 154.

44. In light of the above, the Panel finds that W04575's Proposed Evidence⁹⁴ is relevant, *prima facie* authentic, has *prima facie* probative value which is not outweighed by any prejudicial effect, and is therefore appropriate for admission pursuant to Rules 138(1) and 154.

E. W04651

45. The SPO submits that the proposed evidence of W04651⁹⁵ is: (i) relevant;⁹⁶ (ii) *prima facie* authentic and reliable;⁹⁷ and (iii) suitable for admission under Rule 154.⁹⁸

46. The Defence objects to the admission of W04651's Proposed Evidence pursuant to Rule 154 because: (i) it would not enhance the efficiency of proceedings as direct examination is likely to be repetitive of W04651's Statement; and (ii) W04561's Statement is of limited relevance.⁹⁹ The Defence also objects to the admission of W04651's Associated Exhibits.¹⁰⁰ Lastly, the Defence notes that it has informed the SPO that it objects to W04651 being called as a reserve witness.¹⁰¹

⁹⁴ Statements: (i) SPOE00090690-00090698 RED2; (ii) 085716-085834; and (iii) 088938-TR-ET Part 1 RED2; 088938-TR-ET Parts 2-3 (with corresponding Albanian version).

⁹⁵ The proposed evidence of W04651 ("W04651's Proposed Evidence") consists of: (i) 077803-TR-ET Part 1 RED; 077803-TR-ET Parts 2-3 (with corresponding Albanian version) ("W04651's Statement"); (ii) [REDACTED] (with corresponding English and Albanian versions); (iii) [REDACTED] (with corresponding English version); and (iv) [REDACTED] (with corresponding English version) ("W04651's Associated Exhibits"). *See generally*, Annex 5 to the Motion.

⁹⁶ Motion, paras 32-34.

⁹⁷ Motion, para. 35.

⁹⁸ Motion, para. 38.

⁹⁹ Response, paras 30-31.

¹⁰⁰ Response, paras 32-39.

¹⁰¹ Response, para. 40.

47. The SPO replies that admitting W04651's Proposed Evidence under Rule 154 would save time as eliciting the same information *viva voce* would take more than three times as long.¹⁰² The SPO adds that W04651's Associated Exhibits should be admitted under Rule 154 as they are relevant, can be fully tested with W04651 during cross-examination, and the fact that other witnesses can speak to them is irrelevant as they form an inseparable and indispensable part of the W04651's Statement.¹⁰³

48. At the outset, the Panel notes that the Defence's objection to W04561 being called as a reserve witness is not a relevant consideration for the present decision. If there is any dispute between the Parties in respect of the order in which witnesses are called, and having sought to resolve the matter *inter partes*, the relevant party should seek, and justify, relief from the Panel accordingly.

49. *W04651's Proposed Evidence.* Regarding relevance, W04651 is a former KLA member in a specific operational zone during the relevant timeframe and the author of a book in respect of that zone.¹⁰⁴ The SPO relies upon W04651's Proposed Evidence in respect of, *inter alia*: (i) the establishment of a specific KLA unit; and (ii) the structure and development of a specific operational zone.¹⁰⁵ The Panel is satisfied that W04651's Proposed Evidence is relevant to the charges in the Indictment.¹⁰⁶

50. Regarding authenticity and probative value, W04651's Statement consists of a transcript of the SPO's interview with the witness. W04651's Statement contains multiple indicia of authenticity and reliability, including: (i) the date, place and time of the interview; (ii) the attendees; (iii) the witness's personal details; and (iv) witness warnings, rights and/or acknowledgments.¹⁰⁷ In addition, in W04651's

¹⁰² Reply, para. 5.

¹⁰³ Reply, paras 6-7.

¹⁰⁴ Motion, paras 32-33.

¹⁰⁵ Motion, paras 32-33; Amended List of Witnesses, p. [REDACTED]; SPO Pre-Trial Brief, paras [REDACTED].

¹⁰⁶ Indictment, paras [REDACTED].

¹⁰⁷ See W04651's Statement; Annex 5 to the Motion.

Statement the witness confirmed that the contents thereof were true and accurate and given voluntarily.¹⁰⁸ The Panel is satisfied of the *prima facie* authenticity and probative value of W04651's Statement.

