



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06

**The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli,
Rexhep Selimi, and Jakup Krasniqi**

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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**Public Redacted Version of
Decision on Prosecution Motion for the Admission of the Evidence of Witnesses
W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837
pursuant to Rule 153**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 37 and 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 137, 138, 141(1) and 153 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 8 May 2024, the Specialist Prosecutor’s Office (“SPO”) filed a motion for the admission of evidence of witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 (“Witnesses”) pursuant to Rule 153 (“Motion”).¹

2. On 21 May 2024, the Defence teams for the four Accused (“Thaçi Defence”, “Veseli Defence”, “Selimi Defence”, “Krasniqi Defence”; collectively, “Defence”) filed a joint response to the Motion (“Joint Response”).²

3. On 27 May 2024, the SPO filed a reply to the Joint Response (“Reply”).³

II. SUBMISSIONS

4. The SPO submits that the statements, together with the associated exhibits, of the Witnesses (“Rule 153 Statements” and “Associated Exhibits”, respectively) meet the requirements of Rules 138 and 153, as they are relevant, authentic, reliable and have probative value, which is not outweighed by any prejudice.⁴ The

¹ F02299, Specialist Prosecutor, *Prosecution Motion for the Admission of the Evidence of Witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 pursuant to Rule 153*, 8 May 2024, confidential, with Annexes 1-8, confidential (a public redacted version was filed on the same day, F02299/RED).

² F02321, Specialist Counsel, *Joint Defence Response to Prosecution Motion for the Admission of the Evidence of Witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 pursuant to Rule 153*, 21 May 2024, confidential.

³ F02342, Specialist Prosecutor, *Prosecution Reply Relating to Rule 153 Motion F02299*, 27 May 2024, confidential (a public redacted version was filed on the same day, F02342/RED).

⁴ Motion, para. 3. *See also* Motion, paras 4-9.

SPO therefore requests that the Panel admit the Rule 153 Statements and Associated Exhibits (“Proposed Evidence”) into evidence pursuant to Rule 153.⁵

5. The Defence does not object to the admission, pursuant to Rule 153, of the Proposed Evidence of W04782 and W04694.⁶ The Defence objects to the admission of W04491, W04820, and W04837’s Proposed Evidence through Rule 153 and requests to cross-examine them.⁷ The Defence further requests that the Panel dismiss the SPO motion to tender W00686, W02765, and W04788’s Proposed Evidence through Rule 153 in light of its low relevance, limited probative value, and credibility issues.⁸

6. The SPO replies that under the Rules and accompanying jurisprudence there is no “right” to cross-examination, and no party can simply “elect” to cross-examine any witness it chooses.⁹ The SPO submits that when the Defence does not seek to cross-examine a witness, admitting the evidence pursuant to Rule 153 is clearly in the interests of justice.¹⁰ The SPO also submits that it is immaterial to the merits of the Motion that the SPO previously envisaged certain witnesses as falling under Rule 154.¹¹ The SPO reiterates that the Motion should be granted in its entirety.¹²

III. APPLICABLE LAW

7. The Panel incorporates by reference the applicable law as set out in its previous decisions.¹³

⁵ Motion, paras 1 and 44.

⁶ Joint Response, para. 2.

⁷ Joint Response, para. 4.

⁸ Joint Response, para. 3.

⁹ Reply, para. 2.

¹⁰ Reply, para. 2.

¹¹ Reply, para. 4.

¹² Reply, para. 17.

¹³ F01904, Panel, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153* (“First Rule 153 Decision”), 3 November 2023, confidential, paras 8-10, 12-13 (a public redacted version was

IV. DISCUSSION

A. W00686

8. The SPO submits that W00686's Proposed Evidence¹⁴ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹⁵

9. The Defence requests that the Panel dismiss the SPO motion to tender W00686's Proposed Evidence through Rule 153.¹⁶ The Defence argues that W00686's evidence is entirely hearsay, lacking relevance and probative value, and adds nothing to the issues which the Panel is obliged to consider.¹⁷

10. The SPO replies that W00686's Proposed Evidence does not relate to persons central to the charges, but does relate to a charged crime site. The SPO further submits that the hearsay nature of W00686's evidence is a matter going to the weight and probative value to be assigned to the evidence in light of all evidence adduced during trial.¹⁸

11. Regarding relevance, the Panel notes that W00686's close relatives were allegedly taken into the custody of the Kosovo Liberation Army ("KLA") in early Summer of 1998, and the SPO intends to rely on W00686's Rule 153 Statements in relation to, *inter alia*: (a) the KLA presence in the area of their alleged abduction,

filed on 27 November 2023, F01904/RED). *See also, in relation to the admissibility of prior statements and documentary evidence*: F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("First Rule 154 Decision"), 16 March 2023, confidential, paras 11-25 (a public redacted version was filed on 7 November 2023, F01380/RED); F01409, Panel, *Decision on Specialist Prosecutor's Bar Table Motion* ("First Bar Table Decision"), 31 March 2023, confidential, paras 8-13.

¹⁴ W00686's Proposed Evidence consists of the following items, including any translations thereof: (i) 077584b Part 1 RED, and (ii) 077584-TR-ET Part 1 RED2 ("W00686's Rule 153 Statement"). *See* Annex 1 to the Motion.

¹⁵ Motion, paras 10-12.

¹⁶ Joint Response, para. 3.

¹⁷ Joint Response, para. 5.

¹⁸ Reply, para. 5.

(b) the disappearance of W00686's two relatives, and (c) W00686 being told that those relatives had been taken into the KLA's custody.¹⁹

12. The Panel is of the view that W00686's Rule 153 Statement provides crime-base evidence regarding the disappearance of W00686's relatives. In this regard, the Panel also notes that at least one witness reported seeing W00686's relatives in an alleged KLA detention site connected to the charges in the Indictment.²⁰ Having reviewed the content of W00686's Rule 153 Statement, the Panel is satisfied that it is *prima facie* relevant to the charges in the Indictment.²¹

13. As regards authenticity, the Panel notes that W00686's Rule 153 Statement consists of the audio-video recorded witness's testimony conducted by the SPO and verbatim transcript, and that the witness made a solemn declaration before being asked questions.²² The Panel further notes that the Defence does not challenge the authenticity of W00686's Rule 153 Statements. The Panel is therefore satisfied that W00686's Rule 153 Statements are *prima facie* authentic.

14. Regarding the probative value of W00686's Rule 153 Statement and its suitability for admission pursuant to Rule 153, the SPO submits that W00686's Rule 153 Statement: (i) provides crime-base evidence which is particularly suitable for admission *in lieu* of oral testimony, (ii) is largely cumulative with other witness and documentary evidence concerning the KLA presence and activities in the

¹⁹ Motion, para. 10; *see also* F01594/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief* ("Amended List of Witnesses"), 9 June 2023, confidential, p. 46.

²⁰ Amended List of Witnesses, p. 169 [REDACTED].

²¹ F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment* ("Indictment"), 30 September 2022, confidential, paras 16-31, 59-62, 96-99, 103, 136-139, 153-154; F01594/A03, Specialist Prosecutor, *Annex 3 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of the Pre-Trial Brief* ("SPO Pre-Trial Brief"), KSC-BC-2020-06/F01594/A03, 9 June 2023, confidential, paras 273-280.

²² Motion, para. 11. *See also* Annex 1 to the Motion.

