

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 Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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Public Redacted Version of 'Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1'

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Hashim Thaçi

Luka Misetic

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. In March 2023, the Trial Panel expressed concern that, unless reasonable limitations are placed on the amount of evidence admitted, a risk exists of creating an “unmanageable trial record”.¹ The Trial Panel was responding to Defence submissions that, at a certain point, the size of the evidential record would render it incompatible with a fair trial, and that the duty to ensure the fair and expeditious conduct of the proceedings “includes keeping the case to a manageable size”.² The SPO also appears to have now reached the same position, expressing concerns in March 2024 that the admission of a 10-page document would be “bloating the record even more”.³

2. The procedure of admitting hundreds of documents through bar table motions is a key contributor to the size of the evidential record. In February 2023, the SPO filed its first application for admission of material through the bar table,⁴ seeking to admit 1,389 items totalling more than 13,500 pages.⁵ The Trial Panel issued six decisions regarding the admission of this material, ultimately admitting approximately 900 exhibits through the bar table.⁶

3. These 900 items now form part of an overall list of **3,080 exhibits** which have been admitted in these proceedings to date. This number is immense, particularly

¹ KSC-BC-2020-06/F01380, Trial Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, para. 29.

² KSC-BC-2020-06/F01308, *Joint Defence Response to ‘Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154’*, 20 February 2023, para. 3.

³ KSC-BC-2020-06, Transcript of Hearing (W04147 Testimony), 26 March 2024, pp. 13713-13714.

⁴ KSC-BC-2020-06/F01268, *Prosecution Application for Admission of Material Through the Bar Table*, 8 February 2023, with Annexes 1-8.

⁵ KSC-BC-2020-06/F01387, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table*, 21 March 2023 (“First Bar Table Response”), para. 2.

⁶ KSC-BC-2020-06/F01409, Trial Panel, *Decision on Specialist Prosecutor’s Bar Table Motion*, 31 March 2023 (“First Bar Table Decision”); F01596, *Second Decision on Specialist Prosecutor’s Bar Table Motion*, 9 June 2023; F01705, *Third Decision on Specialist Prosecutor’s Bar Table Motion*, 27 July 2023; F01716, *Fourth Decision on Specialist Prosecutor’s Bar Table Motion*, 8 August 2023; F01832, *Fifth Decision on Specialist Prosecutor’s Bar Table Motion*, 3 October 2023; F01983, *Sixth Decision on Specialist Prosecutor’s Bar Table Motion*, 5 December 2023.

considering that only 54 of the SPO's 302 proposed witnesses have testified, with the evidence of a further 39 witnesses having been admitted in writing through Rules 153 and 155 of the Rules of Procedure and Evidence ("Rules"). These are the kinds of figures foreshadowed by the Defence when it submitted in February 2023 that the size of an evidential record can become incompatible with a fair trial.

4. Now, in April 2024, the SPO seeks the admission of an **additional 580 individual items**, which allegedly comprise "contemporaneous KLA records" related to the Llap Zone ("Proposed Exhibits").⁷ Many of the Proposed Exhibits are, on their face, inadmissible. Among them are handwritten pieces of paper with no date, author, or other indicia of authenticity; testimonial material; draft documents and empty templates; documents that fall outside the Indictment period; and items that exhibit no discernible link to either the KLA or the Llap Zone. There are significant chain of custody and provenance issues, with a significant number of the Proposed Exhibits having been allegedly taken from "SHIK HQ in Pristina in 2002", and then passed to EULEX, and then given to the SPO, with no evidence or supporting documentation being offered to explain these transfers. Many are said to come from the Serbian government, or from the ICTY/IRMCT, but again with no more information as to provenance. There are also compilations of documents with no discernible link to each other or the events of the Llap Zone, and vastly different indicia of reliability, for which admission is being sought *en masse*, without individual justification.

