

**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 Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

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

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**Public Redacted Version of Joint Defence Response to Prosecution Motion for  
Admission of Drenica Zone Documents with Confidential Annex 1**

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**Specialist Prosecutor's Office**  
Kimberly P. West

**Counsel for Hashim Thaçi**  
Luka Misetic

**Counsel for Victims**  
Simon Laws

**Counsel for Kadri Veseli**  
Ben Emmerson

**Counsel for Rexhep Selimi**  
Geoffrey Roberts

**Counsel for Jakup Krasniqi**  
Venkateswari Alagenda

## I. INTRODUCTION

1. The Defence for Messrs. Thaçi, Veseli, Selimi and Krasniqi (“the Defence”) hereby files its Response to the Prosecution motion for admission of Drenica Zone documents (“SPO Motion”).<sup>1</sup> The SPO is seeking to enter into evidence a myriad of documents lacking relevance, probative value and authenticity, additionally failing to substantiate their provenance. Instead of adducing actual expertise in support of its contention that the documents so tendered are authentic, the SPO is merely confining itself to recitations of the contents of the documents offered for admission, generic and unsupported submissions related to mutual corroboration, and reliance on documents not in evidence in defiance of the Trial Panel’s prior rulings.
2. In the absence of contextualizing and authenticating testimony, the Proposed Exhibits do not satisfy the requisite threshold for admission. Thus, to ensure that the Defence is in a position to effectively challenge the SPO’s evidence in accordance with the Accused’s right to confrontation and the principle of orality, the Trial Panel should defer its decision on the admissibility of the Proposed Exhibits until certain witnesses have testified. In the alternative, the Trial Panel should deny the admission of the Proposed Exhibits.

## II. SUBMISSIONS

### A. The SPO Motion is premature

3. At the outset, the Defence notes that the SPO has elected to call, *inter alia*, W04290, [REDACTED] as witnesses related to the Drenica OZ. The Defence has identified several of the Proposed Exhibits which are purported to have been signed by, relate to, or would otherwise potentially fall within the knowledge of

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<sup>1</sup> KSC-BC-2020-06/F02248, Prosecution motion for admission of Drenica Zone documents with confidential Annexes 1-2, 16 April 2024.

the above individuals. However, as outlined below, neither the form and content of the Proposed Exhibits themselves, nor the SPO's submissions on the matter, attest to the Proposed Exhibits' *prima facie* authenticity, probative value and relevance so as to warrant their admission at the present stage in the absence of witness testimony that would properly contextualize and authenticate the material in question. The Defence therefore requests that the Trial Panel defer its ruling on the admissibility of the Proposed Exhibits until the above witnesses have testified, and the extent to which those witnesses can authenticate or contextualize the tendered material has been ascertained.

4. With respect to W04290 in particular, the Defence notes that a considerable number of the Proposed Exhibits are attributed to him or otherwise relate to his position [REDACTED].<sup>2</sup> Nonetheless, in an email from 21 June 2023, the SPO notified the Parties and the Trial Panel that it has “decided not to call W04290 at this stage, and to keep the necessity of his evidence under review as our case develops.”<sup>3</sup>
5. In subsequent litigation, the SPO noted that it still intends to call W04290 as a witness, yet that it “anticipates deciding on further changes to its witness list (including decisions not to call witnesses and/or changes to modes of testimony and examination times) over the coming months, on the basis of decisions received, evidence admitted, and Defence positions communicated in and out of court.”<sup>4</sup> In that context, the Trial Panel ordered that “should the SPO decide at any point not to call W04290 (or any other witness(es)), it must promptly notify the Panel, the Defence and Victims' Counsel of this fact.”<sup>5</sup> To date, no

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<sup>2</sup> See e.g. Item 10: U000- 8229- U000- 8229; Item 22: 096746- 096747; Item 38: 097047- 097056; Item 41: 097160- 097161.

<sup>3</sup> SPO, Email of 21 June 2023 with subject line “Information regarding witnesses to be called”.

<sup>4</sup> KSC-BC-2020-06/F01677, Prosecution response to THAÇI request concerning contact with W04290, 14 July 2023, paras. 3-4.