Likoc/Likovac area,²³ and (iii) is corroborated by witnesses whom the Accused were able to cross-examine, and (iv) complements relevant adjudicated facts.²⁴

15. The Defence argues that W00686's evidence is entirely hearsay, lacks probative value and its inclusion unnecessarily burdens the sizeable case file.²⁵ First, the Panel recalls its previous finding that the hearsay nature of proposed evidence is no impediment to its admission pursuant to Rule 153.²⁶ The Panel also recalls that the ultimate reliability of the evidence will be a factor in the Panel's determination of the weight to attach to that evidence, which is assessed in light of all the evidence at the end of the trial.²⁷ Second, the Panel observes that the Proposed Evidence is probative in so far as another witness allegedly saw W00686's relatives in a detention site.²⁸ Third, the Panel finds that W00686 offers crime-base evidence that is not central to the SPO case, and which goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment. Furthermore, W00686's Rule 153 Statements are largely cumulative of other evidence of witnesses whom the Accused were able to cross-examine about events at the relevant location.²⁹ Lastly, the Panel notes that the Proposed Evidence, which amounts to a 33-page English transcript, is limited in length and not unduly repetitive.³⁰ Therefore, the Panel is satisfied that W00686's Proposed Evidence meets the requirements under Rule 153(1) and (2).

²³ Motion, para. 12, fn. 14.

²⁴ Motion, para. 12, fns. 15-16; F01534/A01, Panel, *Annex 1 to Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* ("Adjudicated Facts"), 17 May 2023, confidential, facts 244-245.

²⁵ Joint Response, paras 5, 7.

²⁶ F02111, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153* ("Second Rule 153 Decision"), 8 February 2024, confidential, para. 22 (a public redacted version was filed on 8 February 2024, F02111/RED).

²⁷ First Rule 153 Decision, para. 56.

²⁸ See Amended List of Witnesses, p. 169 [REDACTED].

²⁹ See in particular [REDACTED]. See also Motion, para. 12.

³⁰ 077584-TR-ET Part 1 RED2. See Annex 1 to the Motion.

16. For these reasons, the Panel finds that W00686's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

B. W02765

17. The SPO submits that W02765's Proposed Evidence³¹ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.³²

18. The Defence requests that the Panel dismiss the SPO motion to tender W02765's Proposed Evidence through Rule 153.³³ The Defence argues that W02765's evidence should not be admitted due to significant credibility and reliability issues arising from inconsistencies between the various statements, and from information that contradicts an adjudicated fact.³⁴ The Defence further argues that W02765's evidence is not relevant to named victims in the Indictment.³⁵

19. The SPO replies that the alleged inconsistencies should be considered as matters going to the weight of the evidence and not its Rule 153 admissibility.³⁶

20. As regards relevance, the Panel notes that the SPO intends to rely on W02765's Rule 153 Statements in relation to, *inter alia*: (a) the situation and ethnic composition of one particular location relevant to the charges in the first half of 1998, and the presence of KLA members at that location; (b) W02765's arrest by

³¹ W02765's Proposed Evidence consists of the following items, including any translations thereof: (i) 078044b Part 1 RED, 078044b Part 2, 078044b Part 3, RED, 078044b Part 4, (ii) 078044-TR-ET Part 1 RED, 078044-TR-ET Part 2 RED, 078044-TR-ET Part 3 RED, 078044-TR-ET Part 4 RED, (iii) SITF00370803-SITF00370808 RED, and (iv) SPOE00113242-SPOE00113245 RED ("W02765's Rule 153 Statements"), and (i) 0187-9878-0187-9879-ET, and (ii) SPOE00111628-SPOE00111629 ("W02765's Associated Exhibits"). See Annex 2 to the Motion.

³² Motion, paras 13-16.

³³ Joint Response, para. 3.

³⁴ Joint Response, paras 8-13.

³⁵ Joint Response, para. 8.

³⁶ Reply, para. 6.

the KLA, alongside relatives and their detention in Likoc/Likovac, and (c) intimidation, interrogation and mistreatment in Likoc/Likovac.³⁷

21. The Panel acknowledges the Defence's submission that W02765's evidence is not relevant to named victims in the Indictment.³⁸ However, this does not dispose of the question of admissibility of the proposed evidence. The SPO alleges that W02765 was arbitrarily arrested, detained, and mistreated, and the Panel recalls that Schedule A to the Indictment, which relates to arbitrary detention and cruel treatment, provides only the approximate minimum number of known victims, not their names.³⁹ Furthermore, the Panel notes that W02765 is specifically mentioned in the SPO Pre-Trial Brief as a person allegedly detained by KLA members.⁴⁰ Having reviewed the content of W02765's Rule 153 Statements, the Panel is satisfied that the evidence they contain is relevant to the charges in the Indictment.⁴¹

22. As regards authenticity, the Panel notes that W02765's Rule 153 Statements consist of: (i) the audio-video recorded and verbatim transcript of W02765's SPO interview during which the witness was duly advised of the rights and obligations as a witness and W02765 confirmed that the content of the statement is true and accurate,⁴² (ii) the statement given to a national authority, which includes the date, time, place, and attendees and W02765 also confirmed that it was truthful and accurate,⁴³ and (iii) the report of an international entity includes the date and time, and W02765 was given the opportunity to make any changes or supply additional information if needed.⁴⁴ The Panel also notes that the report is signed by the person

³⁷ Motion, para. 13; *see also* Amended List of Witnesses, p. 169 (W02765).

³⁸ Joint Response, para. 8.

³⁹ *See* Indictment, paras 61, 96.

⁴⁰ SPO Pre-Trial Brief, para. 273.

⁴¹ *See* Indictment paras 16-31, 59-62; *see also* SPO Pre-Trial Brief, paras 273-280.

⁴² 078044-TR-ET Part 1 RED, pp. 2-3; 078044-TR-ET Part 4 RED, p. 7. *See also* Motion, para. 14.

⁴³ SITF00370803- SITF00370808 RED, pp. SITF00370803-SITF00370805. *See also* Motion, para. 14.

⁴⁴ SPOE00113242-SPOE00113245 RED, pp. SPOE00113242, SPOE00113245. *See also* Motion, para. 14.

who records and conducts the questioning.⁴⁵ The Defence does not challenge the authenticity of W02765's Rule 153 Statements. Therefore, the Panel is satisfied that W02765's Rule 153 Statements are *prima facie* authentic.

23. Turning to W02765's Associated Exhibits, the Panel notes that they consist of: (i) Official Note of interview drawn up by a national authority with W02765,⁴⁶ and (ii) an Officer's Report drawn up by a representative of an international entity regarding a photo line-up during the course of an interview with that entity.⁴⁷ The Panel is satisfied that W02765's Associated Exhibits form an indispensable and inseparable part of W02765's Rule 153 Statements. The Panel is satisfied that they: (i) are relevant and will provide relevant context to the written record in which they are discussed, and (ii) bear sufficient indicia of *prima facie* authenticity.

24. Regarding the probative value of W02765's Rule 153 Proposed Evidence and suitability for admission pursuant to Rule 153, the Panel notes the Defence's submission that the evidence should not be admitted due to significant credibility and reliability issues caused by: (i) conflicting information in W02765's different statements, especially regarding the place of W02765's detention, (ii) the introduction of new information in the later statement, including the organisation or hierarchical structure of the facility and purported personal links to Hashim Thaçi ("Mr Thaçi"), and (iii) W02765's evidence contradicting adjudicated facts of which the Panel has taken judicial notice.⁴⁸

25. First, the Panel has considered the facts and circumstances to which these alleged discrepancies pertain. The Panel has also assessed the importance and/or material relevance of conflicting information to the case. To the extent that such discrepancies have been shown to exist, the Panel further considered whether the

⁴⁵ SPOE00113242-SPOE00113245 RED, p. SPOE00113245.

⁴⁶ 0187-9878-0187-9879-ET. See Annex 2 to the Motion, p. 4.

⁴⁷ SPOE00111628-SPOE00111629. See Annex 2 to the Motion, pp. 4-5.

⁴⁸ Joint Response, paras 8-14.

discrepancies could be effectively addressed in its assessment of the witness's evidence without further questioning.

26. The Panel notes the potential discrepancies in W02765's account regarding the place of detention. In W02765's first statement, Likoc/Likovac is not mentioned as a place of the detention. Instead, W02765 says that they arrived at a place which W02765 "doesn't know".⁴⁹ However, in all of W02765's later statements, the witness referred to Likoc/Likovac as the place of detention.⁵⁰ The Panel is of the view that this can be addressed effectively in the Panel's assessment of W02765's evidence, without the need for further questioning in respect of the place of W02765's detention.