5. The SPO cannot be allowed to simply unload documents into the record in this manner, and then explain their relevance only in its final trial brief and closing argument, when the Accused will have no meaningful opportunity to adduce rebuttal evidence. Prosecution offices in other tribunals have typically sought admission of these types of military documents through expert witnesses who prepare reports that

⁷ KSC-BC-2020-06/F02178, *Prosecution motion for admission of Llap Zone documents and related request*, 14 March 2024 ("SPO Request"), para. 1.

explain the provenance of the documents, as well as their relevance to the case.⁸ Here, the SPO has failed to include any military expert testimony, and is now attempting to overcome this failure by simply “dumping” the documents into the record.

6. The SPO has accordingly failed to adhere to the Trial Panel’s direction to use a high threshold of evaluation so as to ensure that only evidence of high probative value is tendered.⁹ Rather, the SPO is using the bar table procedure to avoid fair scrutiny and the procedure of items being authenticated and verified by relevant witnesses, before being admitted into the record of the case. The Defence objections to the admission of the Proposed Exhibits are accordingly set out below.

II. SUBMISSIONS

A. THE SPO REQUEST IS PREMATURE

7. The SPO Witness List includes many witnesses who are put forward as having occupied positions within the KLA, in the Llap Zone, during the Indictment period. Some have already testified,¹⁰ while others are still to come.¹¹ These SPO witnesses include: Commander of the Llap Zone (W04746); [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED], as well as other KLA fighters and members who are alleged to have played different and diverse roles.

⁸ See, e.g., ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Admission of Exhibits Cited in Amalgamated Expert Report of Reynauld Theunens, 29 July 2013; *Prosecutor v. Gotovina et al.*, IT-06-90, Decision and Guidance with regard to the Expert Report, Addendum, and the Testimony of Reynaud Theunens, 17 November 2008, para. 27. See also Reynaud Theunens, ‘The Role of Military Expertise in the Prosecution of and Trials for International Crimes’, 48 MIL. L. & L. WAR REV. 119 (2009): “[t]he appropriate sourcing of the report will facilitate the tendering of large quantities of relevant military documents in an efficient and organised manner that allows the Trial Chamber to better understand the significance and importance of the respective documents”.

⁹ KSC-BC-2020-06/F01226/A01, Trial Panel, Annex 1 - Order on the Conduct of Proceedings (“Order on Conduct of Proceedings”), 25 January 2023, para. 49.

¹⁰ W04746 (testified in July 2023); W04323 (testified in June 2023).

¹¹ See, e.g., [REDACTED].

8. The SPO Request does not explain why the Proposed Exhibits, all purportedly relevant to the Llap Zone, were not introduced through the Llap witnesses who have testified, or cannot be introduced through those who are still to come. Many of the Proposed Exhibits are obviously related to these witnesses, who could either authenticate them, or give relevant context. The SPO asserts, for example, that six of the Proposed Exhibits were signed by the Commander of the Llap Zone (W04746),¹² who testified in July 2023. Other items purport to record meetings W04746 attended, or his visits or activities.¹³ The SPO does not explain why these Proposed Exhibits were not put to W04746 when he testified, given his ability to give sworn evidence on their authenticity, or otherwise. Similarly, 32 of the Proposed Exhibits were signed by, or otherwise directly relate to, [REDACTED], who has yet to testify.¹⁴ Again, the SPO has not indicated why these items should be admitted through the bar table, rather than being put to [REDACTED].

9. The SPO is therefore using the bar table procedure as an alternative to submitting evidence through witnesses. This practice contravenes the Trial Panel's instruction, mirroring the practice of other international courts,¹⁵ that "bar table motions should not be used as a way to render the principle of orality irrelevant to these proceedings." The Trial Panel has already been clear that "[w]hile the bar table procedure is in the interest of judicial economy, it should not become an alternative to presenting the most important exhibits through witnesses who are in a position to speak to them and to be cross-examined about them."¹⁶

¹² Item nos. 55, 63, 66, 70, 71, and 170.

¹³ See, e.g., item nos. 34, 79, 109, 127, 279.

¹⁴ Item nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 21, 22, 23, 28, 29, 32, 43, 49, 55, 65, 67, 68, 69, 73, 78, 79, 80, 81, 98, 109, 127, 201.