51. Regarding the suitability of W04651's Statement for admission pursuant to Rule 154, the Panel notes the Defence's argument that admitting W04651's Statement will not save time as the direct examination is still one hour and will likely be duplicative of W04651's Statement.¹⁰⁹ In this respect, the Panel notes that the estimate of one hour was given based on W04651's mode of testimony being under Rule 154.¹¹⁰ In addition, the Panel has already directed the calling party to ensure that oral evidence is not duplicative of statements admitted under Rule 154.¹¹¹ Lastly, W04651's Statement is 63 pages (in English) and would not unduly increase the number of pages contained in the trial record. The Panel is, therefore, satisfied that the admission of W04651's Statement under Rule 154: (i) would contribute to the expeditiousness of the proceedings; and (ii) given that the Defence will have an opportunity to cross-examine the witness, would not cause unfair prejudice to the Defence. The Panel is therefore also satisfied that the *prima facie* probative value of W04651's Statement is not outweighed by its prejudicial effect, and that W04651's Statement is suitable for admission pursuant to Rule 154.

52. *W04651's Associated Exhibits*. The Panel observes that W04651's Associated Exhibits comprise three items: (i) an SPO official note containing five documents which W04651 provided to the SPO during W04651's Statement ("Official Note");¹¹² (ii) a list of members of the TMK/KPC ("List");¹¹³ and (iii) a book

¹⁰⁸ See 077803-TR-ET Part 3, pp. 13-14.

¹⁰⁹ Response, para. 31.

¹¹⁰ SPO Witness List, p. [REDACTED].

¹¹¹ First Rule 154 Decision, para. 33.

¹¹² Official Note: [REDACTED] (with corresponding English and Albanian versions); See Annex 5 to the Motion, Item 1.

¹¹³ List: [REDACTED] (with corresponding English version); See Annex 5 to the Motion, Item 2.

authored by the witness (“Book”).¹¹⁴

53. With respect to the Official Note, the Panel notes that the Defence argues that the admission of Exhibits 2, 3 and 5 therein should be postponed as these items were signed by W04757 and W04758, who are on the SPO Witness List, and, therefore, better placed to clarify the content of these items.¹¹⁵ However, the fact that there are better witnesses to comment on an item is not a ground to refuse its admission if it otherwise meets the requirements of Rules 138(1) and 154. The Defence can cross-examine those witnesses on the Official Note. The Panel is satisfied that W04651 discussed the documents in the Official Note, which are also referenced in the Book, in W04651’s Statement.¹¹⁶ Without the Official Note, W04651’s Statement would become incomprehensible or of lesser probative value. The Panel is, therefore, satisfied that the Official Note forms an inseparable and indispensable part of W04651’s Statement. The Panel is further satisfied that the Official Note is relevant, *prima facie* authentic, and has *prima facie* probative value which is not outweighed by any prejudicial effect. The Panel, therefore, finds that the Official Note is appropriate for admission under Rules 138(1) and 154.

54. With respect to the List, the Panel notes that the Defence objects to the admission of this item as it is dated outside the temporal scope of the Indictment.¹¹⁷ The Panel agrees with the Defence that the item is dated outside the temporal scope of the Indictment and that its relevance to events within the temporal scope of the Indictment is not entirely clear. In addition, while W04651 verified his position as correct, he did not otherwise verify the accuracy of the List.¹¹⁸ As the information that W04651 confirmed as accurate is included in W04651’s Statement, the Panel considers that the List does not form an inseparable part of W04651’s Statement and finds, without prejudice, that it is not appropriate for admission

¹¹⁴ Book: [REDACTED] (with corresponding English version); See Annex 5 to the Motion, Item 3.

¹¹⁵ Response, para. 38.

¹¹⁶ 077803 Part 1 RED, pp. 6-7; 077803-TR-ET Part 3, pp. 1-13.

¹¹⁷ Response, para. 39.

¹¹⁸ 077803-TR-ET Part 1 RED, p. 22, line 24 to p. 23, line 19.

under Rule 154 at this time. Should the SPO seek to tender this document, it shall clarify through the witness that it meets the conditions for admission under Rule 138(1).