27. The Panel also disagrees with the Defence's argument that the fact that new information appears in W02765's SPO statement, not present in the earlier statements, calls into question W02765's credibility and renders all of W02765's Proposed Evidence not suitable for admission under Rule 153. The Panel finds the Defence's submissions on W02765's credibility to be speculative. The Panel will not rule at this stage on whether the witness's addition of such information is indicative of the witness's low credibility. In any event, the Panel may account for this apparent discrepancy when assigning weight to W02765's evidence at the end of the case.

28. Second, the Panel takes note of the Defence's argument that information provided by W02765, which goes against an adjudicated fact of which the Panel has taken judicial notice, raises serious credibility issues.⁵¹ The Panel agrees that one interpretation is that a part of W02765's testimony in which the witness says that a named individual was "in command of the entire Drenica area" appears to

⁴⁹ 0187-9878-0187-9879-ET.

⁵⁰ SPOE00113242-SPOE00113245 RED, p. SPOE00113243; SITF00370803-SITF00370808 RED, p. SITF00370804; 078044-TR-ET Part 2, p. 15.

⁵¹ Joint Response, para. 12.

contradict the adjudicated fact.⁵² However, the Panel has found only that by taking judicial notice of an adjudicated fact, this gives rise to a “well-founded presumption” of its accuracy, but it does not have independent evidentiary value. This is particularly true for facts that are in dispute between the Parties.⁵³ Adjudicated facts will thus be assessed at the end of the case in light of any corroborating and/or contradictory evidence. Therefore, the Panel finds that the fact that part of a witness’s testimony appears to contradict part of an adjudicated fact of which the Panel has taken judicial notice does not render the Proposed Evidence unreliable.

29. The Panel acknowledges that, generally speaking, a part of W02765’s prior recorded testimony may lack reliability insofar as it includes contradictions, inconsistencies, or information contradicting an adjudicated fact of which the Panel has taken judicial notice. However, definitive proof of reliability is not required at the admissibility stage.⁵⁴ The Panel also recalls that the assessment of evidence for the purposes of the judgment will be guided by Rule 139 which specifically states that: (i) the Panel shall assess each piece of evidence in light of the entire body of evidence admitted before it at trial, and (ii) the Panel shall carry out a holistic evaluation and weighing of all the evidence taken as a whole to establish whether or not the facts at issue have been established, and inconsistencies in a piece of evidence do not *per se* require a Panel to reject it as unreliable. Based on the above, the Panel finds that the apparent discrepancies, additions, and part of a testimony that appears to contradict an element of an adjudicated fact are not *per se* an impediment to its admission pursuant to Rule 153.

⁵² 078044-TR-ET Part 3 RED, p. 31; *cf* Adjudicated Fact 242. *See also* Joint Response, para. 12.

⁵³ F01534, Panel, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, 17 May 2023, paras 13, 26.

⁵⁴ First Rule 153 Decision, para. 56.

30. Finally, the Panel finds that, as submitted by the SPO, W02765's Rule 153 Statements: (i) are largely cumulative of other witness and documentary evidence concerning the KLA's presence and activities in the Likoc/Likovac area, (ii) are corroborated by witnesses whom the Accused were able to cross-examine, and (iii) complement relevant adjudicated facts.⁵⁵ The Panel also notes that W02765's Proposed Evidence is not unduly repetitive and provides crime-base evidence which goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment. The Panel is therefore satisfied that W02765's Proposed Evidence meets the requirements under Rule 153(2).

31. The Panel also notes that the Defence requests redactions to excerpts of W02765's evidence related to Mr Thaçi because they fall outside the temporal scope of the Indictment.⁵⁶ The SPO replies that references to Mr Thaçi are general in character and immaterial but may be relevant to a full assessment of the witness's evidence and credibility.⁵⁷ The Panel notes that the challenged part of W02765's statement covers events in the 1980s. W02765 in the Statement says that "[a]nd I just want to say that Hashim THAÇI, he is the worst villain of them all".⁵⁸ The Panel finds that this aspect of the proposed evidence is general in character and not directly relevant to establishing facts material to the charges.⁵⁹ However, that evidence could be relevant to the Panel's assessment of the credibility of W02675 and the suggested redactions are not justified.

⁵⁵ See Motion, para. 15, referring to [REDACTED], and Adjudicated Facts 244-245.

⁵⁶ Joint Response, para. 14.

⁵⁷ Reply, para. 7.

⁵⁸ 078044-TR-ET Part 3, pp. 30-31.

⁵⁹ Cf. F02393, Panel, *Decision on Selimi Defence Motion to Exclude Evidence of W04846*, 19 June 2024, confidential, para. 17 with further references (a public redacted version was filed on the same day, F02393/RED), in which the Panel found that information in a statement that does not relate to the charges or falls outside the temporal scope of the Indictment does not necessarily render such evidence inadmissible insofar as it constitutes relevant evidence of a fact occurring during the Indictment period which is relevant to the case.

32. For these reasons, the Panel finds that W02765's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

C. W04491

33. On 10 October 2023, the Panel partly granted the SPO's motion for admission of evidence of W04491 pursuant to Rule 154.⁶⁰ The SPO presently submits a motion for admission of the evidence of W04491 pursuant to Rule 153 as the witness is not willing to testify.⁶¹ The SPO further submits that the unwillingness of W04491 to testify appears to be based to a significant degree on fears that if he testified, the Accused or members of their networks would find him, reveal his identity, and he and his family members would be at risk.⁶²

34. The SPO submits that W04491's Proposed Evidence⁶³ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.⁶⁴

35. The Defence objects to the admission of W04491's Proposed Evidence pursuant to Rule 153.⁶⁵ The Defence argues that admission of W04491's evidence pursuant to Rule 153 would remove that important counter-balance and tip the

⁶⁰ F01848, Panel, *Decision on Prosecution Motion for Admission of Evidence of W00208, W02082, W02475, W04147, W04325, W04491 and W04753 Pursuant to Rule 154* ("Fifth Rule 154 Decision"), 10 October 2023, confidential, paras 79-88, 104 (a public redacted version was filed on the same day, F01848/RED). See also F01788, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154*, 14 September 2023, confidential, with Annexes 1-7, confidential (a public redacted version was filed on the same day, F01788/RED).

⁶¹ Motion, paras 17-21.

⁶² Motion, para. 20.

⁶³ W04491's Proposed Evidence consists of the following items, including any translations thereof: (i) 071102b Part 1 RED and 071102b Part 2 (ii) 071102-TR-ET Part 1 Revised RED; 071102-TR-ET Part 2 Revised RED, (iii) 118305-118310A, and (iv) 118311-118321 ("W04491's Rule 153 Statements") and (i) 081908-081908, (ii) 081912-081912 RED2, (iii) 081911-081911 RED2, and (iv) 061427-31 ("W04491's Associated Exhibits"). See Annex 3 to the Motion. The Panel notes that the SPO does not tender Associated Exhibits 3, 5 and 7-10 for admission (see Annex 3 to the Motion, pp. 5-8).

⁶⁴ Motion, paras 17-21.

⁶⁵ Joint Response, para. 15.

scales into unfair prejudice, caused by W04491's unavailability to be cross-examined to clarify contradictions in the statements.⁶⁶

36. The Panel has already found, in relation to the Rule 154 motion, that W04491's SPO interview is *prima facie* relevant, authentic and has a probative value.⁶⁷ Thus, the Panel will now assess the relevance and authenticity of W04491's Preparatory Notes.

37. Regarding relevance, the Panel notes that W04491's Preparatory Notes are *prima facie* relevant as they provide clarifications, changes and corrections to W04491's SPO statement.⁶⁸

38. As regards authenticity, the Panel notes that W04491's Preparatory Notes are signed by the person who prepared them. The Preparatory Notes also appear to be signed by W04491 on the last page. The Panel further notes that the Defence does not challenge the authenticity of W04491's Preparatory Notes. The Panel finds that W04491's Preparatory Notes are *prima facie* authentic.

