

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge 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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Further Public Redacted Version of Joint Defence Response to Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Requests (F01830)

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I. INTRODUCTION

1. The Defence for Messrs Thaçi, Veseli, Selimi, and Krasniqi (collectively, “the Defence”) hereby files its response to the Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 (“the Motion”).¹
2. The SPO seeks admission pursuant to Rule 154 of the prior statements and associated exhibits of seven witnesses. The Defence objects to parts of the material tendered through Rule 154 on the grounds 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) their probative value is outweighed by their prejudicial effect; and (iv) the time-saving function of admission pursuant to Rule 154 is overshadowed, in many instances, by the lengthy *viva voce* testimony sought by the SPO and the similarly lengthy cross-examination estimates of the Defence.
3. Finally, the Defence notes that some of the evidence tendered pertains to certain ultimate issues in this case. It follows that admission through Rule 154 would prove highly prejudicial for the rights of the Accused.

II. SUBMISSIONS

A. W03170

i. Rule 154 Statements

¹ F01830, Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7, 3 October 2023, confidential (“SPO Motion”).

4. For W03170, the SPO is proposing to admit 802 pages into the record pursuant to Rule 154,² in order to save approximately three (3) hours of examination in chief.³ This is an absolute false economy. For this, and the other reasons set out below, the Defence objects to the admission of the proposed material pursuant to Rule 154.⁴
5. W03170 is alleged to have [REDACTED] with [REDACTED]. On [REDACTED], both men were allegedly escorted from a meeting with [REDACTED] at an [REDACTED] and taken away in a vehicle. The SPO case is that they were blindfolded, hands bound, and were threatened and beaten, before being taken to a location in [REDACTED], where they were allegedly detained until [REDACTED]. One of the KLA members in the vehicle is claimed to have told [REDACTED] and W03170 that his name was [REDACTED].⁵
6. This incident is charged in the Indictment,⁶ and is described at length in the SPO Pre-Trial Brief.⁷ [REDACTED], W03170 and [REDACTED], are being called to testify. Seven other SPO witnesses are also being put forward as capable of addressing this event in their evidence: [REDACTED],⁸ [REDACTED],⁹ [REDACTED],¹⁰ [REDACTED],¹¹ [REDACTED],¹²

² See generally, F01830/A01, *Annex 1 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, confidential (“SPO Motion Annex 1”).

³ SPO Motion, para. 15.

⁴ See generally, SPO Motion Annex 1.

⁵ SPO Motion, paras 5-6.

⁶ F00999/A01, *Amended Indictment*, 30 September 2022 (“Indictment”), confidential, [REDACTED].

⁷ F01594/A03, *Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’*, KSC-BC-2020-06/ F01296/A01, dated 15 February 2023, 9 June 2023 (“SPO Pre-Trial Brief”), confidential, [REDACTED].

⁸ F01596/A02, *Annex 2 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief*, 9 June 2023, (“SPO Witness List”), confidential, pp. [REDACTED].

⁹ SPO Witness List, pp. [REDACTED].

¹⁰ SPO Witness List, p. [REDACTED].

¹¹ SPO Witness List, p. [REDACTED].

¹² SPO Witness List, p. [REDACTED].

[REDACTED],¹³ and [REDACTED].¹⁴ The Trial Panel has previously held that the *importance* of the proposed evidence to a Party's case is a factor that the Panel may take into consideration, and that it may refuse admission pursuant to Rule 154 of a statement that is central to a party's case.¹⁵ There is no doubt that the SPO considers this as being important evidence of an incident that is "central" to its case, calling nine witnesses in total to discuss this allegation, and pleading it specifically in the Indictment. Given that W03170 is one of the two alleged direct victims, this militates against admission of his evidence under Rule 154, on the basis of its centrality to the SPO case.

7. W03170's evidence offered pursuant to Rule 154 also goes directly to the acts and conduct of Mr Thaçi as charged in the Indictment. This fact alone does not render the evidence automatically inadmissible under that Rule.¹⁶ However, evidence which is purported to implicate the accused directly in charged crimes, will necessarily reinforce a submission that the evidence is important and central to the SPO's case.
8. Also significant is the way in which W03170 is said to implicate Mr Thaçi, which is anything but straightforward, and further renders this evidence unsuitable for Rule 154 admission. The SPO presents an extremely simplified version of W03170's evidence about Mr Thaçi in the SPO Request. The SPO claims that [REDACTED]. [REDACTED]. While W03170 believed this to be the case, [REDACTED] did not.¹⁷ On its face, this is an inconsistency between the two men that should be explained during live evidence. However, the situation is far more complicated than that presented by the SPO.

¹³ SPO Witness List, p. [REDACTED].

¹⁴ SPO Witness List, pp. [REDACTED].

¹⁵ F01380, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023 ("First Rule 154 Decision"), confidential, para. 28.

¹⁶ First Rule 154 Decision, para. 80.

¹⁷ SPO Motion, para. 8.