55. With respect to the Book, the Panel notes that the Defence objects to its admission due to its limited relevance and probative value as it relies on hearsay and as the methodology used was not rigorous.¹¹⁹ The Panel observes that W04651 refers to 21 pages of the Book (“Pages”), which have not previously been admitted into evidence.¹²⁰ The Book has 341 pages (in English). While the SPO seeks admission of the Book in its entirety,¹²¹ the Panel is of the view that this would unnecessarily bloat the record. However, the Panel is satisfied that the Pages: (i) form an indispensable and inseparable part of W04651’s Statement; and (ii) are relevant, *prima facie* authentic, and have *prima facie* probative value which is not outweighed by any prejudicial effect. Should additional pages of the Book be considered relevant to these proceedings, the SPO can present those pages to the witness during direct examination and seek their admission. The Panel, therefore, finds that the Pages are appropriate for admission under Rules 138(1) and 154, and rejects, without prejudice, the remainder of the Book.

56. In light of the above, the Panel finds that, except for the List and the Book (excluding the Pages), W04651’s Proposed Evidence¹²² is relevant, *prima facie* authentic, has *prima facie* probative value which is not outweighed by any prejudicial effect, and is therefore appropriate for admission pursuant to

¹¹⁹ Response, paras 32-37.

¹²⁰ The Panel notes that W04651 refers to pp. [REDACTED] of the Book; See 077803-TR-ET Part 1 RED, pp. 13-21; 077803-TR-AT Part 2, pp. 1-24; 077803-TR-AT Part 3, pp. 3-12. The Panel notes, however, that four of these pages have already been admitted into evidence, namely pp. [REDACTED]; See F01596, Panel, *Second Decision on Specialist Prosecutor’s Bar Table Motion*, 9 June 2023, paras [REDACTED]; F01903, Panel, *Decision on Prosecution Request for Admission of Items Used During the Examination of W04746*, 3 November 2023, paras 10-18, 28(b); See also P00187_ET.

¹²¹ Motion, paras 36-37; Annex 5 to the Motion, Item 3.

¹²² Statements: 077803-TR-ET Part 1 RED; 077803-TR-ET Parts 2-3 (with corresponding Albanian version); Associated Exhibits: (i) [REDACTED] (with corresponding English and Albanian versions); and (ii) [REDACTED] (with corresponding English version).

Rules 138(1) and 154.

V. CLASSIFICATION

57. The Panel notes that the SPO has redacted some evidence reference numbers (“ERN”) of the Proposed Evidence in the public redacted version of the Motion. The Panel has, therefore, redacted those ERNs in this decision. The Panel is of the view, however, that the ERNs of the Proposed Evidence may become public after the Witnesses have testified at trial, unless the SPO demonstrates good cause to maintain the redactions. The Panel, therefore, orders that, after the Witnesses’ testimony, the SPO: (i) reassess whether the redactions of the ERNs of the Proposed Evidence remain justified; and (ii) make submissions accordingly, within seven days of the end of the testimony of the last witness in a witness’s block.

VI. DISPOSITION

58. Based on the above, the Panel hereby:

- a. **GRANTS** the Motion with respect to W03878, W04446, and W04575 in full, and with respect to W01453, and W04651 in part;
- b. **FINDS** the Statements and Associated Exhibits of W01453, W03878, W04446, W04575, and W04651 as set out in paragraphs 25, 31, 38, 44, and 56 and the respective footnotes, appropriate for admission once the requirements of Rule 154(a)-(c) are met in respect of each witness and their statements and associated exhibits;
- c. **FINDS** that the Pages of W01453’s Statements are not appropriate for admission for the reasons set out in paragraph 14;
- d. **FINDS** that the following Associated Exhibits of W04651 are not appropriate for admission, for the reasons set out in paragraphs 54-55: (i) the List; and (ii) the remainder of the Book;

- e. **DIRECTS** the SPO to lead W01453's evidence in respect of relevant issues in the Pages *viva voce* and to prepare updated versions of W01453's Statements where the Pages are excluded for the reasons set out in paragraphs 14 and 21; and
- f. **ORDERS** the SPO to: (i) reassess whether the redactions applied to the ERNs of the Proposed Evidence remain justified after the Witnesses' testimony; and (ii) make submissions accordingly, within seven days of the end of the testimony of the last witness in a witness's block.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 12 February 2024

At The Hague, the Netherlands.