¹⁵ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1838, TC VI, *Decision on Prosecution's Request for Admission of Documentary Evidence*, 28 March 2017, para. 13; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-847-Corr, TC V(A), *Decision on the Conduct of Trial Proceedings (General Directions)*, 9 August 2013, paras 26-27; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, TC, *Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts*, 14 May 2012, paras. 12, 15.

¹⁶ First Bar Table Decision, para. 16.

10. Seeking to introduce 580 Proposed Exhibits, put forward as being contemporaneous KLA records relevant to events in the Llap Zone, before the majority of Llap witnesses have testified, is premature. The Defence appreciates that the SPO has been asked by the Trial Panel to continue to streamline its case,¹⁷ and that the SPO has undertaken to find further opportunities to do so.¹⁸ However, seeking to prematurely admit documents *en masse* is not a procedurally sound shortcut. The Trial Panel should defer its decision until the Llap witnesses have testified, and the parties have had the opportunity to examine them on the basis of the Proposed Exhibits. This would be coherent with both the principle of orality and the Accused's right to confront the evidence against them.

B. DEFENCE OBJECTIONS TO THE PROPOSED ITEMS

11. Should the Trial Panel decline to defer its decision, and consider the SPO Request on the merits, the Defence offers the following submissions. Firstly, the Defence has annexed a modified version of Annex 1 to the SPO Request, listing the Defence objections to the Proposed Exhibits. For the convenience of the Trial Panel, the Defence relies on the same categories of objections formulated in response to the First Bar Table Request in March 2023.¹⁹

12. In addition to the individual objections included in Annex 1, the Defence makes the following submissions on particular characteristics of the Proposed Exhibits which render them unsuitable for admission through the bar table procedure.

¹⁷ KSC-BC-2020-06, Transcript of Hearing (Scheduling Conference), 21 February 2024, p. 12807, wherein the SPO undertook to provide a 'meaningful' streamlining proposal by 21 May 2024.

¹⁸ *Ibid.*, p. 12775, wherein the SPO acknowledged the need to keep streamlining the case down, and noted that: "[e]very witness that finishes creates an opportunity to reassess others. We're looking also for opportunities beyond witnesses finishing."

¹⁹ First Bar Table Response, Annex 7: Index of Objections.

1. *KLA Documents*

13. The SPO submits that each of the Proposed Exhibits are “contemporaneous KLA records”.²⁰ The Defence’s starting position is the same as articulated in its First Bar Table Response; namely, purported KLA documents should be authenticated through witnesses to ensure their proper contextualisation, and to allow witnesses to speak to the documents’ background, authorship, and authenticity.²¹

14. The SPO has put the KLA’s internal functioning, structure and operation at the centre of this case. The SPO asserts that Proposed Exhibits are, or include, contemporaneous KLA records that are probative of these questions. If this is indeed the case, the Proposed Exhibits should not be admitted *en masse* through the bar table, but should be explained by the very witnesses who signed them, created them, or can otherwise contextualise them. The SPO is calling a large number of KLA witnesses who would, or should, have direct knowledge of authentic and probative KLA documents. Against this backdrop, the SPO has offered no submissions as to *why* the process of authentication should be circumvented for these 580 items.

15. This need for authentication is heightened by the fact that many of the Proposed Exhibits have **no discernible link** to the KLA at all.²² Many are handwritten pieces of paper; unsigned, undated, with no letterhead, stamps or author. They are put forward as KLA records without sufficient, or any, justification. In some cases, the SPO has inserted “KLA” into the description of the item where the document itself makes no reference to the KLA. For example, the “Handwritten KLA Duty Service Book”, does not refer to the KLA in either its title or entries. The fact that its entries all post-date the end of the armed conflict, would go some way to explaining this.²³

²⁰ SPO Request, para. 1.

²¹ First Bar Table Response, paras. 14-15, and citations therein.

²² *See, e.g.*, item nos. 211, 226, 220.