9. W03170 first explained the divergence between himself and [REDACTED] in an UNMIK statement on [REDACTED], stating “[REDACTED].”¹⁸ Next, on [REDACTED] in a statement to the Kosovo Specialist Prosecutor’s Office, W03170 said that a part of the [REDACTED] UNMIK statement that he gave was “[REDACTED].” Specifically, regarding the people he said had arrested him, he only knew [REDACTED], and “didn’t know the others.”¹⁹
10. The story then becomes more complicated during his SPO interview, when W03170 is asked about his statement to UNMIK on [REDACTED] that he had [REDACTED] as [REDACTED], or “[REDACTED].” W03170 replies that the prosecutor intervened and warned him against speaking under “[REDACTED].”²⁰ The evidence which follows is objectively unclear and difficult to follow, but includes the following exchange:

[REDACTED].²¹

As such, W03170 has given inconsistent information about [REDACTED]’s involvement in an incident charged in the Indictment.

11. The SPO summary also circumvents that part of W03170’s evidence which gives rise to a larger inconsistency with [REDACTED]’s version of events. This inconsistency also directly concerns Mr Thaçi’s alleged role. In his UNMIK statement of [REDACTED], W03170 said that he believed [REDACTED]. This is not repeated in later interviews. The SPO put this accusation to [REDACTED], being that [REDACTED]. The witness responded that:

[REDACTED].²²

¹⁸ 051775-051780 RED2, p. 051779.

¹⁹ 051765-051770-ET, p. 051770.

²⁰ 053191-TR-ET Part 2 RED2, p. 30, lines 17-19.

²¹ 053191-TR-ET Part 2 RED2, p. 31, lines 15-22.

²² 055919-TR-ET Part 10 RED, p. 35, lines 13-22.

12. The Trial Panel has previously held that Rule 154 admission is not appropriate where the credibility of a witness constitutes a central element of the Defence case.²³ The credibility issues that are apparent from W03170's written statements directly concern the implication of Hashim Thaçi in these events. This mass of internally contradictory, and objectively unclear statements about Mr Thaçi and his alleged (non) involvement, as well as the contradictions with his [REDACTED], cannot simply be smoothed over by admitting 802 pages into evidence, rather than permitting him to explain this story live. It should not fall to the Defence to have to probe each of these inconsistencies through cross-examination. Rather, W03170 should be required to testify in chief and explain to the Panel and the parties where he now stands. Moreover, these are central questions. W03170 has given directly contradictory statements on whether [REDACTED], and whether [REDACTED]. Simply admitting all these contradictions into evidence is an entirely unsatisfactory way of the SPO leading evidence relating to allegations of direct involvement of the accused.
13. In terms of the volume of evidence, the SPO claims that that the introduction of the 802 pages of proposed Rule 154 material will "significantly reduce" the number of hours required for direct examination. This "significant" reduction is three (3) hours.²⁴ The Trial Panel has previously characterised a reduction of 16.5 hours, or nearly 3.5 court days, as "not inconsequential."²⁵ The SPO's characterisation of a 3-hour reduction as "significant" is an overstatement. On a basic cost-benefit analysis, there is simply no way that review of 802 pages of statements and evidence can be equated with the review of three (3) hours of

²³ First Rule 154 Decision, para. 20, citing ICTY, *Prosecutor v. Mićo Stanišić and Stojan Župljanin* (Trial Chamber II) [Decision Denying Prosecution's Motion for Admission of Evidence of Pedrag Radulović pursuant to Rule 192 ter](#), 1 April 2010, para. 9.

²⁴ SPO Motion, para. 15.

²⁵ First Rule 154 Decision, para. 81.

testimony which, based on the hearings to date, will amount to less than 100 pages of transcript.

14. Nor is this volume justifiable; much of the content of W03170's statements are repetitive, overlapping, and often incomprehensible in its translated English. The SPO has not indicated which sections of W03170's record should be admitted, an exercise which has been held to "go some way towards ensuring that the size of the case record is not bloated with irrelevant material and that the Defence can focus its attention upon those parts of the witness' written record that the SPO seeks to tender."²⁶ Rather than selecting the relevant extracts, the SPO inexplicably seeks to admit this material *en bloc*, presumably to capture the most incriminating allegations against [REDACTED] which W03170 has later walked back. This conclusion is reinforced by the fact that the SPO is still intending to present the evidence of W03170's [REDACTED], being [REDACTED], as a *viva voce* witness for 4.5 hours. If [REDACTED]'s evidence is deemed worthy of 4.5 hours of examination in chief, it is difficult to accept that W03170's evidence is nonetheless admissible through Rule 154.

ii. Associated Exhibits

15. Turning to the associated exhibits, the media articles should not be admitted, even if they were shown to or provided by W03170, given their low probative value. The first of these media articles, for example, is described as an "English translated news article [REDACTED] being arrested, [REDACTED]" and is referred to as "Exhibit 4."²⁷ It is a typed extract, with no indicia of reliability or provenance, or anything to indicate where it was published, or any indication of authenticity. The original is not provided. It is said to have been "discussed"

²⁶ First Rule 154 Decision, para. 81.