<sup>5</sup> KSC-BC-2020-06/F01719, Decision on Thaçi Defence Request Concerning Contact with W04290, 16 August 2023, para. 22.

information has been forthcoming as to whether W04290 will still be called to give evidence, and W04290 has not been notified as a scheduled witness for any of the evidentiary blocks following receipt of the SPO's email.

6. The uncertainty surrounding W04290's expected testimony directly impacts the admissibility of the Tendered Exhibits. Ruling on the admissibility of these items at a stage where doubt hangs over the Defence's opportunity to cross-examine this witness risks causing prejudice to the Defence whereby a large collection of items may be admitted that the Defence has had no opportunity to meaningfully challenge.
7. Furthermore, the Defence notes that several items related to W04290 have been admitted in previous bar table decisions with the qualification that the Defence will have the opportunity to examine W04290 on the contents of those documents as a safeguard against prejudice.<sup>6</sup> Should the SPO elect not to call W04290 as a witness, then the burden will be unjustly shifted to the Defence to seek reconsideration of the Trial Panel's rulings on the admission of these items against the much stricter standard reflected in Rule 79. Ruling on the admissibility of the items tendered in the Motion at this stage will only serve to compound this procedurally inequitable outcome, should W04290 not be called to testify by the SPO.
8. Considering the above, the Trial Panel should defer its decision until the Drenica OZ witnesses have testified, and the parties have had the opportunity to cross-examine them in relation to the Proposed Exhibits. This would be consistent with both the principle of orality and the Accused's right to confront the evidence against them.

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<sup>6</sup> See, for example, KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, paras. 67, 99, 143.

## B. Defence objections to the Proposed Exhibits

9. Should the Trial Panel decline to defer its decision, and consider the SPO Motion on the merits, the Defence has annexed a modified version of Annex 1 to the SPO Motion, listing specific objections to the Proposed Exhibits.<sup>7</sup> 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<sup>8</sup> and in the most recent response to the bar table application related to the Llap zone.<sup>9</sup>
10. 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 from the bar table.

### 1. The Proposed Exhibits should not be admitted on relevance grounds

11. The SPO has tendered several items of marginal relevance and probative value. They include, *inter alia*, (i) documents with nothing of substance but titles and/or inscriptions,<sup>10</sup> (ii) records detailing facts and circumstances whose exact purpose and context cannot be determined in the absence of contextualizing testimony,<sup>11</sup> and (iii) documents that relate to individuals and units whose affiliation with the KLA and connection to the SPO's case as pled remain unexplained.<sup>12</sup> In that respect, the Trial Panel has previously denied admission from the bar table of material where, despite the SPO's assertions to the contrary, it was not self-

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<sup>7</sup> Annex 1 to the present submissions.

<sup>8</sup> KSC-BC-2020-06/F01387/A07, Annex 7 to Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, 21 March 2023.

<sup>9</sup> KSC-BC-2020-06/F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024.

<sup>10</sup> See, e.g. Item 51: U000-8248-U000-8249; Item 90: SPOE00227544-SPOE00227544.

<sup>11</sup> See, e.g. Item 54: U002-3672-U002-3672; Item 57: U002-3678-U002-3678.

<sup>12</sup> See, e.g. Item 91: SPOE00227545- SPOE00227545; Item 54: U002-3672-U002-3672, Item 60: 098705-098717, Item 61: U002-3680-U002-3680. The Trial Panel has previously denied the admission of evidence related to individuals in respect of whom "it is unclear who they are, what roles, if any, they had in the KLA." (KSC-BC-2020-06/F01705, Third Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023, para. 47)

evident from the material itself how they related to relevant issues<sup>13</sup> in the absence of further contextualisation by a witness.<sup>14</sup>

12. The Defence further notes that the SPO's consistent tendering of documents with unexplained relevance and probative value demonstrates its disregard of 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.<sup>15</sup>
13. The tenuous relevance and probative value of several of the Proposed Exhibits is also evident from the sparse references to the Proposed Exhibits in the SPO Pre-Trial Brief, a factor that the Trial Panel has previously considered in determining the relevance of tendered material to the SPO's case.<sup>16</sup> In total, out of almost 100 items, only 32 of them have been referred to in the SPO's Pre-Trial Brief, whereas only 3 of them have been displayed during in-court proceedings to date, and 8 have been notified as exhibits to be used with past or upcoming witnesses.
14. Furthermore, the Motion is replete with attempts to establish the Proposed Exhibits' relevance on the basis of extrapolations or conclusory representations. Illustrative of this approach is a notebook bereft of any indication as to its author and which purports to record ten individual names or nicknames and their respective phone numbers, four of which the SPO claims to relate to KLA members in the Drenica OZ.<sup>17</sup> In attempting to establish its relevance, the SPO

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<sup>13</sup> KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 18.