²³ SITF00241894-00241992 (Item 193). *See also* SITF00243851-00243852 (Item 194), described by the SPO as a ‘Request to KLA Military Police’, whereas the document is addressed to the ‘Military police of

16. The need to authenticate purported KLA records has been reinforced during the proceedings. Repeatedly, SPO witnesses have denied knowledge, authorship, or recognition of alleged KLA documents, objecting to their content, form and substance. For example, when presented with purported KLA documents, SPO witnesses have testified that: "I find the content to be unusual", "this is not the wording I would have used", "I have not seen this document before, and I do not recognise it", "it's really very weird", and "I don't see his signature or I don't see a stamp", as well as suggesting that KLA documents have been written by people other than the alleged author.²⁴ Testimony denying knowledge of certain documents undoubtedly calls authenticity into question, and therefore affects admissibility. This testimony also

Kosovo, Local Department of Police in Prishtina'; SITF00244769-00244769 (Item 197) is described by the SPO as a report issued by the KLA Llap OZ, when the document is a handwritten note allegedly addressed to/or issued by 'operational zone Llap'.

²⁴ See, e.g., KSC-BC-2020-06, Transcript of Hearing (W04746 Testimony), 12 July 2023, p. 5582: "A. Yes, this must be my signature. However, I am surprised by this document. This is not one of the -- our documents that I would sign. The form and content seems to me unusual."; p. 5656: "A. Allow me to say that I did not recognise the last document, and this is not the wording I would have used or my collaborators would have used. It must have been drafted by a journalist, a reporter or somebody else. I wouldn't be able to say who."; pp. 5902-5904: "Q. Am I right to think that you are familiar with that document? A. I am not. I don't know this document [...] the Albanian. Do you recognise that signature, sir? A. No, I don't. And this is the reason why I indicated that I'm unable to recognise the document [...] A. I believe I released Mr. Stankovic, but I did not draft this type of document, though." See also KSC-BC-2020-06, Transcript of Hearing (W04765 Testimony), 4 December 2023, pp. 10457-10460: "A. It may be a truthful, accurate document. However, it doesn't bear no signature or stamp. And I don't know how Fatmir Limaj would have had the right to put here his own name when, to my knowledge, Sokol Dobruna was the legal adviser of the General Staff, not Fatmir Limaj. It reads here Fatmir Limaj in the name of the police. I don't know. I don't understand. I don't have any information, and I have not seen this document before [...]. However, I don't see his signature or I don't see a stamp. I see a protocol number on top of the document. But I have not seen this document before, and I do not recognise it [...] This is very interesting because I don't know where would they have filed a complaint to. There were no higher instances. There were no judges, no prosecutors, no -- nothing. The only person present there was Sokol Dobruna as a legal adviser. Where would they have filed their complaint? Unless they would have done this to the Serb -- before the Serb authorities. It's really very weird."; pp. 10473-10475: "This is not a document of the Pashtrik zone. I have no connection whatsoever with this document. I have not applied that... A. Yes, I see that. But it's not probable. It's not possible. Well, 25 days in prison. How is it possible to keep this person in 25 days? Because we never were located in the same position. As the KLA, we were moving within the week. Therefore, it's not possible. It's not probable. This was a document that was probably written by somebody else, although the name here is Bislim Zyrapi. Probably it would be best to ask Mr. Zyrapi about it. I have not seen this document before."

demonstrates the danger in presuming that documents are “KLA records” simply because they are designated as such by the SPO.

17. The SPO attempts to circumvent many of these obvious obstacles to admissibility by cross-relying on the Proposed Exhibits in an attempt to bolster their reliability. Where documents present the same indicia of reliability (or lack thereof), their authenticity cannot be bolstered in this way. A collection of poorly authenticated or non-authenticated documents cannot create one authenticated document.²⁵ This is the case even where some details are replicated across different items. Without a showing that the documents contain information that is within the sole knowledge of the KLA, which is both unreasonable in the context, and the SPO has not attempted, the same authenticity concerns remain.

18. Without a witness providing context, the Proposed Exhibits fall short of the minimum requirements for admissibility: they are insufficiently reliable, their authenticity cannot be presumed, and they lack probative value. Further, the prejudicial effect of tendering the Proposed Exhibits through the bar table outweighs their probative value because the Defence is prevented from confronting any witness as to the truth of the contents, their authenticity or to contextualise their purpose.