²⁷ SPO Motion Annex 1, p. 4, item 2 (SPOE00126367-00126368).

by W03170 during his SPO interview on [REDACTED].²⁸ The discussion is in fact one-sided from the SPO only, the entirety of which is as follows:

[REDACTED].²⁹

16. As such, Exhibit 4 does not come close to meeting the requirements of Rule 138. The fact that it was put briefly in front of W03170 during an SPO interview cannot circumvent the requirements that otherwise govern the admission of evidentiary material. In fact, all the media articles for which admission is sought do not form an integral part of the Rule 154 statements, the statements are not “less complete or of diminished value” without them, nor do they provide any necessary context. They should not be admitted.³⁰
17. There are also problems with Exhibit 9, being the “[REDACTED]” in the media, which is a copy of SITF00316652-00316655. The Trial Panel declined to admit this document through the bar table, on the basis that a copy is already in evidence.³¹ The SPO submits that it should nonetheless be admitted through W03170 “for ease of reference, also considering it is marked as an exhibit and initialled by W03170.”³² W03170 only initialled this document after the following exchange with the SPO, in which W03170 expressed his view that it was not an authentic version and had been modified:³³

[REDACTED].

18. Therefore, not only would the admission of Exhibit 9 be duplicative, but W03170 undermined the basis for its admission into the record; it has been

²⁸ SPO Motion Annex 1, p. 4, item 2 (SPOE00126367-00126368) “[d]iscussed in 053191-TR-ET Part 1 RED3, pp. 7-8.”

²⁹ 053191-TR-ET Part 1 RED3, p. 8, lines 11-14.

³⁰ SPO Motion Annex 1, p. 4, items 2 (SPOE00126367-00126368), 3 (SPOE00126369-00126369/043862-043862-ET Revised 1, p.2) and 4 (SPOE00126370-00126370/SPOE00126370- SPOE00126370-ET).

³¹ F01705, *Third Decision on Specialist Prosecutor’s Bar Table Motion*, 27 July 2023 (“Third Bar Table Decision”), confidential, [REDACTED].

³² SPO Motion Annex 1, pp. 7-8, item 7 (SPOE00126372-00126372/SITF00316652-00316655, p. SITF00316652).

³³ 053191-TR-ET Part 6 RED2, p. 10, line 13 – p. 11, line 2.

modified from the original for political reasons. Similarly, Exhibit 10³⁴ is already in the record, and the fact that it has been “initialled by W03170,” who is not the author, does not give rise to a reason for its duplicative admission. Particularly given the Trial Panel’s stated position that “[i]t is not apparent to the Panel why more than one copy of the same document needs to be admitted.”³⁵

19. The Krasniqi Defence objects to Exhibit 6³⁶ and an additional media article which relates to the same information discussed in Exhibit 6.³⁷ Exhibit 6 was shown briefly to the witness during his SPO interview and was not discussed with him in detail, despite the promise by the interviewer to do so at a later stage.³⁸ The second media article related to this incident, was not shown to the witness at all, according to his SPO interview. The Krasniqi Defence takes note that these documents relate directly to evidence provided by Mr. Krasniqi at the ICTY, the admissibility of which is still the subject of litigation in this case³⁹ and to which the Krasniqi Defence has issued strenuous objections.⁴⁰ Secondary documents commenting on, and at times quoting from, this material should not be admitted in association with this witness, whilst the admissibility of the underlying material remains in dispute; it would be premature to do so at this time. Any future decision by the Trial Panel to exclude Mr. Krasniqi’s testimony, would be wholly undermined by the admission of articles referring to and citing that testimony. The Defence further notes that the Prosecution has

³⁴ SPO Motion Annex 1, p. 9, item 8 (SPOE00126373-00126373/SPOE00126373-00126373-ET).

³⁵ Third Bar Table Decision, para. 12.

³⁶ SPO Motion Annex 1, pp. 5-6, item 4 (SPOE00126370-SPOE00126370/SPOE00126370-SPOE00126370-ET).

³⁷ *See*, 064890-064893.

³⁸ 053191-TR-ET Part 1, p. 8, line 20 – p. 9, line 12

³⁹ *See generally*, F01351, *Prosecution Motion for Admission of Accused’s Statements with Public Annex 1*, 8 March 2023, confidential; F01475, *Krasniqi Defence Response to Prosecution Motion for Admission of Accused’s Statements*, 24 April 2023 (“Krasniqi Accused’s Statements Response”), confidential.