<sup>14</sup> KSC-BC-2020-06/F01705, Third Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023, paras. 24, 33; KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, paras. 15, 124.

<sup>15</sup> KSC-BC-2020-06/F01226/A01, Order on the Conduct of Proceedings, 25 January 2023, para. 49.

<sup>16</sup> KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 37; KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, para. 20.

<sup>17</sup> Item 67: 098294-098304.

asserts that this document “shows communication and association between various KLA members.”<sup>18</sup> It is unexplained how this document alone, unattributed to any identified person, would demonstrate that these four members, or the KLA in the Drenica OZ in general, engaged in communications with one another. However, even if they did, the SPO has failed to explain which aspect of its case such communication would prove, when there is no witness to provide evidence on the purpose or content of such communications.

15. Further examples include: a blank document with the title “Homeland Calling” Fund, which, on the SPO’s submission, purports to demonstrate that this fund was operational and was used to finance operations in the Drenica OZ;<sup>19</sup> a technical print-out of a Motorola portable radio model specification with two handwritten words and a number<sup>20</sup> which, on the SPO’s submission, can only reasonably refer to just one specific individual in the Drenica OZ, and demonstrates that this particular Motorola radio was in use in the area at that time. As such, the Motion is replete with instances where the SPO is attempting to establish the relevance of a document not based on the contents of the documents themselves, but on its singular inferences from their contents, or by imputing imaginary facts into them. The SPO cannot substitute its own wishful hypotheses for the testimony of a witness with actual knowledge of the documents in question, who can provide particulars as to their purpose and content, and thereby demonstrate their relevance or lack thereof.
16. Considering the foregoing, the SPO should adduce oral testimony in respect of the documents tendered whose relevance is not apparent from the contents of the documents themselves. Admitting into evidence material of this nature would unduly overburden the trial record. The Defence reiterates that it is the

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<sup>18</sup> *Ibid.*

<sup>19</sup> Item 51: U000-8248-U000-8249.

<sup>20</sup> Item 66: 097195-097198.



SPO's heavy reliance on wholesale submission of evidence via the bar table which is the key contributor to the size of the evidential record and raises the immediate concern that its unmanageable size may negatively impact the fairness of these proceedings.<sup>21</sup>

## 2. The SPO failed to authenticate the Proposed Exhibits

17. The Defence notes that the vast majority of items tendered by the SPO are, in its submission, "contemporaneous KLA records".<sup>22</sup> The Defence reiterates that purported KLA documents should be authenticated through witnesses in order to ensure their proper contextualisation, and to allow witnesses to speak to the documents' background, authorship, and authenticity.<sup>23</sup>
18. Several of the Proposed Exhibits contain virtually no indication of authenticity. The collection is replete with, *inter alia*, (i) handwritten materials whose authors have not been identified,<sup>24</sup> and for which the SPO has failed to provide any relevant information as to the context in which those documents were prepared, and for what purpose; (ii) purported orders or requests that are unsigned<sup>25</sup> and whose signature has not been attributed,<sup>26</sup> and which contain no indication as to

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<sup>21</sup> KSC-BC-2020-06/F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, paras. 1-6.

<sup>22</sup> SPO Motion, para. 1.

<sup>23</sup> KSC-BC-2020-06/F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, para. 13; KSC-BC-2020-06/F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8, 21 March 2023, paras. 14-15.

<sup>24</sup> Item 76: U017-3004-U017-3034. In relation to handwritten materials, the Trial Panel determined that documents of this nature must "reveal sufficient indicia of prima facie authenticity and probative value, including in respect of its reliability", and denied admission of such documents where they were not "not sufficiently authenticated and reliable, without further contextualisation by a witness, as some of the items are undated, and for some it is unclear who authored the items and based on what information." (KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, para. 90)

<sup>25</sup> Item 30: 097179-097179; Item 41: 097160-097161; Item 73: U017-3874-U017-3887; Item 77: U000-7904-U000-7904.