39. Turning to W04491's Associated Exhibits, the Panel has already found, in relation to the Rule 154 motion, that the handwritten report from a criminal file containing W04491's account,⁶⁹ and the handwritten letter, which W04491 wrote to an international entity in respect of facts relevant to this case,⁷⁰ are *prima facie* relevant, authentic and probative.⁷¹

40. The Panel also found, in relation to the Rule 154 motion, that the photograph provided by W04491 during the interview with the SPO purportedly showing an

⁶⁶ Joint Response, para. 15.

⁶⁷ Fifth Rule 154 Decision, paras 81-82.

⁶⁸ 118305-118310A, and 118311-118321.

⁶⁹ 081912-081912 RED2 (typewritten English translation) and 081910-081910 RED2 (handwritten original in Albanian).

⁷⁰ 081911-081911 RED2 (typewritten English translation) and 081909-081909 RED2 (handwritten Albanian original).

⁷¹ Fifth Rule 154 Decision, paras 86-88.

individual identified by the witness (“Photograph”)⁷² was not appropriate for admission at that point.⁷³ In particular, the Panel stressed that the Photograph does not contain any markings or signature of W04491 nor does W04491’s SPO statement appear to contain any references to the Photograph. The Panel observes that since the issuance of the Panel’s Rule 154 decision in respect of W04491, the witness confirmed, during the witness preparation session, that the Photograph was provided to the SPO during the initial interview.⁷⁴ The Panel also notes that the Defence does not challenge the relevance or authenticity of the Photograph.⁷⁵ The Panel finds that the Photograph is *prima facie* relevant and authentic.

41. Finally, among W04491’s Associated Exhibits not already ruled upon in the Panel’s Rule 154 decision is a video.⁷⁶ The Panel notes that the content of the video was discussed during the witness preparation session.⁷⁷ The Panel also notes that the Defence does not challenge the video’s relevance or authenticity.⁷⁸ The Panel is satisfied that Associated Exhibits not already ruled upon form an indispensable and inseparable part of W04491’s Rule 153 Statements. The Panel is also satisfied that they: (i) are relevant and will provide relevant context to the written record in which they are discussed, and (ii) bear sufficient indicia of *prima facie* authenticity.

42. Regarding the probative value versus prejudicial effect of W04491’s Proposed Evidence and suitability for admission pursuant to Rule 153, the SPO submits that W04491’s evidence: (i) is complementary to other witness and documentary

⁷² 081908-081908.

⁷³ Fifth Rule 154 Decision, para. 85.

⁷⁴ 118311-118321, para. 17; 118305-118310A, para. 17.

⁷⁵ Joint Response, paras 15-26.

⁷⁶ 061427-31.

⁷⁷ 118311-118321, para. 12.

⁷⁸ Joint Response, paras 15-26.

evidence, (ii) is corroborated by witnesses whom the Accused were and will be able to cross-examine, and iii) complements relevant adjudicated facts.⁷⁹

43. The Defence responds that: (i) due to the contradictions contained in the different statements of W04491, the prejudice of admitting this evidence without cross-examination would far outweigh its probative value,⁸⁰ and (ii) the SPO avoided including an additional statement of W04491 in its Rule 153 material package in order to selectively keep evidence from the record which undermines W04491's credibility.⁸¹

44. The Panel notes that the credibility of the witness, based on contradictions and inconsistencies in the different statements of W04491, seems to constitute a central element of the Defence's objection to admission. First, the Panel has considered the facts and circumstances to which these alleged discrepancies pertain. The Panel has also assessed the importance and/or material relevance of conflicting information to the case. To the extent that such discrepancies have been shown to exist, the Panel has further considered whether the discrepancies could be effectively addressed in its assessment of the witness's evidence without further questioning in respect of those. The Panel observes that during the SPO interview, W04491 said that together with a close relative, they were taken to a certain location where they were beaten⁸² and called spies,⁸³ and later sent to Likoc/Likovac where W04491 was interviewed by a named individual⁸⁴ and eventually released by another named individual.⁸⁵

45. However, in the statement given in 2013, W04491 did not expressly mention being beaten at the first or being called a spy. Furthermore, in that statement,

⁷⁹ Motion, para. 19, *referring to* [REDACTED], and Adjudicated Facts 217, 244-245.

⁸⁰ Joint Response, para. 26.

⁸¹ Joint Response, para. 22.

⁸² 071102-TR-ET Part 1 Revised RED, p. 22.

⁸³ 071102-TR-ET Part 2 Revised RED, pp. 11, 12.

⁸⁴ 071102-TR-ET Part 2 Revised RED, pp. 32-33.

⁸⁵ 071102-TR-ET Part 1 Revised RED, pp. 26-28.

W04491 did not mention being interviewed, at any point, while in either location.⁸⁶ To the contrary, it is noted that “during the detention [there was] no interviews with them and no beatings, they just spent time in the cell”.⁸⁷ W04491 said that the KLA fighters were masked during the arrest and detention so the witness was unable to recognise them.⁸⁸ In the same statement, W04491 noted being afraid to give more information about his detention close relatives had been killed by unknown persons.⁸⁹

46. The Panel also notes that immigration authorities held that W04491’s explanations about the reasons for his detention were vague. Also, those authorities held that it was not possible to determine the circumstances that led to his detention and circumstances of his release.⁹⁰ In brief, the identified inconsistencies across various statements mainly relate to: (a) the reasons for W04491’s arrest, (b) beatings and mistreatment in detention; (c) the recognition of KLA members during the arrest and detention; (d) the alleged involvement of a named individual in his arrest; and (e) the circumstances of release (including the alleged involvement of another named individual).

47. The Panel finds that W04491’s Rule 153 Statements, together with the Associated Exhibits, including the statement given in 2013, and the decision of immigration authorities, which are both currently not tendered for admission,⁹¹ contain what appears to be a number of material inconsistencies and contradictions.

⁸⁶ 085004-085004 RED3.

⁸⁷ 085004-085004 RED3.

⁸⁸ 085004-085004 RED3.

⁸⁹ 085004-085004 RED3.

⁹⁰ 081887-081897-ET RED3, p. 081888.

⁹¹ 085004-085004 RED3. *See* Annex 3 to the Motion, p. 6 (item 5 not tendered for admission). 081887-081897-ET RED3. *See* Annex 3 to the Motion, p. 7 (item 8 not tendered for admission).

48. The Panel recalls its previous finding that alleged inconsistencies and contradictions are not in principle an obstacle to admissibility under Rule 153.⁹² Nevertheless, here, the Panel has considered the number, importance and/or material relevance of the discrepancies. The Panel finds that, in relation to W04491's evidence, the following issues are central to the SPO's case: (a) the reasons for arrest and detention; (b) the commission of beatings and acts of mistreatment in detention; (c) the identification of KLA members during the arrest and detention; and (d) the alleged involvement/role of KLA members in the detention facility in Likoc/Likovac. Importantly, the Panel finds that the witness's alleged identification of KLA members during the arrest and detention, especially their involvement/role in the detention in Likoc/Likovac, goes beyond mere crime-base evidence and might be relevant to other inferences sought from the Panel.

49. The Panel also notes that W04491's Rule 153 Statements refer to actions of an alleged member of the Joint Criminal Enterprise ("JCE") charged in the Indictment.⁹³ W04491 provides information, *inter alia*, about (a) this individual's involvement in the interrogation of the witness in Likoc/Likovac; (b) W04491 informing that person about prior beatings that W04491 endured in a KLA detention;⁹⁴ (c) that person informing W04491 about the reasons for W04491's detention, including the allegation of W04491 being a spy,⁹⁵ and (d) that individual, together with two other named KLA members, being in charge of the KLA HQ in Likoc/Likovac.⁹⁶

50. The Panel finds that the references to the actions of an alleged member of the JCE appears to be numerous and material.⁹⁷ Moreover, the Panel observes that

⁹² First Rule 153 Decision, para. 56.