⁴⁰ Krasniqi Accused’s Statements Response, paras 28-39.

attempted to tender Exhibit 6 as part of its Bar Table Motion, to which the Defence have once again objected strongly.⁴¹

20. Additionally, the prejudicial value of the articles outweighs any limited probative value. The articles are misleading in that they purport to contain extracts from the above testimony, shorn of any context and without reproducing the complete testimony. The newspaper articles have not been authenticated by W03170 during his interview, and contain an incendiary, secondary reaction to Mr. Krasniqi's testimony by W03170, which does not accurately reflect the testimony itself. These reactions were apparently garnered during a press conference which is also not mentioned explicitly by W03170 in his witness statement. These articles have, at best, limited probative value. W03170's comments on Mr Krasniqi's testimony given at the ICTY are barely relevant to these proceedings, if at all. Certainly, they do not form an inseparable or indispensable part of W03170's statement, as they are not covered in depth (Exhibit 6) or at all (064890-064893) by this witness. They should therefore not be admitted into evidence.

B. W04043

21. The Defence does not contest the *prima facie* authenticity and reliability of W04043's Rule 154 statement.⁴² The Defence does however note that the witness' statement is short and the time projected for direct examination is currently one hour. Given the scope of his statement, the time and resources saved by admitting the proposed evidence pursuant to Rule 154, would be

⁴¹ See generally, F01387/A06, *Annex 6 to Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table*, 21 March 2023, confidential.

⁴² See, F01830/A02, *Annex 2 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, ("SPO Motion Annex 2"), confidential, p. 1 (106336-TR-ET Part 1 RED2; 106336-TR-ET Part 2; 106336-TR-ET Part 3; 106336-TR-ET Part 4; 106336-TR-AT Part 1 RED2; 106336-TR-AT Part 2; 106336-TR-AT Part 3; 106336-TR-AT Part 4; 106336-TR-ST Part 1 RED2; 106336-TR-ST Part 2; 106336-TR-ST Part 3; 106336-TR-ST Part 4).

minimal. The Defence therefore suggests that leading the witness *viva voce* would not add significantly to the trial time and would streamline the overall evidence record.

22. The Defence also does not object to the associated exhibits accompanying W04043's statement.⁴³ The Defence additionally takes note of two documents which the Prosecution projects to use with the witness⁴⁴ and which, according to the Prosecution submission on the list of witnesses for 30 October to 13 December 2023, will require another amendment to the exhibit list.⁴⁵ The lesser redacted version of these documents has recently been disclosed pursuant to Rule 107, and the Defence has no objection to the use of these documents with this witness.

C. W04444

i. Rule 154 Statement

23. The Defence does not contest the *prima facie* authenticity and reliability of W04444's Rule 154 statement.⁴⁶ However, the Defence objects to the admission of this evidence pursuant to Rule 154 in the light of the unique nature of the evidence and the lack of any substantial time saving.
24. W04444's account of his alleged arrest and detention in [REDACTED] is uncorroborated. Neither any of the people that W04444 says were present at the time of his alleged arrest, nor the only person who was allegedly detained

⁴³ SPO Motion Annex 2, p. 2, items 1 (SPOE00341540-00341540) and 2 (106334-106335).

⁴⁴ See, F01828/A01, *Annex 1 to Prosecution submission of list of witnesses for 30 October to 13 December 2023*, 2 October 2023, ("F01828/A01") confidential, p. 18, items 7 (SPOE00341654-00341654) and 8 (SPOE00341655-00341655).

⁴⁵ F01828/A01, p. 18, fns 10 and 11.

⁴⁶ See, F01830/A03, *Annex 3 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, ("SPO Motion Annex 3"), confidential, p. 1 (066662-TR-ET Part 1 RED3; 066662-TR-ET Part 2; 066662-TR-ET Part 3; 066662-TR-ET Part 4; 066662-TR-AT Part 1 RED3; 066662-TR-AT Part 2; 066662-TR-AT Part 3; 066662-TR-AT Part 4).

in the same room as W04444, are witnesses in this case. There is also no KLA member in the SPO witness list who claims to have been involved or to have knowledge of any of the circumstances surrounding W04444's detention. Therefore, no other SPO witness can testify to these events. Furthermore, there is no other evidence, such as medical records, tendered in support of W04444's account. Indeed, the only evidence cited in the SPO's Pre-Trial Brief in relation to the detention of W04444 and [REDACTED] is W04444's SPO interview.⁴⁷ Additionally, W04444 is only able to provide hearsay evidence about the persons and motives behind his detention, which cannot be effectively tested.⁴⁸ As a result, the evidence should be heard *viva voce*.

25. Further, given the limited scope of W04444's SPO interview and the allocated time for supplementary examination, the amount of time and resources that would be saved admitting the proposed statement through Rule 154, as opposed to hearing the entirety of the witness' testimony *viva voce*, is minimal. The SPO interview is less than 60 pages long. Leading the relevant evidence *viva voce* is unlikely to take significantly longer than the one hour currently proposed for supplementary examination. For all these reasons, the Defence objects to the admission of W04444's statement pursuant to Rule 154.

ii. Associated Exhibits

26. The Defence does not oppose the admission of the map,⁴⁹ as it was used with the witness during the interview and was properly marked, dated, and signed by W04444.

⁴⁷ SPO Pre-Trial Brief, [REDACTED].