<sup>26</sup> Item 48: U000-8276-U000-8276; Item 63: 097149-097157; Item 72: U017-3739-U017-3788. The Panel has likewise previously denied admission of documents whose authors' identity has not been attributed



whether such materials were disseminated, and if so, to whom; and (iii) materials purportedly issued by individuals or bodies whose functions and relationship to the KLA remain unexplained.<sup>27</sup>

19. The Trial Panel has previously determined that it is for the tendering party to provide indicators of a proposed exhibit's authenticity, where such indicators are not apparent from the face of the document in question.<sup>28</sup> As such, the Panel has previously declined to admit certain documents where the SPO failed to provide clear and verifiable indications as to their origin.<sup>29</sup> In addition to the fact that the Proposed Exhibits now tendered by the SPO fail to satisfy the requirements of authenticity by themselves, the SPO's submissions in support of their admission likewise fall short of the requisite threshold.
20. The SPO argues that the *prima facie* authenticity of the collection may be established if the entire collection is viewed "holistically".<sup>30</sup> To that effect, it argues, *inter alia*, that the documents relate to the same persons, contain similar information or are otherwise interconnected.<sup>31</sup> The Defence reiterates that a collection of poorly authenticated or non-authenticated documents cannot create one authenticated document.<sup>32</sup> As set out by Judge Morrison in the *Bemba* case, the evidential value of a piece of information that holds none on its own cannot

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(KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 38).

<sup>27</sup> Item 54: U002-3672-U002-3672; Item 55: U002-3674-U002-3674; Item 56: U002-3676-U002-3676; Item 58: U002-3678-U002-3678; Item 61: U002-3680-U002-3680; Item 80: U000-7780-U000-7780; Item 81: U017-2602-U017-2615.

<sup>28</sup> KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 11.

<sup>29</sup> KSC-BC-2020-06/F01983, Sixth Decision on Specialist Prosecutor's Bar Table Motion, 5 December 2023, para. 38; KSC-BC-2020-06/F01705, Third Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023, paras. 24, 33.

<sup>30</sup> SPO Motion, para. 20.

<sup>31</sup> *Id.*

<sup>32</sup> F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, para. 17.

be satisfied by reference to a related piece of information whose evidential value is likewise nil.<sup>33</sup> As such, when there is no independent and verifiable source to establish the veracity and authenticity of the information contained in the Proposed Exhibits, such as through a testifying witness, the fact that that information is replicated across the collection does nothing to buttress the authenticity of the collection as a whole.

21. Furthermore, the clear instances of individuals rejecting what appeared to be their own signatures on documents obtained by the SPO, or otherwise questioning the authenticity of such documents and querying the absence of relevant identification criteria,<sup>34</sup> should have alerted the SPO to the necessity of adducing independent evidence to confirm the authenticity of the documents in its possession. The SPO's submissions demonstrate that no such effort has been undertaken.
22. The SPO further argues that the authenticity of the Proposed Exhibits is demonstrated by the fact that "many of [them] contain detailed information, including on routine and administrative matters, that only Drenica OZ KLA members would be in a position to know."<sup>35</sup> This argument is nothing but a speculative leap in and of itself and hinges on an unsubstantiated assumption that the documents in questions are indeed authentic documents authored by the KLA in the Drenica OZ and relate to events that did indeed occur in the area at the time.
23. In the absence of concrete evidence establishing the authenticity of these documents and attributing them to the Drenica OZ, and attesting to the veracity

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<sup>33</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-T-374-ENG CT WT, Transcript of Appeal Hearing, 11 January 2018, p. 58.

<sup>34</sup> F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, para. 16.

<sup>35</sup> SPO Motion, para. 20.

of their contents, the inference proposed by the SPO is implausible. It is only *if* the documents were authentic, and their contents true, that they could fall within the knowledge of the KLA members in the Drenica OZ.