⁹³ 071102-TR-ET Part 2 Revised, p. 32. See also SPO Pre-Trial Brief, para. 273.

⁹⁴ 071102-TR-ET Part 2 Revised, pp. 31-34.

⁹⁵ 071102-TR-ET Part 2 Revised, pp. 34-35.

⁹⁶ 071102-TR-ET Part 2 Revised, pp. 31 – 32.

⁹⁷ 071102-TR-ET Part 2 Revised, pp. 31 -36; 118305-118310A, pp. 4-5, 118311-118321, pp. 4-5. See also SPO Pre-Trial Brief, p. 120.

W04491 appears to be the only witness who alleges to have seen the alleged JCE member in the detention centre in Likoc/Likovac. While another witness testified about being detained in Likoc/Likovac and recalled being asked by two soldiers to clean the prison on orders of two individuals, including the named JCE member,⁹⁸ but that witness did not claim to have seen the JCE member at the detention facility.⁹⁹ Another witness, who also already testified, mentioned the alleged role the named JCE member in the Summer of 1998,¹⁰⁰ but provided no information about the detention in Likoc/Likovac or any involvement/role that this individual would have played there. Another witness named by the SPO does not mention the alleged JCE member at all.¹⁰¹ Finally, based on information before the Panel, two witnesses who are yet to testify about the alleged JCE member will provide only limited information regarding the alleged involvement/role of the named JCE member in the detention in Likoc/Likovac.¹⁰²

51. Finally, W04752 provided information that might be partly corroborating of W04491's proposed evidence, though this witness provided less details than is proposed to be led from W04491.¹⁰³

52. For these reasons, while satisfied that the Defence was or will be able to confront evidence regarding the general role of the named JCE member,¹⁰⁴ the Panel finds that the *viva voce* evidence offered or to be offered by other witnesses regarding his alleged involvement/role in Likoc/Likovac is of a limited nature.

⁹⁸ Transcript of hearing of [REDACTED].

⁹⁹ Transcript of hearing of [REDACTED].

¹⁰⁰ Transcript of hearing of [REDACTED].

¹⁰¹ Transcript of hearing of [REDACTED].

¹⁰² Amended List of Witnesses, pp. 257-258, p. 466.

¹⁰³ See e.g. Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752 [REDACTED]; Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752, [REDACTED]. Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752, [REDACTED]; Transcript of hearing of W04752, [REDACTED]. See also P01355.4_ET, pp. 4-6, 23-25.

¹⁰⁴ [REDACTED]and W04752.

53. For the foregoing reasons, the Panel finds that the prejudicial effect of the admission of W04491's Proposed Evidence under Rule 153 outweighs its probative value at this stage. This is consistent with the Panel's finding in the Rule 154 decision in relation to W04491, which states that admission of W04491's Statements would not cause prejudice to the Defence insofar as the Defence has a meaningful opportunity to cross-examine the witness.¹⁰⁵ Accordingly, the Panel will exercise its discretion not to admit W04491's Proposed Evidence pursuant to Rule 138(1) and 153, without prejudice to the SPO's calling the witness to testify or under the provisions of Rule 154.

D. W04694

54. The SPO submits that W04694's Proposed Evidence¹⁰⁶ is relevant, authentic, reliable, suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹⁰⁷

55. The Defence does not object to the admission of W04694's Proposed Evidence pursuant to Rule 153.¹⁰⁸

56. Regarding relevance, the Panel notes that W04694 is a relative of a disappeared person, and the SPO intends to rely on W04694's Rule 153 Statement in relation to, *inter alia*: (i) the circumstances of the disappearance of W04694's relative, (ii) attempts to locate the relative, and (iii) the existence of a video capturing W04694's relative in detention being interrogated.¹⁰⁹ The video was

¹⁰⁵ Fifth Rule 154 Decision, para. 83.

¹⁰⁶ W04694's Proposed Evidence consists of the following items, including any translations thereof: (i) 076244b Part 1 RED; 076244b Part 2 RED, (ii) 076244-TR-ET Part 1 RED; 076244-TR-ET Part 2 RED ("W04694's Rule153 Statement") and (i) SITF00408102-SITF00408107-ET RED, pp. SITF00408102-SITF00408105, (ii) SITF00408102-SITF00408107-ET RED, p. SITF00408106, and (iii) 054774-TR-ET ("W04694's Associated Exhibits"). See Annex 4 to the Motion. The Panel notes that the SPO does not tender Associated Exhibit 2 for admission (see Annex 4 to the Motion, p. 4).

¹⁰⁷ Motion, paras 22-25.

¹⁰⁸ Joint Response, para. 2.

¹⁰⁹ Motion, para. 22. See also Amended List of Witnesses, p. 424.

allegedly provided to W04694 by W04837. According to W04873, four named KLA members could also be seen in the video.¹¹⁰ The Panel also notes that the Defence does not question the relevance of W04694's Proposed Evidence.¹¹¹

57. Though W04694 provides evidence about the disappearance of the relative, the Panel notes that the relative is not named in either Schedule B ("Murder or Killing") or C ("Enforced Disappearance of Persons") to the Indictment. Nevertheless, the Panel finds that W04694's Proposed Evidence is *prima facie* relevant to the SPO's case concerning arbitrary detention and cruel treatment in a facility in the Drenica Zone and could also be relevant to alleged patterns of conduct and alleged existence of a widespread or systematic attack against a civilian population. Having reviewed the content of W04694's Rule 153 Statements, the Panel is satisfied that they are relevant to charges in the Indictment.¹¹²

58. As regards authenticity, the Panel notes that W04694's Rule 153 Statement consists of the witness's SPO interview. During the SPO interview, W04694 was duly advised of the rights as a witness and confirmed that the content of the statement is true and accurate.¹¹³ The Panel further notes that the Defence does not challenge the authenticity of W04694's Rule 153 Statement. The Panel is therefore satisfied that W04694's Rule 153 Statement is *prima facie* authentic.

59. Turning to W04694's Associated Exhibits, the Panel notes that it consists of a redacted version of a file from national police authorities containing statements of W04694 and a video of four men being detained by the KLA as described above.

¹¹⁰ Amended List of Witnesses, p. 424.

¹¹¹ Joint Response, para. 2.

¹¹² See Indictment, paras 16-31, 59-62, 96-99; see also SPO Pre-Trial Brief, paras 267-282.

¹¹³ 076244-TR-ET Part 2 RED, pp. 33-34.

The file also includes a certified document regarding the disappearance of W04694's relative.¹¹⁴

60. The Panel is satisfied that W04694's Associated Exhibits form an indispensable and inseparable part of W04694's Rule 153 Statement. The Panel is further satisfied that they: (i) are relevant and will provide relevant context to the written record in which they are discussed, and (ii) bear sufficient indicia of *prima facie* authenticity.

61. Regarding the probative value of W04694's Proposed Evidence and its suitability for admission pursuant to Rule 153, the Panel concurs with the SPO's submission and finds that W04694's Proposed Evidence: (i) provides crime-base and contextual evidence, (ii) is cumulative with other witness and documentary evidence, (iii) is corroborated by witnesses whom the Accused have confronted or will be able to confront, including through cross-examination, and (iv) complements certain adjudicated facts.¹¹⁵ Furthermore, the Panel notes that W04694's Proposed Evidence does not contain evidence relating to the Accused's acts and conduct, and it is limited in length and is not unduly repetitive.

62. Accordingly, the Panel is satisfied that W04694's Proposed Evidence is: (i) probative and its admission *in lieu* of oral testimony would not be unduly prejudicial within the meaning of Rule 138(1), and (ii) suitable for admission pursuant to Rule 153(1)(a).