19. This must be considered along with the fact that, for many of the Proposed Exhibits, the SPO is unable to offer any details of chain of custody information, beyond generic descriptions about the source being the ICTY/IRMCT, EULEX or the Serbian authorities. Taking these one by one:

²⁵ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-T-374-ENG CT WT, Transcript of Appeal Hearing, 11 January 2018, p. 58: “JUDGE MORRISON: [...] would you accept this as a proposition, that if the evidential weight of any given piece of information is zero, and there is another piece of information whose evidential weight is equally regarded as zero, that those two pieces of evidence cannot corroborate each other?”.

(a) “This item was provided to the SPO by the Serbian authorities”

20. The Defence has consistently raised concerns about the reliability of evidence originating from the Republic of Serbia.²⁶ Serbia has a long history of manipulating facts that includes: a series of brutal false flag operations aimed at incriminating the KLA;²⁷ using torture to extract false confessions;²⁸ crime scene manipulation, including the mass-removal of civilian bodies to cover up its own atrocities;²⁹ an ongoing misinformation campaign aimed at delegitimising Kosovo’s claim to independence and undermining the existence of the State;³⁰ and attempts to introduce false testimony before international courts.³¹ Evidence disclosed by the SPO in these proceedings indicates that Serbia has also attempted to have false evidence relied upon by the KSC.³² Moreover, it is accepted that the fact of evidence originating from the adversary raises concerns about reliability which necessitates care.³³

21. Given the admissibility problems which already plague the premature admission of these purported KLA records, having the Serbian authorities as their

²⁶ KSC-BC-2020-06/F00877/COR, *Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103* (“Rule 103 Joint Defence Motion”), 21 July 2022. See also KSC-BC-2020-06/F01193, *Thaçi Defence Consolidated Response to ‘Prosecution Request for Reconsideration or Leave to Appeal Decision F01149’* (F01185) and *‘Prosecution Request for Suspensive Effect Relating to Decision F01149’* (F01186), 10 January 2023; F01194, *Veseli Defence Consolidated Response to Prosecution Requests for Reconsideration or Leave to Appeal Decision F01149 and for Suspensive Effect*, 10 January 2023; F01100, *Veseli Defence Supplemental Submissions to Joint Defence Motion for Disclosure Pursuant to Rule 103* (F00877/COR) (“Veseli Defence Supplemental Submissions”), 14 November 2022; F01101, *Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103* (F00877/COR), 14 November 2022; F01911, *Joint Defence Response to Prosecution Submissions on Admissibility of Items Following W04769’s Testimony*, 8 November 2023 (“F01911”).

²⁷ Rule 103 Joint Defence Motion, paras. 34-45.

²⁸ Rule 103 Joint Defence Motion, paras. 66-72.

²⁹ Rule 103 Joint Defence Motion, paras. 46-58.

³⁰ Rule 103 Joint Defence Motion, paras. 29-31.

³¹ Rule 103 Joint Defence Motion, paras. 59-62.

³² Veseli Defence Supplemental Submissions, *especially* paras. 39-41.

³³ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, TC I, *Judgement*, 3 April 2008, paras. 13-14; *Prosecutor v. Milutinović et al.*, IT-05-87-T, TC, *Judgement*, 26 February 2009, para. 54; *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, TC II, *Judgement*, 29 November 2012, para. 653; *Prosecutor v. Tolimir*, IT-05-88/2-T, TC II, *Judgement*, 12 December 2012, para. 37.

source is undoubtedly a further factor weighing against admission of the Proposed Exhibits through the bar table.

(b) “This item was provided to the SPO by the ICTY/MICT”

22. Where there is no other information about the source or chain of custody of an item, the fact that it was previously in the possession of the ICTY or IRMCT, and was passed to the SPO, does not render it automatically suitable for admission before the KSC.

23. In its Request, however, the SPO relies solely on items having been transferred from one judicial institution to another as somehow imbuing them with sufficient reliability to warrant admission. This passing between institutions does not circumvent the lack of information about the original source. The SPO has offered no evidence, supporting statements or documentation to explain how the items came into the possession of the ICTY or IRMCT, or their provenance.