24. In addition, the SPO contends that the Proposed Exhibits are corroborated by other admitted evidence, items on the Exhibit List, and witness evidence.<sup>36</sup> Nevertheless, the “corroboration” contended by the SPO falls short of establishing the authenticity of the *specific* documents it elected to tender.
25. By way of example, the SPO tenders a [REDACTED]<sup>37</sup> and contends that the authenticity of this document is corroborated by two documents attesting to [REDACTED].<sup>38</sup> Similarly, the SPO tenders a handwritten letter which it claims to have originated from W04476,<sup>39</sup> and puts forward an extract attributed to Jakup Krasniqi as corroborative evidence argued to confirm W04476’s role in the Drenica OZ at the relevant time.<sup>40</sup> The SPO fails to explain how evidence as to an individual’s position proves their authorship of a certain document and furthermore, establishes that the contents of that document are true.
26. In a similar instance, the SPO tendered what it claims to be a document containing an account of fuel usage.<sup>41</sup> On one page of the document, the word “Pllumbi” is recorded, which, according to the translation, simply means “pigeon”. In the SPO’s view, the authenticity of the document is corroborated by the fact that a unit with the same name was founded by Ferat Shala according to a book authored by Jakup Krasniqi.<sup>42</sup> That the alleged existence of a unit identified by a common noun would corroborate the authenticity of a document

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<sup>36</sup> SPO Motion, para. 20.

<sup>37</sup> Item 15: U000-7640-U000-7640.

<sup>38</sup> [REDACTED], pp. 20-21; U015-8743-U015-9047, p. U015-8829.

<sup>39</sup> Item 50A: SPOE00225147-SPOE00225147.

<sup>40</sup> U015-8743-U015-9047, p. U015-884.

<sup>41</sup> Item 58: 097239-097241.

<sup>42</sup> U015-8743-U015-9047, p. U015-8829.

where the same common noun features in a completely different context is a submission based solely on conjecture.

27. In fact, the SPO seeks admission of a number of documents which, according to the SPO, relate to the 'Pëllumbi' unit.<sup>43</sup> The items tendered do not, on their own, bear sufficient indicia of authenticity and reliability and are of minimal, if any, probative value. Even taken at their highest, the documents cannot be probative of any degree of organisation of the Pëllumbi unit. The majority of the items contain illegible signatures or are merely blank templates and/or have varying formats and the SPO offers no evidence as to how, if at all, these documents were consistently used in practice. Furthermore, as submitted above,<sup>44</sup> a 'holistic' view of several non-authenticated documents cannot establish authenticity of the collection as a whole.<sup>45</sup> The SPO should call Ferat Shala as a witness, who would be in a position to authenticate the documents.
28. Furthermore, the SPO refers repeatedly to documents which it has not tendered for admission as corroborative of the authenticity of the Proposed Exhibits, including, as identified above, extracts that have been denied admission of the book "The Big Turn" by Jakup Krasniqi<sup>46</sup> and [REDACTED].<sup>47</sup> In so doing, the SPO is either inviting the Trial Panel to disregard its previous determination that it will not base its assessment of admissibility on material not offered for admission,<sup>48</sup> or is otherwise requesting that the Trial Panel reconsider its finding to that effect without putting forward any submissions with a view to satisfying

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<sup>43</sup> See items 86-96.

<sup>44</sup> *Supra*, para. 20.

<sup>45</sup> SPO Motion, para. 20.

<sup>46</sup> U015-8743-U015-9047.

<sup>47</sup> [REDACTED].

<sup>48</sup> KSC-BC-2020-06/F01603, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, 14 June 2023, para. 50.

the criteria of Rule 79. Accordingly, the SPO's references to documents not offered into evidence or otherwise denied admission should be disregarded.

29. Surprisingly, the SPO is seeking to reintroduce documents that have previously been rejected by the Trial Panel.<sup>49</sup> For example, the Trial Panel denied admission of 098615-098626 and other handwritten documents because they were "not sufficiently authenticated and reliable, without further contextualisation by a witness, as some of the items are undated, and for some it is unclear who authored the items and based on what information".<sup>50</sup> The fact that the Prosecution has shown certain pages of this item to a witness, does not authenticate the remainder of the document, especially since when the item in question is a compilation of documents with different handwritings, signatures, dates, format, and information. Should the SPO seek admission of this item through the Bar Table, it must seek reconsideration of the Trial Panel's decision.
30. Finally, the generic and unverifiable chain of custody information provided by the SPO<sup>51</sup> provides no support in favour of the authenticity of the Proposed Exhibits. The Defence therefore reiterates its submissions in that respect made in previous litigation.<sup>52</sup> In particular as several of the items have been seized from the residences of Messrs. Selimi and Krasniqi, the Defence recalls its previously stated objections concerning the admissibility of such items.<sup>53</sup>
31. In support of its arguments relating to the chain of custody, the SPO referred to a [REDACTED].<sup>54</sup> The SPO further refers to an ICTY Investigator Declaration