⁴⁸ See for example, 066662-TR-ET Part 2, pp. 12-13; 066662-TR-ET Part 3, p. 2; 066662-TR-ET Part 3, p. 12.

⁴⁹ SPO Motion Annex 3, p. 1, associated exhibit 1 (066661-066661).

27. The Defence opposes the admission of the [REDACTED] article purportedly published in 'Infosot' as an associated exhibit to W04444's Rule 154 statement.⁵⁰ The SPO showed the article to W04444, who stated that the events described therein did not happen to him, but rather had taken place before the war and in any case prior to the time when he was taken to [REDACTED]. W04444 further clarified that he had not been [REDACTED], as the article claims.⁵¹ In fact, W04444 could not confirm the existence of [REDACTED] at all.⁵² Moreover, the article does not provide a date or a time frame when these events took place.
28. Evidently, this item cannot be admitted for the truth of its contents. Given that W04444 did not accept his involvement in the events described in the article, its probative value and its reliability are minimal. In addition, the SPO has not indicated its intention to seek further clarification in relation to the article as part of the information provided according to paragraph 74 of the Order on Conduct of Proceedings.⁵³ Consequently, the article does not form an "inseparable and indispensable" part of W04444's statement.
29. The item that the SPO seeks to tender appears to contain not only the article that the SPO showed to W04444, but also other articles or passages which are wholly unrelated to the events involving W04444. In particular, the document includes information regarding the detention of [REDACTED] and [REDACTED] and makes a series of serious and speculative allegations against Mr. Krasniqi.⁵⁴ If relied upon by the SPO, those matters must be pursued with another witness. The SPO's failure to confine its request to the passages of the

⁵⁰ SPO Motion Annex 3, p. 2, associated exhibit 2 (064890-064893/064890-064893-ET).

⁵¹ See, 066662-TR-ET Part 2, pp. 21-23.

⁵² See, 066662-TR-ET Part 2, p. 22.

⁵³ F01226/A01, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, public, para. 74; F01828, p. 4.

⁵⁴ See, 064890-064893-ET, pp. 3-4.

document actually shown to W04444 represents yet another attempt by the SPO to introduce evidence against the Accused which is alien to the witness in question. Any probative value that could be afforded to this article, which the Defence submits is minimal, is wholly outweighed by its prejudicial effect, since the Defence cannot cross-examine W04444 on any of the allegations against Mr. Krasniqi.

30. The Defence therefore objects to the admission of this document in its entirety. Should the Trial Panel decide to admit the article as associated exhibit to W04444's statement, the Defence requests that the SPO be ordered to refile a version of the article including only the parts showed to or discussed with W04444.

D. W04571

i. Rule 154 Statement

31. W04571's Rule 154 Statement relates to his interactions with the KLA and more specifically regarding his arrest at a checkpoint by KLA soldiers and the mistreatment he allegedly suffered. The SPO seeks to have this witness' five-part SPO interview⁵⁵ admitted under Rule 154.
32. During his SPO interview, the witness repeatedly mentions that his memory is impaired. On two occasions, W04571 stated "[REDACTED]"⁵⁶ and "[REDACTED]"⁵⁷. W04571 has a vague recollection of the events and mainly recalls being questioned by [REDACTED] and [REDACTED].⁵⁸ The witness'

⁵⁵ See, F01830/A04, *Annex 4 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, ("SPO Motion Annex 4"), confidential, p. 1 (075468-TR-ET Part 1 RED2; 075468-TR-ET Parts 2-5).

⁵⁶ 075468-TR-ET Part 1 RED2, p. 8.

⁵⁷ 075468-TR-ET Part 1 RED2, p. 26.

⁵⁸ 075468-TR-ET Part 3, pp. 1-4.

memory issues are also acknowledged by the SPO in its Motion.⁵⁹ While the fact that a witness may forget details does not necessarily impugn his evidence, such evidence is better heard *viva voce*. Finally, the low probative value of the witness' interview paired with the fact that only a small part of the witness' evidence appears to be relevant to the case, militate against its admission under Rule 154.

ii. Associated Exhibits

33. The Defence does not object to the original sketch plan drawn⁶⁰ by the witness during his SPO Interview being admitted as an associated exhibit.
34. One of the documents shown to the witness is an arrest order concerning W04571 signed by someone named "[REDACTED]" dated [REDACTED].⁶¹ When presented with this document, the witness stated that he had never seen this document before,⁶² and that he did not know anyone with the name or nickname "[REDACTED]." Neither does the SPO offer any suggestions as to who this person might be. As such, the Defence is of the position that the author of this document is indiscernible and the presence of a signature cannot in this case be determinative of its admission.
35. The witness told the SPO that he had no recollection of any previously given statements.⁶³ When shown his OSL Statement during his interview, the witness said "All I remember is that they said, put your signature here. I didn't feel well at the time."⁶⁴ The SPO has indicated in the Annex for this witness that it is not tendering this statement for admission as an associated exhibit. Notwithstanding, the Defence generally objects to this document being

⁵⁹ SPO Motion, para. 34.