63. For these reasons, the Panel finds that W04694's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

¹¹⁴ Annex 4 to the Motion, pp. 3-5. The Panel notes that the SPO does not tender Associated Exhibit 2 for admission (*see* Annex 4 to the Motion, p. 4).

¹¹⁵ Motion, para. 24, *referring to* [REDACTED], and Adjudicated Facts 62-64, 217, 244-245.

E. W04782

64. The SPO submits that W04782's Proposed Evidence¹¹⁶ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹¹⁷

65. The Defence does not object to the admission of W04782's Proposed Evidence pursuant to Rule 153.¹¹⁸

66. Regarding relevance, the Panel notes that W04782 is a relative of a named disappeared person and the SPO intends to rely on W04782's Rule 153 Statements in relation to, *inter alia*: (i) the circumstances of W04782's relative's arrest, (ii) W04782's attempts to locate the relative, including visiting a KLA camp where W04782 was able to see the relative for a short while, and (iii) the relative not being released and subsequently going missing.¹¹⁹ The Panel also notes that the Defence does not question the relevance of W04782's Proposed Evidence.¹²⁰ Having reviewed the content of W04782's Rule 153 Statements, the Panel is satisfied that its content is relevant to charges in the Indictment.¹²¹

67. As regards authenticity, the Panel notes that W04782's Rule 153 Statements comprise the witness's Police Report and W04782's Statement in front of another jurisdiction.¹²² The Panel notes that the Police Report includes the date, time, place, and persons present during the questioning. The Report is also signed by the person who recorded and/or conducted the questioning and by W04782.¹²³ During

¹¹⁶ W04782's Proposed Evidence consists of the following items, including any translations thereof: (i) SPOE00069903-SPOE00069904-ET RED2, and (ii) SITF00095413-00095418 RED3 (*see* Annex 5 to the Motion).

¹¹⁷ Motion, paras 26-28.

¹¹⁸ Joint Response, para. 2.

¹¹⁹ Motion, para. 26. *See also* Amended List of Witnesses, p. 495.

¹²⁰ Joint Response, para. 2.

¹²¹ *See* Indictment, paras 59-62, 96-98, 136-138, 141, 175. *See also* SPO Pre-Trial Brief, paras [REDACTED].

¹²² Annex 5 to the Motion.

¹²³ SPOE00069903-SPOE00069904-ET RED2.

the questioning, the Report was read back to W04782 who confirmed that the content of the statement is true and accurate.¹²⁴ W04782's Statement in front of another jurisdiction also notes the date, time and place of the questioning. The statement is also signed by the person who recorded and/or conducted the questioning and by W04782.¹²⁵ The Panel further notes that the Defence does not challenge the authenticity of W04782's Rule 153 Statements. The Panel is therefore satisfied that W04782's Rule 153 Statements are *prima facie* authentic.

68. Regarding the probative value of W04782's Proposed Evidence and its suitability for admission pursuant to Rule 153, the Panel concurs with the SPO's submission and finds that W04782's Proposed Evidence: (i) provides crime-base evidence, (ii) provides additional details about the arrest and disappearance of W04782's relative including the identity of at least one of the perpetrators, (iii) is cumulative with other witness and documentary evidence concerning the KLA prison in Likoc/Likovac, and the fate of many of those who were detained there, (iv) is corroborated by witnesses whom the Accused have confronted or will be able to confront, including through cross-examination, and (v) complements certain adjudicated facts.¹²⁶ Furthermore, the Panel notes that W04782's Proposed Evidence does not contain evidence relating to the Accused's acts and conduct, and it is limited in length and is not unduly repetitive.

69. Accordingly, the Panel is satisfied that W04782's Proposed Evidence is: (i) probative and its admission *in lieu* of oral testimony would not be unduly prejudicial within the meaning of Rule 138(1), and (ii) suitable for admission pursuant to Rule 153(1)(a).

70. For these reasons, the Panel finds that W04782's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

¹²⁴ 076244-TR-ET Part 2 RED, pp. 33-34.

¹²⁵ SITF00095413-00095418 RED3.

¹²⁶ Motion, para. 28, referring to [REDACTED], and Adjudicated Facts 217, 244-245.

F. W04788

71. The SPO submits that W04788's Proposed Evidence¹²⁷ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹²⁸

72. The Defence requests that the Panel dismiss the SPO motion to tender W04788's Proposed Evidence through Rule 153.¹²⁹ The Defence submits that W04788's Proposed Evidence has low relevance, limited probative value and credibility issues.¹³⁰

73. Regarding relevance, the Panel notes that W04788 is a relative of a murder victim, and the SPO intends to rely on W04788's Rule 153 Statements in relation to, *inter alia*: (i) the disappearance of the relative and the efforts made to locate him, (ii) the circumstances of the disappearance, namely how the relative travelled to KLA headquarters in Likoc/Likovac, with a neighbour, W04820, and (iii) how W04788 learnt that the relative's body was found.¹³¹ The Defence submits that W04788's Rule 153 Statements have low relevance, without substantiating the argument. The Panel notes that W04788 provides additional information regarding the disappearance of a murder victim. The Panel is satisfied that W04788's Rule 153 Statements are relevant to the charges in the Indictment.¹³²

74. As regards authenticity, the Panel notes that W04788's Rule 153 Statements comprise the witness's SPO interview and ICTY statement. During the SPO interview, W04788 was duly advised of the rights as a witness and confirmed that

¹²⁷ W04788's Proposed Evidence consists of the following items, including any translations thereof: (i) IT-03-66 P183, (ii) 091224b Part 1 RED, (iii) 091224-TR-ET Part 1 RED, and (iv) U008-7496-U008-7510 RED ("W04788's Rule 153 Statements"); and IT-03-66 P183 ("W04788's Associated Exhibit"). See Annex 6 to the Motion.

¹²⁸ Motion, paras 29-32.

¹²⁹ Joint Response, para. 3.

¹³⁰ Joint Response, para. 3.

¹³¹ Motion, para. 29. See also Amended List of Witnesses, p. 499.

¹³² See Indictment, paras 59-61, 64, 96-98, 101, 136-138, 145; see also SPO Pre-Trial Brief, paras 267-282, 327-330.

the contents of the statements, including his prior testimony, are true and accurate.¹³³ The Panel further notes that the Defence does not challenge the authenticity of W04788's Rule 153 Statements. The Panel is therefore satisfied that W04788's Rule 153 Statements are *prima facie* authentic.

75. Turning to W04788's Associated Exhibits, the Panel notes that they consist of a file which includes: (i) a court document confirming the date of the victim's death, (ii) three copies of newspaper articles covering the victim's death, (iii) two copies of newspaper articles covering the victim's trial in 1994, and (iv) a letter of gratitude issued to the victim's family.¹³⁴ The Panel is satisfied that W04788's Associated Exhibits form an indispensable and inseparable part of W04788's Rule 153 Statements. The Panel is also satisfied that they: (i) are relevant and will provide relevant context to the written record in which they are discussed, and (ii) bear sufficient indicia of *prima facie* authenticity.

76. Regarding probative value and suitability for admission pursuant to Rule 153, the Panel finds that W04788's Proposed Evidence: (i) is crime-base evidence; (ii) is largely cumulative; (iii) is corroborated by other witnesses whom the Accused have confronted or will be able to confront; and (iv) complements or supplements certain adjudicated facts.¹³⁵ The Panel also notes that W04788's Proposed Evidence is not unduly repetitive and provides crime-base evidence, which goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment.

77. Accordingly, the Panel is satisfied that W04788's Proposed Evidence is: (i) probative and its admission *in lieu* of oral testimony would not be unduly prejudicial within the meaning of Rule 138(1), and (ii) suitable for admission pursuant to Rule 153(1)(a).

¹³³ 091224-TR-ET Part 1, p. 6.

¹³⁴ Annex 6 to the Motion.

¹³⁵ See Motion, para. 31 referring to [REDACTED], and Adjudicated Facts 244-245.