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<sup>49</sup> 098615-098626; 098615-098626-ET Revised.

<sup>50</sup> F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, paras 90-91.

<sup>51</sup> SPO Motion, para. 21.

<sup>52</sup> KSC-BC-2020-06/F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, paras. 19-27.

<sup>53</sup> KSC-BC-2020-06/F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8, 21 March 2023, paras. 31-51.

<sup>54</sup> 095845-095862-ET

concerning the chain of custody of documents falling within a certain ERN,<sup>55</sup> yet the SPO has failed to specify which of the Proposed Exhibits are covered by that declaration. Nonetheless, the SPO asserted that it is not tendering these documents, yet relies on them in support concerning provenance and authenticity. In so doing, the SPO is likewise ignoring the Trial Panel's pronouncements to that effect, as articulated above.<sup>56</sup>

32. The Defence further notes that the SPO has confirmed that it does not intend to call the author of the ICTY Investigator Declaration as a witness.<sup>57</sup> Similarly, none of the individuals featured in [REDACTED] feature on the SPO's witness list. By submitting these statements for consideration (provided in the context of criminal proceedings), the SPO is attempting to circumvent the requirements of Rules 153-155. Accordingly, the SPO's references to these two items should be summarily dismissed.
33. Nevertheless, the Defence submits that the two items, even if considered, are of marginal value to enhancing the authenticity of the Proposed Exhibits. Concerning the [REDACTED], in addition to providing merely generic information as to the locations where the items were purported to have been found, the communication explicitly confirms that the [REDACTED] could not identify the specific individuals who collected the materials and thus was not in a position to certify an uninterrupted chain of custody.<sup>58</sup>
34. The ICTY Investigator Declaration likewise provides virtually no authentication to the Proposed Exhibits, with the investigator merely confirming that the documents originate from Serbian authorities and were seized by the security

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<sup>55</sup> ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Prosecution's Submission of Chain of Custody Information for Exhibits Tendered through Bislim Zyrapi, 7 November 2007, Annex A (Investigator Declaration).

<sup>56</sup> *Supra* para. 28.

<sup>57</sup> Transcript of 20 March 2024, p. 13516.

<sup>58</sup> 095845-095862-ET, p. 095862.

forces of the Ministry of Interior of the Republic of Serbia, without providing any information as to the identity of those involved in their collection; the exact timing and the location from which they were seized; and the identity and number of individuals who subsequently took possession of the documents following their seizure.<sup>59</sup> If anything, this document confirms the Defence contention that several of the documents originating from the ICTY have in fact been provided to the latter by the Serbian authorities, as opposed to being independently collected by the former, which does nothing to resolve the extant authenticity concerns.<sup>60</sup> As such, the SPO's averments to the effect that the authenticity of an item is enhanced by virtue of the same item having been provided by the SPO by both the ICTY and the Serbian authorities are without merit.

35. Considering the foregoing, the SPO has failed to establish the *prima facie* authenticity of the Proposed Exhibits and their admission should therefore be denied.

**3. The probative value of the Proposed Exhibits is outweighed by their prejudicial effect**

36. The Trial Panel has emphasized that while the bar table procedure promotes 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.<sup>61</sup> As is evident from the SPO's submissions, it is intending to rely on the Proposed Exhibits to prove central and highly contested elements of its case, including (i) the existence of an armed conflict at

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<sup>59</sup> Investigator Declaration.

<sup>60</sup> F02243, Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1, 15 April 2024, paras. 22-25.