⁶⁰ SPO Motion Annex 4, p. 2, item 1 (078022-078022-ET/078022-078022).

⁶¹ SPO Motion Annex 4, p. 2, item 2 (U000-5370-U000-5370-ET/U000-5370-U000- 5370).

⁶² 075468-TR-ET Part 4, pp 18-19.

⁶³ 075468-TR-ET Part 4, pp 1 and 3.

⁶⁴ 075468-TR-ET Part 3, p. 17.

considered for admission as its contents have not been discussed in detail during the witness' interview and it therefore cannot form an inseparable and indispensable part of the witness' Rule 154 Statement.

E. W04765

36. W04765 held various positions in the KLA in the [REDACTED] and, briefly, within the [REDACTED]. His proposed Rule 154 statements cover, *inter alia*, (i) KLA organisation, particularly in the [REDACTED] from the summer of 1998, contacts with the Accused and the General Staff, documents which he may have authored or signed, and the relationship between the KLA and government forces, *i.e.*, FARK; (ii) crimes alleged to have occurred in [REDACTED] in the summer of 1999; (iii) his post-war contacts with W04474 regarding [REDACTED]; and (iv) crimes alleged to have occurred in [REDACTED] in 1998 and 1999 about which [REDACTED], [REDACTED], and [REDACTED] also give evidence. He is the author of a book on the KLA⁶⁵, and a frequent maker of public statements, including through Facebook.⁶⁶ The SPO seeks the admission of 294 pages of transcripts, and 17 associated exhibits.

37. Preliminarily, the Defence notes that the following submissions should be read in conjunction with the objections set out in F01849/A05.

i. Rule 154 Statements

38. The SPO seeks to tender two interviews that it conducted with the witness, the second of which it neglected to include on its Exhibit List.⁶⁷ On both occasions,

⁶⁵ See, F01830/A05, *Annex 5 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, ("SPO Motion Annex 5"), confidential, p. 6, item, 8 (SPOE00209321-00209428/SPOE00209321-00209428-ET Revised 1).

⁶⁶ SPO Motion Annex 5, p. 7, item 9 (SPOE00328676- 00328733, pp. SPOE00328676-SPOE00328696/108011-108040- ET, pp.108011- 108022).

⁶⁷ SPO Motion, para. 51.

W04765 provided evidence as a suspect, voluntarily waiving his right to have an attorney present.⁶⁸

39. The Defence does not oppose the addition of W04765's second interview to the SPO's exhibit list. However, the Defence submits that the SPO's explanation for its failure to do so, namely that it intended to call the witness *viva voce*⁶⁹ is deficient. Even if the witness were to testify entirely *viva voce*, there remains a very real possibility of needing to rely on his interview to refresh recollection (as the SPO admits⁷⁰) or for the SPO to impeach its own witness. Given that the witness was interviewed on both occasions as a suspect, it is inconceivable that the SPO would not have been alive to the prospect of W04765 becoming uncooperative. Plainly, W04765's second interview should have been included in the SPO's list of potential exhibits, and no justification has been provided for this failure. Therefore, while the Defence does not oppose the addition of W04765's second interview to the SPO's exhibit list, it requests an acknowledgement by the Trial Panel that the SPO has not demonstrated good cause or, for that matter, provided timely notice in support of its request.
40. The Defence does not oppose the admission of W04765's interviews via Rule 154. However, it submits that its reliability and probative value of this evidence is affected by the SPO frequently prompting the witness into giving speculative answers, while at the same time, failing to inquire into the basis or extent, of his professed knowledge or, in other places, the lack thereof.⁷¹ This will require particularly careful unpicking on cross-examination.

⁶⁸ 083721-TR-ET Part 1,

⁶⁹ SPO Motion, para. 51.

⁷⁰ SPO Motion, para. 51.

⁷¹ See for example, 083721-TR-ET Part 2, p. 1; 083721-TR-ET Part 3, p. 16; 083721-TR-ET Part 3, pp. 15-16.

41. For instance, when asked about a photograph of a building that he initially does not recognise at all (“From what I see, I don’t recollect anything”) he is happy to suggest upon further prompting from the SPO that it is probably an unfinished building in [REDACTED].⁷² In contrast, when asked about a photograph of a room, from [REDACTED] in Prizren in June 1999, the witness is adamant that he has never seen the room before and does not recognise the man depicted in the picture at all, despite other evidence of his presence at that location.⁷³
42. Due to the manner in which questions were put to him, the manner in which he responded, and the failure to ask obvious and important follow-up questions, the Defence will need to cross-examine the witness more extensively on his Rule 154 statements than might otherwise be the case.⁷⁴

ii. Associated Exhibits

43. Some the proposed exhibits associated with the witness were discussed only briefly, with the witness apparently not having an opportunity to inspect the items thoroughly and are therefore not adequately authenticated or contextualised. Within this category are item 1, which contains a record of a TV [REDACTED] interview⁷⁵ and item 2, which is a version of KLA disciplinary regulations.⁷⁶ Their probative value is thus minimal and the Defence opposes their admission.