78. For these reasons, the Panel finds that W04788's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

G. W04820

79. On 8 January 2024, the Panel granted the SPO's motion for admission of evidence of W04820 pursuant to Rule 154.¹³⁶ The SPO now submits the Motion for the admission of W04820's evidence under Rule 153,¹³⁷ in which the SPO argues that W04820's Proposed Evidence¹³⁸ is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹³⁹

80. The Defence opposes the admission of W04820's evidence pursuant to Rule 153 and wishes to exercise its right to cross-examine the witness.¹⁴⁰ The Defence argues that the admission of W04820's evidence pursuant to Rule 153 would allow admission of evidence elicited through leading questions and comments by the SPO.¹⁴¹

81. As the Panel has already assessed relevance and authenticity in its previous decision,¹⁴² only the questions of probative value and prejudicial effect as well as suitability for admission pursuant to Rule 153 will be assessed here.

¹³⁶ F02044, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request* ("Eighth Rule 154 Decision"), 8 January 2024, confidential, paras 85-86, 88(d) (a public redacted version was filed the same day, F02044/RED).

¹³⁷ Motion, para. 1.

¹³⁸ W04820's Proposed Evidence consists of the following items, including any translations thereof: (i) 094542b Part 1 RED and 094542b Part 2, and (ii) 094542-TR-ET Part 1 RED2 and 094542-TR-ET Part 2 RED3 ("W04820's Rule 153 Statements"). See Annex 7 to the Motion.

¹³⁹ Motion, paras 33-35.

¹⁴⁰ Joint Response, para. 27.

¹⁴¹ Joint Response, para. 30.

¹⁴² Eighth Rule 154 Decision, paras 85-86, 88(d).

82. Regarding the probative value of W04820's proposed evidence and suitability for admission pursuant to Rule 153, the Panel notes that the SPO submits that W04820's Rule 153 Statement: (i) provides purely crime-base evidence; (ii) is largely cumulative with other witnesses and corroborated by additional evidence concerning the arrest and detention of a named individual; (iii) is corroborated by witnesses whom the Accused have confronted or will be able to confront, including through cross-examination; and (iv) complements or supplements certain adjudicated facts.¹⁴³

83. The Defence argues that W04820's SPO Statement is unreliable and it seeks to cross-examine W04820 because: (i) the safeguard of cross-examination was central to the Panel's previous decision with regard to Rule 154;¹⁴⁴ (ii) any defect in W04820's evidence due to the form of the questions would not be cured by the cross-examination of two other named witnesses; and (iii) W04820 is well-placed to give evidence and explanations about the structure of a particular unit relevant to this case and the impact of the Serbian offensives on the structure and reporting within that unit.¹⁴⁵

84. First, the Panel recalls its previous findings that the Defence could adequately explore the potential leading questions during cross-examination and, in any event, the weight to be given to this witness's evidence is an issue to be decided at the end of the case in light of all relevant evidence.¹⁴⁶ The Panel considers that the possibility for the Defence to cross-examine this witness was one of the factors on which the Panel found the Proposed Evidence to be admissible pursuant to Rule 154. Moreover, while the Panel does not consider that leading questions would render a statement inadmissible under Rules 153 or 154, the Panel notes

¹⁴³ Motion, para. 35.

¹⁴⁴ Joint Response, para. 30.

¹⁴⁵ Joint Response, paras 31-32.

¹⁴⁶ Eighth Rule 154 Decision, para. 85.

that the SPO is only seeking admission of one statement, which might contain a number of suggestive questions.

85. Second, the SPO refers to corroboration in the evidence of another witness, but the Panel notes that the evidence of this witness was admitted under Rule 155, i.e., without cross-examination.¹⁴⁷ The Panel also finds that W04820 is not a *typical* crime-base witness. W04820 is a former KLA soldier whose testimony covers the circumstances of a person's disappearance, which allegedly occurred during detention by the KLA. The Panel disagrees with the SPO's submission that W04820's evidence is also largely cumulative of other witnesses.¹⁴⁸ It appears that W04820 is the only witness who can provide direct evidence about the whereabouts of a victim named in the Indictment¹⁴⁹ immediately before the victim's disappearance.¹⁵⁰ While another witness provided evidence regarding the alleged murder of the victim, the information leading to the killing of the victim provided by that witness was limited in nature.¹⁵¹

86. Therefore, the Panel finds that the prejudicial effect of the admission of W04820's Proposed Evidence under Rule 153 outweighs its probative value at this stage. Accordingly, the Panel finds that W04820's Proposed Evidence is not admissible pursuant to Rules 138(1) and 153, without prejudice to the SPO's calling the witness to testify live or under the provisions of Rule 154.

¹⁴⁷ [REDACTED].

¹⁴⁸ Motion, para. 35.

¹⁴⁹ Indictment, para. [REDACTED] and [REDACTED].

¹⁵⁰ 094542-TR-ET, Part 1 RED2, 094542-TR-ET, Part 2 RED3.

¹⁵¹ Transcript of hearing of [REDACTED].

H. W04837

87. The SPO submits that W04837's Proposed Evidence¹⁵² is relevant, authentic, reliable, and suitable for Rule 153 admission and that its probative value is not outweighed by any prejudice.¹⁵³

88. The Defence submits that W04837's Proposed Evidence is not suitable for admission pursuant to Rule 153.¹⁵⁴ The Defence argues that W04837 is in a position to offer unique and relevant evidence regarding the security services of another country that can only be elicited by having the witness appear for cross-examination.¹⁵⁵

89. Regarding relevance, the Panel notes that W04837 worked for an intelligence agency and provides information about a disappeared person. The Panel also notes that the SPO intends to rely on W04837's Rule 153 Statements in relation to, *inter alia*: (i) information about the alleged death of the disappeared person; (ii) information about a video showing the disappeared person at a detention site relevant to the Indictment; and (iii) an alleged threatening call attributed to a KLA member.¹⁵⁶

90. The Defence argues that W04837's evidence in relation to circumstances of the disappearance is quite limited. The Defence further submits that: (i) W04837 has no knowledge, other than hearsay, of what happened to the disappeared person afterwards; (ii) W04837 could not confirm that the disappeared person was kidnapped by KLA members, which was recorded in W04837's statement from

¹⁵² W04837's Proposed Evidence consists of the following items, including any translations thereof: (i) 093382b Part 1 RED; 093382b Part 2; 093382b Part 3 RED, (ii) 093382-TR-ET-Part 1 RED; 093382-TR-ET-Part 2 RED; 093382-TR-ET Part 3 RED3 ("W04837's Rule 153 Statement"), and (i) SPOE00019630-SPOE00019642, (ii) 054774-TR-ET ("W04837's Associated Exhibits"). See Annex 8 to the Motion. The Panel notes that the SPO does not tender Associated Exhibit 2 for admission (See Annex 8 to the Motion, p. 3).

¹⁵³ Motion, paras 36-39.

¹⁵⁴ Joint Response, paras 33-38.

¹⁵⁵ Joint Response, para. 33.

¹⁵⁶ Motion, para. 36; see also Amended List of Witnesses, pp. 530-531.

2015; (iii) W04837 does not offer any information about the video apart from being given the video by the police; and (iv) W04837's statement displays what the Defence describes as ethnic prejudice on the part of the witness.¹⁵⁷

91. The Panel observes that W04837 provides information regarding the disappeared person, who was allegedly taken to a camp in or near Likoc/Likovac where the person was allegedly killed.¹⁵⁸ The Panel also observes that the disappeared person is not a named victim in the Indictment.¹⁵⁹ W04837 also provides limited information about the video depicting several detainees, including the disappeared person. The Panel notes that the Defence does not seem to challenge the relevance of W04837's evidence but only argues that its relevance is limited.¹⁶⁰ Having reviewed the content of W04837's Rule 153 Statement, the Panel is satisfied that it is relevant to the charges in the Indictment.¹⁶¹

92. As regards authenticity, the Panel notes that W04837's Rule 153 Statement comprises W04837's SPO interview and that: (i) the SPO interview is recorded and documented in a verbatim transcript;¹⁶² and (ii) during the SPO interview, W04837 was duly advised of his rights as a witness and confirmed that the contents of the SPO statement are true and accurate.¹⁶³ The Panel further notes that the Defence does not challenge the authenticity of W04837's Rule 153 Statement. The Panel is satisfied that W04837's Rule 153 Statement is *prima facie* authentic.