24. To this end, the Defence repeats and relies on the well-documented concerns about the provenance of material in possession of the ICTY, and evidence that, for example, the Serbian documents provided “tens of thousands of documents” to the ICTY in 2001.³⁴ Importantly, this undermines the SPO’s argument that the authenticity of handwritten documents originating from the Serbian Ministry of Justice is corroborated by the fact that an exact copy had been provided to the SPO by the ICTY.³⁵ In fact, all this demonstrates is that the source for the ICTY/IRMCT and Serbian Ministry of Justice is one and the same. Importantly, the SPO acknowledges that, many of the ICTY versions are often less legible. This is also evident on their face. It then becomes likely that the Serbian Ministry of Justice provided these documents to

³⁴ See, e.g., F01911, paras. 20-23.

³⁵ See, e.g., item nos. 88, 99, 103, 104, 105.

the ICTY/IRMCT, and the same authenticity concerns remain.

25. As such, given that many of the Proposed Exhibits already lack the indicia that would allow the Trial Panel to be satisfied as to their reliability in the absence of authentication by a witness, the uncertainty as to their source and origins weighs further against their admission.

(c) “This item was recovered from the SHIK HQ in Prishtinë in 2002, and provided to the SPO by EULEX”

26. The SPO asserts that a cache of items for which it seeks admission were recovered from “the SHIK HQ” in 2002. Through this description, the SPO appears to be suggesting that the source of each of these items is necessarily the KLA, as a whole. In reality, the 2002 search of the SHIK HQ in Pristina was limited to Latif Gashi’s office, and no other rooms or corridors in the SHIK HQ.³⁶ Nor does it follow that, because Latif Gashi was once in the KLA, items recovered from his SHIK office years later were necessarily KLA documents. As such, if the Proposed Exhibits include items recovered during this search, the SPO is again asking that the Trial Panel assume provenance and authenticity of these “KLA records”, with an insufficient basis.

27. Even simply considering how many hands these items have passed through, they cannot safely be relied on without having been authenticated through live witnesses, particularly when so many former KLA members are available and are already being called by the SPO. This is particularly the case, given that many of the items contain no dates, source, author, or signatures, and even comprise of scraps of handwritten paper with no indication whatsoever of their source; literal office detritus

³⁶ SPOE00120782-SPOE0012079 RED, p. SPOE00120785:

[REDACTED]

See also SPOE00086472-00086497, p. SPOE00086473.

with no place in the evidential record of a criminal trial.

2. *Compilations*

28. The Proposed Exhibits also include lengthy “compilations”, being a number of different documents presented together, sometimes with no discernible link to each other, or to events in the Llap Zone. For example, SITF00244716-00244741 (Item 290), is a compilation of documents described as a [REDACTED]. It is comprised of a mix of typewritten and handwritten notes (in different handwriting), and a post-it. Most of the individual documents are unsigned, undated, and without an author. The documents fall outside the Indictment period. Similarly, SITF00244829-00244854 (Item 237) is a compilation with no obvious connection between some of the documents, which relate to different people and circumstances, and with some documents having no obvious link to the Llap Zone. The cover sheet simply reads ‘Closed File’, with no identifying features linking it to the KLA or the Llap Zone, and no indication of authorship or record maintenance. The majority of the individual documents again lack indicia of authenticity; some are handwritten documents, almost all have no indication of authorship, no signature or no identification of the signatory, none are stamped, and some have no date. Some of the documents appear to be simply handwritten scraps of paper or post-its. The compilation also contains photographs, the source of which is not identified. Some of the documents are testimonial, including statements of third parties who are not witnesses in these proceedings and whose evidence cannot therefore be tested.

29. The SPO’s submissions on admissibility of these compilations do not address the authenticity or provenance of the individual documents. Rather, they are submitted *en masse*, on the apparent basis that they draw authenticity from their inclusion as part of a compilation. However, no information is provided indicating whether the documents were found in this compiled form, or were assembled later,

or how the documents link to each other. These compilations do not exhibit sufficient indicia of authenticity to warrant admission through the bar table. The prejudice in their admission outweighs any probative value.