⁷² 108643-TR-ET Part 4, pp. 2-4.

⁷³ 108643-TR-ET Part 3, pp. 3.

⁷⁴ See, F01849/A05, Annex 5 to Joint Defence Response to ‘Prosecution submission of list of witnesses for 30 October to 13 December 2023’ (F01828), 10 October 2023, confidential, p. 1 where the Defence forecasted a total of 16 hours for cross-examination.

⁷⁵ SPO Motion Annex 5, p. 3, item 1 (073358-073365 RED/073358-073365-ET).

⁷⁶ SPO Motion Annex 5, p. 3, item 2 (U009-1596-U009-1662, pp. U009- 1596 to U009- 1614/U009-1596-U009-1662-ET, pp. U009- 1596 to U009- 1614).

44. The SPO's request to admit the entirety of W04765's book, [REDACTED] as item 8 should be denied.⁷⁷ In his SPO interview, the witness comments only on pages 10 to 12. To admit the entirety of the book would clutter the record with evidence of questionable probative value. The Parties have been repeatedly cautioned against tendering of books and other lengthy items in their entirety, and the failure to specify with particularity the purposes for which such items, or passages thereof, are being tendered.
45. Similarly, the Defence objects to the SPO's request to admit 21 pages worth of Facebook posts by the witness as item 9⁷⁸ which are not discussed in any detail in his SPO witness interview and are largely repetitive of other evidence from the witness.
46. With respect to item 17⁷⁹ the Defence observes that the witness states that he does not recognize the building depicted; that he surmises it is "probably" the [REDACTED]⁸⁰ is pure speculation, of the type to which this witness is particularly prone. The Defence submits that it cannot be considered an indispensable part of his Rule 154 evidence and admission should be rejected.

F. W04811

47. W04811 will provide evidence on the abduction of her [REDACTED], his detention in [REDACTED], her visits during that period, and his subsequent death.

⁷⁷ SPO Motion Annex 5, pp. 6-7, item 8 (SPOE00209321-SPOE00209428/SPOE00209321-SPOE00209438-ET Revised 1).

⁷⁸ SPO Motion Annex 5, p. 7, item 9 (SPOE00328676-00328733, pp. SPOE00328676-SPOE00328696/108011-108040-ET, pp.108011-108022).

⁷⁹ SPO Motion Annex 5, p. pp. 11-12, item 17 (SITF00032697-SITF000302697).

⁸⁰ 108643-TR-ET Part 4, pp. 2-3.

i. Rule 154 Statements

48. The SPO seeks to admit the witness' one-part SPO Interview⁸¹ as well as her previous testimonies in [REDACTED]⁸². The witness' SPO Interview does not directly relate to the allegations the witness is expected to testify on. Almost all 43 pages of this interview exclusively relate to the emotional and psychological state of the witness and her family following the death of her [REDACTED]. These issues tangentially relate to the allegations in question and are of minimal probative value. Additionally, the interview merely serves the purpose of confirming that the witness' evidence in [REDACTED] was given voluntarily and that it accurately reflects the witness' recollection. It follows that the admission of W04811's testimonies in [REDACTED] that directly relate to the events in question would be more sensible.

ii. Associated Exhibits

49. The Defence does not object to the admission of a document on the release of [REDACTED] which was provided to the Investigating Judge in [REDACTED] by W04811.⁸³ Nor does the Defence object to the Record of a photo board identification procedure dated [REDACTED],⁸⁴ in which W04811 identifies one of the alleged KLA members responsible for kidnapping [REDACTED]. It is noted, however, that while the witness was shown these documents during her SPO Interview, the discussion in relation to them was connected to the evidence the witness gave during the [REDACTED] rather than prompted by what the

⁸¹ See, F01830/A06, *Annex 6 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7*, 3 October 2023, ("SPO Motion Annex 6"), confidential, p. 1 (092712-TR-ET Part 1 RED/092712-TR-AT Part 1 RED).

⁸² SPO Motion Annex 6, p. 2 (SPOE00122527-SPOE00122542 RED/SPOE00119524- SPOE00119533 RED).

⁸³ SPO Motion Annex 6, p. 4, item 1 (SPOE00122543- SPOE00122543-RED).

⁸⁴ SPO Motion Annex 6, p. 4, item 2 (SITF00240114-SITF00240120/ SITF00240114-SITF00240114-ET, SITF00240120-SITF00240120-ET).

witness said during the SPO Interview. As such, their admission as associated exhibits are not objected to if it relates to the witness' [REDACTED] testimony.⁸⁵

G. W04870

i. Rule 154 Statements

50. W04870 is a [REDACTED] in the Llap Operational Zone, and is expected to testify about the alleged murder of her [REDACTED]. The Defence does not contest the *prima facie* authenticity and reliability of the proposed Rule 154 statements, being SPO Transcripts of her witness interview and records from [REDACTED].⁸⁶

51. The Defence objects, however, to the admission of W04870's evidence concerning Mr Thaçi's alleged position in the KLA hierarchy,⁸⁷ for several reasons. In addition to being hearsay, W04870 gives no basis for her knowledge, stating when questioned about Mr Thaçi's role and nickname (which she did not know), that "I really don't remember right now. But, you know, I know he was the one, and I know he was president after that. And, you know. But, no - - I mean, I don't want to say something I don't know."⁸⁸ W04870's evidence on Mr Thaçi's alleged role was also prompted by leading questions from the SPO, who introduces itself the concept that "everyone knew", about Mr Thaçi's position, for example as shown in this exchange:

[REDACTED].⁸⁹

⁸⁵ See, SITF00240114- SITF00240120 RED.