93. Turning to W04837's Associated Exhibits, the Panel notes that they consist of: (i) W04837's 2015 statement in front of another jurisdiction; and (ii) a video of four

¹⁵⁷ Joint Response, paras 36-38.

¹⁵⁸ Motion, para. 36.

¹⁵⁹ Indictment, para. 145 and Schedule B and C.

¹⁶⁰ Joint Response, paras 36-38.

¹⁶¹ Indictment, paras 16-57, 59-61, 62, 96-98, 99, 136-138, 175. SPO Pre-Trial Brief, paras 267-282.

¹⁶² 093382-TR-ET-Part 1 RED; 093382-TR-ET-Part 2 RED; 093382-TR-ET Part 3 RED3. *See also* Annex 8 to the Motion.

¹⁶³ 093382-TR-ET-Part 1 RED; 093382-TR-ET-Part 2 RED; 093382-TR-ET Part 3 RED3. *See also* Annex 8 to the Motion.

Serbian men allegedly detained by the KLA in May 1998.¹⁶⁴ The Panel notes that both exhibits are referred to in W04837's SPO interview. The Panel is satisfied that W04837's Associated Exhibits form an indispensable and inseparable part of W04837's Rule 153 Statement. The Panel is also satisfied that they: (i) are relevant and will provide relevant context to the written record in which they are discussed, and (ii) bear sufficient indicia of *prima facie* authenticity.

94. Regarding the probative value of W04837's Proposed Evidence and its suitability for admission pursuant to Rule 153, the Panel finds that: (i) the Proposed Evidence is crime-base and contextual; (ii) it is largely cumulative with other witness evidence concerning abductions and disappearances in the Drenica Zone; (iii) there is general and more specific corroboration of the proposed evidence, including in the evidence of witnesses whom the Accused were or will be able to cross-examine; and (iv) it complements or supplements relevant adjudicated facts.¹⁶⁵

95. The Panel notes, in particular, that evidence regarding detention in Likoc/Likovac is provided by several witnesses listed in the SPO's Motion. However, information regarding the disappeared person, including the disappeared person's alleged detention, is provided only by W04837, and two other witnesses. The Panel notes that the information provided by W04837 and another SPO witness is fairly limited in nature in respect of this matter.¹⁶⁶ A third witness, who will be heard live, will testify that a KLA unit allegedly abducted the disappeared person and Serbs who were taken to Likoc/Likovac and were later executed.¹⁶⁷ Thus, the Panel finds that W04837's evidence is materially corroborated and supplemented by the proposed evidence of at least one witness

¹⁶⁴ Annex 8 to the Motion, pp. 3-4. The Panel notes that the SPO does not tender Associated Exhibit 2 for admission as it is already admitted as P00220, p. 098615. Annex 8 to the Motion, p. 3.

¹⁶⁵ Motion, para. 38, referring to [REDACTED], and Adjudicated Facts 217, 244-246.

¹⁶⁶ See also [REDACTED].

¹⁶⁷ Amended List of Witnesses, p. 466.

whom the Defence will be able to confront through cross-examination. Moreover, the Defence does not appear to suggest that W04837 should appear for cross-examination in relation to any issue apart from his work with an intelligence agency,¹⁶⁸ which, in the view of the Panel, is only an ancillary to W04837's evidence. The Panel is also of the view that W04837's evidence does not pertain to an issue central to the SPO's case.

96. In relation to the Defence's argument that W04837's evidence contains information without reference to any sources,¹⁶⁹ the Panel recalls that the fact that evidence is hearsay or unsourced would not prevent admission pursuant to Rule 153. This would rather go to the weight of the evidence.¹⁷⁰

97. The Panel also notes the Defence's argument that W04837 is in a position to offer unique and relevant evidence, namely: (i) how a certain intelligence body operated at the time, including their use of local sources of information; (ii) how that agency gathered information on the ground; and (iii) to what extent that agency allegedly infiltrated the KLA, which the Defence claims can only be elicited by having the witness appear for cross-examination.¹⁷¹ The Panel finds that while the onus of establishing the conditions of admission under Rule 153 is with the SPO, the Defence has failed to establish that questions regarding this matter cannot effectively be explored with other witnesses and that prejudice would arise from its inability to raise those issues with this particular witness. Further, the Panel notes that the claimed facts and circumstances are not material to the SPO case. The Defence can elect to call evidence, if it chooses to do so, on matters which the Panel determines to be relevant.

98. The Panel notes that W04837's Proposed Evidence is limited in length and is not unduly repetitive. Accordingly, the Panel is satisfied that W04837's Proposed

¹⁶⁸ Joint Response, paras 33 and 35.

¹⁶⁹ Joint Response, para. 38.

¹⁷⁰ Second Rule 153 Decision, para. 22. *See also* First Rule 153 Decision, para. 56.

¹⁷¹ Joint Response, para. 34.

Evidence is: (i) probative and its admission *in lieu* of oral testimony would not be unduly prejudicial within the meaning of Rule 138(1), and (ii) suitable for admission pursuant to Rule 153(1)(a). The Panel also notes that one of W04837's Associated Exhibits, the video, is also being tendered through W04694. The Panel already found that the video, as part of W04694's Proposed Evidence, is admissible pursuant to Rules 138(1) and 153 without cross-examination.

99. For these reasons, the Panel finds that W04837's Proposed Evidence is admissible pursuant to Rules 138(1) and 153 without cross-examination.

V. CLASSIFICATION

The Panel notes that the Joint Response has been submitted confidentially. The Panel therefore orders the Defence to request the reclassification or submit a public redacted version of the Joint Response by Wednesday, 21 August 2024. The Panel reminds the Defence once again of the Panel's oral order regarding the publicity of proceedings, wherein the Panel ordered the Parties and participants, as a matter of principle, to: (i) file simultaneously a public redacted version of any confidential filing, and (ii) when there are compelling reasons not to do so, to indicate in the classification section of the filing reasons why a public redacted version could not be provided at the same time.

VI. DISPOSITION

100. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** the Motion, in part;
- b) **ADMITS** into evidence without cross-examination the following items, including any translations, full audio recordings and public versions

- thereof: (i) W00686's Proposed Evidence;¹⁷² (ii) W02765's Proposed Evidence;¹⁷³ (iii) W04694's Proposed Evidence;¹⁷⁴ (iv) W04782's Proposed Evidence;¹⁷⁵ (v) W04788's Proposed Evidence;¹⁷⁶ and (vi) W04837's Proposed Evidence;¹⁷⁷
- c) **DENIES** the admission of: (i) W04820's Proposed Evidence;¹⁷⁸ and (ii) W04491's Proposed Evidence,¹⁷⁹ without prejudice to the SPO's calling W04820 and W04491 to testify live or under the provisions of Rule 154;
- d) **DIRECTS** the Registrar to assign exhibit numbers to the items referred to in paragraph 100(b), and linking the Associated Exhibits with the relevant Rule 153 Statements as indicated in footnotes 31, 106, 127 and 152; and
- e) **ORDERS** the Defence to submit a public redacted version of the Joint Response by no later than Wednesday, 21 August 2024.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 22 July 2024

At The Hague, the Netherlands.

¹⁷² See above footnote 14.

¹⁷³ See above footnote 31.

¹⁷⁴ See above footnote 106.

¹⁷⁵ See above footnote 116.

¹⁷⁶ See above footnote 127.

¹⁷⁷ See above footnote 152.

¹⁷⁸ See above footnote 138.

¹⁷⁹ See above footnote 63.