3. *Handwritten Documents and Other Drafts*

30. In the First Bar Table Decision, the Trial Panel considered Defence objections to handwritten documents, and concluded that “documents bearing no indication of a named source or which have yet to be corroborated are often considered to lack the requisite indicia of reliability”.³⁷ On this basis, the Trial Panel declined to admit, for example, a handwritten notebook containing event entries, which had been put forward as being relevant to the disappearance of two named victims, given the lack of “witness testimony or corroboration regarding the disappearance of the named victims”.³⁸

31. The same approach should be adopted in relation to the handwritten materials contained in the “KLA records”. Handwritten documents should not be admitted through the bar table in the absence of evidence relating to their creation and authorship, particularly if the document is not the original.³⁹ More specifically, handwritten documents bearing no concrete and verifiable information as to their authorship, such as a stamp, signature, header or date,⁴⁰ should not be admitted from the bar table on account of the impossibility of establishing with certainty the authenticity of such documents, and often the author. Authorship cannot be presumed because of the location at which the documents were seized, without any

³⁷ First Bar Table Decision, para. 59.

³⁸ First Bar Table Decision, paras. 60-62, discussing U001-8967-U001-9121.

³⁹ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, TC, *Decision on Accused’s Bar Table Motion: Municipality Component Documents*, 14 April 2014, para. 19.

⁴⁰ See, for example, ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, TC, *Decision on Pavković Second Motion for Admission of Documents from Bar Table*, 28 November 2007, para. 7; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1181, TC VI, *Decision on Prosecution’s First Request for the Admission of Documentary Evidence*, 19 February 2016, paras. 18, 20.

further substantiation by the SPO. The absence of such indicia necessarily deprives the Panel of its ability to determine “how [the] document was prepared, by whom, and on the basis of what information.”⁴¹

32. Similarly, the Proposed Exhibits also include documents that are clearly in draft form. This includes blank “templates” which are unsigned and undated. The Defence objects to the admission of such drafts in the absence of a witness to establish their relevance, probative value and reliability. The very nature of these ‘drafts’ renders them of little-to-no probative value, given the absence of final or published versions.

4. *Statements and Other Testimonial Documents*

33. The Proposed Items also contain testimonial documents; purported statements, signed written accounts of incidents, whether as individual documents or part of compilations. Many of these statements are, again, handwritten. These statements are attributed to people who are not witnesses in these proceedings and whose evidence cannot therefore be tested.

34. Documents that are testimonial in nature cannot be admitted through the bar table. The legal framework of the KSC provides that testimonial evidence may only be relied upon by the parties when the person appears to testify at trial or, when previously recorded under certain conditions which render the statement admissible under Rules 153-155 of the Rules. Evidence which is testimonial in nature is thus inadmissible – irrespective of the purpose for which it would be relied upon by a party – when not elicited orally or when the conditions for the introduction of the prior

⁴¹ ICTY, *Prosecutor v. Đorđević*, IT -05-87/1-T, TC II, *Decision on Vlastimir Dordevic’s Motion to Exceed the Word Limit and Motion to Admit Documents from The Bar Table*, 23 June 2010, para. 18.

recorded testimony specifically provided for in the Court's applicable law have not been met.⁴²

35. The prohibition on the admission of testimonial documents through the bar table protects the right of the Accused to challenge and confront the allegations of the witnesses against him. It also assists the Trial Panel by ensuring that the reliability of these allegations is tested during the trial process. Witnesses who have spoken about matters relevant to the charges, and their words were in some way recorded, should be called to testify orally, allowing the Accused to explore these various statements, "including which the SPO says are incriminating for the Accused, and to verify with them the accuracy and reliability of the written records of what they allegedly said."⁴³ Therefore, "unless the accused persons have either waived their right to examine the witness or had the opportunity to do so when the testimony was recorded, the statement will not be admitted unless the witness is available for examination at trial."⁴⁴

5. *Materials Seized from Rexhep Selimi*

36. In relation to the Items 73 and 289, purportedly seized from the residence of Rexhep Selimi, the Defence repeats and relies upon the objections raised in the First Bar Table Response.⁴⁵

III. CLASSIFICATION

37. These submissions contain confidential information about witnesses and documents, and as such, are filed confidentially.