<sup>61</sup> KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 16.



the relevant time;<sup>62</sup> (ii) the involvement of the Accused in alleged crimes committed in furtherance of the common purpose as pled in the Indictment;<sup>63</sup> (iii) the structure of the Drenica OZ and its relationship with and reporting lines to the General Staff;<sup>64</sup> (iv) the involvement of named and unnamed alleged JCE members and tools in the crimes charged;<sup>65</sup> (v) the existence and development of the alleged common criminal purpose;<sup>66</sup> and (vi) the authority of the General Staff, and of the Accused in particular, over military police, intelligence and special units operating in the Drenica OZ.<sup>67</sup>

37. While the Trial Panel has determined that the centrality of the Proposed Exhibits does not, in and of itself, render them inadmissible, items related to central issues of the SPO's case would still be subject to exclusion if an unfairness results from their admission.<sup>68</sup> The inability of the Defence to challenge the evidence fairly and effectively, in violation of the Accused's confrontation rights, is indicative of precisely that prejudice.<sup>69</sup> On that basis, the Trial Panel has previously denied admission of material tendered from the bar table on the basis that such material negatively affects the right to confrontation and would cause prejudice to the Accused.<sup>70</sup>
38. In arguing that the probative value of the Proposed Exhibits is not outweighed by their prejudicial effect, the SPO contends that the Defence will have ample

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<sup>62</sup> SPO Motion, para. 5.

<sup>63</sup> SPO Motion, para. 6.

<sup>64</sup> SPO Motion, para. 9-10.

<sup>65</sup> SPO Motion, paras. 11-12.

<sup>66</sup> SPO Motion, para. 11.

<sup>67</sup> SPO Motion, paras. 13-18.

<sup>68</sup> KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, para. 84.

<sup>69</sup> KSC-BC-2020-06/F01623, Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 36.

<sup>70</sup> KSC-BC-2020-06/F01705, Third Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023, para. 33; KSC-BC-2020-06/F01596, Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023, para. 36.

opportunity to challenge the Proposed Exhibits by, *inter alia*, putting their contents to witnesses.

39. Nevertheless, for the Defence to be able to challenge the Proposed Exhibits effectively, it must be first established that the Drenica OZ witnesses identified above (i) will indeed testify; and (ii) if they do, that they are in a position to provide evidence allowing the Defence to challenge the materials in question. While it may be presumed that a witness would be in a position to give evidence in relation to an item purportedly signed by or otherwise directly related to them, it is of note that numerous Proposed Exhibits bear no indication that they are related to any witness scheduled to testify in the present case. That being the case, it cannot be automatically assumed that the Defence will be able to challenge the contents of such documents until the relevant witnesses appear for testimony. This is all the more relevant in light of the fact that most of the Proposed Exhibits have not been shown to any of the relevant witnesses during their SPO interview, and as such the Defence is not on notice on as to whether they are actually in a position to comment on their contents.
40. As such, should the Trial Panel reject the request to defer its decision, the Proposed Exhibits should be denied admission for otherwise a large number of items that the SPO intends to rely upon to prove central elements of its case would be entered into the record absent any indication that the Defence is able to effectively and fairly challenge them.

### III. CONCLUSION AND RELIEF REQUESTED

41. For the foregoing reasons, the Defence respectfully requests that the Trial Panel:
- DEFER** its consideration of the SPO Motion until after SPO's Drenica 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.

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Respectfully submitted on 6 May 2024,



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Luka Misetic  
Counsel for Hashim Thaçi



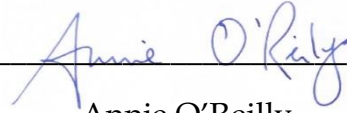
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Ben Emmerson, CBE KC  
Counsel for Kadri Veseli



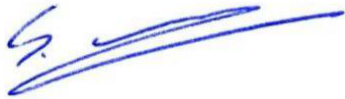
Kerrie Ann Rowan

Co-Counsel for Kadri Veseli



Annie O'Reilly

Co-Counsel for Kadri Veseli



GEOFFREY ROBERTS

Lead Counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI

Co-counsel for Rexhep Selimi



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Venkateswari Alagenda  
Lead Counsel for Jakup Krasniqi



---

Aidan Ellis  
Co-Counsel for Jakup Krasniqi



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Victor Băieșu  
Co-Counsel for Jakup Krasniqi