⁸⁶ F01830/A07, Annex 7 to Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7, 3 October 2023, ("SPO Motion Annex 7"), confidential, p. 2, items 1 (SITF00240173-00240192 RED2/ SITF00240184-SITF00240192-ET RED) and 2 (103775-103785/ 103775-103785-ET).

⁸⁷ See, 103774-TR-ET Part 3 RED, p. 40, line 22 – p. 44, line 17.

⁸⁸ See, 103774-TR-ET Part 3 RED, p. 44, lines 14-17.

⁸⁹ See, 103774-TR-ET Part 3 RED, p. 41, lines 14-25.

52. The form of these questions renders W04870's already-hearsay evidence of such little probative value, that it is outweighed by prejudice, which should preclude its admission. Particularly given that this was the first time that W04870 had brought up Mr Thaçi, in response to direct questions from the SPO. The Defence therefore objects to the admission of the exchanges between the SPO and W04870 concerning Mr Thaçi and his role.⁹⁰

ii. Associated Exhibits

53. The SPO also seeks admission of what it calls "[REDACTED]."⁹¹ While some of the content appears to have been written in a [REDACTED]. While the SPO indeed asks W04870 to number the [REDACTED] and put them in sequence, this is only done during the [REDACTED] interview, with no information about why the sequence chosen in [REDACTED] was reflective of the alleged events.⁹² For the [REDACTED] that remained in the "[REDACTED]" itself, the dates of the events do not conform to the dates on the [REDACTED]. The first [REDACTED], for example, is on the [REDACTED] "[REDACTED]", [REDACTED] "[REDACTED]."⁹³ While obviously not fatal to admission, W04870 herself expresses additional confusion about when [REDACTED] these "[REDACTED]", as shown by the following exchange:

[REDACTED].⁹⁴

54. The lack of indicia in the newly-sequenced pages as to dates, reliability, and provenance, make this material unsuitable for admission through Rule 154. Admission would properly depend on the testimony of W04870 and her sworn testimony about the provenance, dates and circumstances of the creation of the

⁹⁰ See, 103774-TR-ET Part 3 RED, p. 40, line 22 – p. 44, line 17.

⁹¹ SPO Motion Annex 7, p. 2, item 2 (103775-103785/103775-103785-ET).

⁹² See, 103774-TR-ET Part 2 RED, p. 20 lines 11-12: "[REDACTED]." See also, 103774-TR-ET Part 3 RED, p. 14.

⁹³ 103775-103785, p. 103775.

⁹⁴ 103774-TR-ET Part 3 RED, p. 11 line 25 – p. 12 line 25.

diary entries and pages in question. Absent this testimony, the Defence objects to the admission of this bundle.⁹⁵

III. CLASSIFICATION

55. These submissions are filed confidentially pursuant to Rule 82(4) as they respond to confidential submissions filed by the SPO. The Defence will submit a public redacted version of the present submissions in due course.

IV. CONCLUSION

56. In light of the above, the Defence respectfully requests that the Trial Panel:

a. **TAKE NOTE** of the Defence objections;

b. **DENY** the admission of:

- W03170's proposed Rule 154 statement and the associated exhibits objected to in paragraphs 16-20.
- W04444's proposed Rule 154 statement and the associated exhibits objected to in paragraphs 27-30.
- W04571's proposed Rule 154 statement and the associated exhibits objected to in paragraphs 34-35.
- W04765's associated exhibits objected to in paragraphs 43-46.
- W04870's Rule 154 statement as it pertains to exchanges between the witness and the SPO concerning Mr Thaçi and his role in the KLA, and the associated exhibits objected to in paragraph 49 (subject to the caveat stated therein).

⁹⁵ SPO Motion Annex 7, p. 2, item 2 (103775-103785/103775-103785-ET).

c. **ORDER** the SPO to:

- Lead W03170, W04043, W04444 and W04571 *viva voce*.
- Refile a new version of the 064890-064893 (associated exhibit of W04444) should it consider the item admissible as an associated exhibit of the witness.

d. **FIND** the SPO has not provided timely notice, nor shown good cause for the addition of 108643-TR-ET Parts 1-7 (W04765's second SPO interview) to the exhibit list.

Word Count: 7,608

Respectfully submitted on 13 October 2023, in the Hague

/signed/

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