⁴² KSC-BC-2020-07/F00334, Trial Panel II, *Decision on the Prosecution Request for Admission of Items Through the Bar Table* ("Gucati and Haradinaj SPO Bar Table Decision"), 29 September 2021, para. 87; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2635, TC II, *Decision on the Prosecutor's Bar Table Motions* ("Katanga and Ngudjolo Decision"), 17 December 2010, para. 47.

⁴³ *Gucati and Haradinaj SPO Bar Table Decision*, para. 91.

⁴⁴ *Katanga and Ngudjolo Decision*, para. 50.

⁴⁵ F01387, paras. 31-51.

IV. CONCLUSION AND RELIEF SOUGHT

38. The SPO has put the internal functioning, structure and operation of the KLA at the centre of this case. The Proposed Exhibits, characterised as “contemporaneous KLA records”⁴⁶ are being presented as being directly relevant to this central question, despite the SPO’s awareness that so many of them exist in draft, handwritten, and incomplete form, without the requisite indicia of reliability for admission in a criminal case, and with little or no information about the circumstances of their creation.

39. The admission of these 580 documents would, undoubtedly, contribute to an expanding evidential record, which already runs into the thousands, when only 54 SPO witnesses having been called to give live evidence. Even putting figures aside, the Trial Panel has directed the parties to use a high threshold of evaluation so as to ensure that only evidence of high probative value is tendered.⁴⁷ The Proposed Exhibits cannot reasonably be considered as meeting this standard. The SPO Request adopts an impermissibly broad approach to admissibility, with the SPO submitting that handwritten scraps of paper with no date, signature, or author, are worthy of admission; a position which serves to undermine the credibility of the SPO Request more broadly.

40. In this context, given the poor quality of the documents, the lack of information available about their creation and source, and the testimony from SPO witnesses questioning the authenticity of purported KLA records already shown to them during these proceedings, the need for authentication through live witnesses is heightened, and would be coherent with the Trial Panel’s direction that “[w]hile the bar table procedure is in the interest of judicial economy, it should not become an alternative to

⁴⁶ SPO Request, para. 1.

⁴⁷ Order on Conduct of Proceedings, para. 49.

presenting the most important exhibits through witnesses who are in a position to speak to them and to be cross-examined about them.”⁴⁸

41. Of the 302 witnesses the SPO proposes to call as witnesses in these proceedings, approximately a third are being presented as former KLA members. Among these former KLA members, are numerous witnesses who are presented as having been in the Llap Zone during the charged events. No explanation has been offered as to *why* the SPO is trying to circumvent the procedure for contextualisation and authentication of the Proposed Exhibits, by seeking admission instead through the bar table. Until the Llap Zone witnesses are heard, this attempt is premature.

42. For the foregoing reasons, the Defence respectfully requests that the Trial Panel:

DEFER its consideration of the SPO Request until after SPO’s Llap Zone witnesses have completed their testimony; or, in the alternative

REJECT admission of the Proposed Exhibits for the reasons set out in the present filing and its Annex.

[Word count: 5,873 words]

⁴⁸ First Bar Table Decision, para. 16.

Respectfully submitted on 15 April 2024




Luka Misetic
Co-Counsel for Hashim Thaçi



Ben Emmerson, CBE KC
Counsel for Kadri Veseli



Kerrie Ann Rowan
Co-Counsel for Kadri Veseli



Annie O'Reilly
Co-Counsel for Kadri Veseli



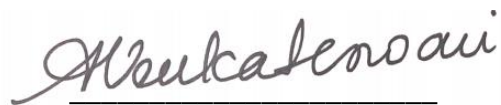
Geoffrey Roberts
Counsel for Rexhep Selimi



Eric Tully
Co-Counsel for Rexhep Selimi



Rudina Jasini
Co-Counsel for Rexhep Selimi



Venkateswari Alagenda
Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi