

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

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

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

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Public Redacted Version of 'Joint Defence Response to Prosecution motion for admission of Nerodime Zone documents through the bar table and related request (F02667) with confidential Annex 1'

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I. INTRODUCTION

1. The SPO Request¹ to admit items purportedly related to the Nerodime zone, brings the total number of exhibits sought to be admitted through the bar table in these proceedings to 2,261.² This number should be considered in the context of the 5,404 items that have been admitted as SPO exhibits to date, 923 of which were not authenticated or contextualised by witnesses, but admitted from the bar. The position of the Defence for Messrs. Thaçi, Veseli, Selimi and Krasniqi (“the Defence”) is that the SPO’s use of bar table motions to seek to admit thousands of exhibits, particularly those of uncertain provenance and questionable reliability is incompatible with the Trial Panel’s instruction to use a high threshold so as to ensure that only evidence of high probative value is tendered.³

2. Contrary to the Trial Panel’s instruction, the 97 items submitted in the present SPO Request (“Items”) demonstrate, once again, that the SPO is using the bar table procedure to avoid fair scrutiny, and circumvent the procedure of evidence being authenticated and verified by relevant witnesses. This approach impacts not only the size of the evidential record, but its quality.

¹ KSC-BC-2020-06/F02667, *Prosecution motion for admission of Nerodime Zone documents with confidential Annexes 1-2*, 21 October 2024 (“SPO Request” or “F02667”).

² KSC-BC-2020-06/F01268, *Prosecution application for admission of material through the bar table*, 8 February 2023, public; F02178, *Prosecution motion for admission of Llap Zone documents and related request*, 14 March 2024, public; F02248, *Prosecution motion for admission of Drenica Zone documents*, 16 April 2024, public; F02468, *Prosecution motion for admission of Shala Zone and Karadak Zone documents*, 24 July 2024, public; F02667.

³ KSC-BC-2020-06/F01226/A01, Trial Panel, *Annex 1 - Order on the Conduct of Proceedings*, 25 January 2023, public (“Order on Conduct of Proceedings”), para. 49. See, e.g., KSC-BC-2020-06/F01387, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8*, 21 March 2023, confidential, para. 3 (“First Bar Table Response”); KSC-BC-2020-06/F02291, *Joint Defence Response to Prosecution Motion for Admission of Drenica Zone Documents with Confidential Annex 1*, 6 May 2024, para. 12; KSC-BC-2020-06/F02243, *Joint Defence Response to Prosecution motion for admission of Llap Zone documents and related request (F02178) with confidential Annex 1*, 20 April 2024, para. 6; KSC-BC-2020-06/F02521/COR, *Corrected Version of Joint Defence Response to ‘Prosecution motion for admission of Shala Zone and Karadak Zone documents’ with Confidential Annexes 1-3*, 30 August 2024, para. 1.

3. Many of the Items have no discernible relevance to the charges.⁴ This is reflected in the fact that only nine (9) of the 97 Items are cited in the SPO's Pre-Trial Brief,⁵ and only four (4) of the 97 Items are said by the SPO to be related to the testimony of the SPO's Nerodime witnesses.⁶

4. For other Items, however, the SPO has made a calculated decision not to introduce them through witnesses to whom they directly relate, and instead has chosen the path of lesser resistance, being admission through the bar table. Item 95, for example, is a video that was "downloaded from YouTube by SITF". It purportedly shows W04576 using telephones [REDACTED].⁷ W04576 testified on 1, 20, 21 and 22 February 2024. This video was not shown to him. W04576 would have been in a position to either identify himself in the video, or deny his likeness. He could have confirmed the date and place of the alleged recording, or disputed it. W04576 might have recognised the video as a legitimate recording of him using a phone for KLA operational purposes, or he might have testified that he was talking on a phone he borrowed from a civilian to call his family, because the KLA did not use telephones during this period. W04576 was not given a chance to assist the Trial Panel by doing any of these things.

5. This was not a mistake or an oversight on the part of the SPO. This is demonstrated by Item 93, another video "downloaded from YouTube by the SITF", which also apparently shows [REDACTED].⁸ Item 93, by contrast, was shown to W04576. He identified himself on the video, and explained that the phone in question had been borrowed from a civilian, and was being used by himself and other KLA members to try to contact their families. W04576 then invited the SPO to play the video

⁴ See, e.g., Items 35, 37 which are handwritten reports concerning cigarette smuggling in April 1999.

⁵ F02667/A01, Items 5, 6, 20, 28, 63, 77, 79, 80, 94.

⁶ F02667/A01, Items 21, 51, 53, 70. The remainder of the 97 documents are marked "N/A" in the column titled "Related witness".

⁷ F02667/A01, Item 95.

⁸ F02667/A01, Item 93.

with sound, which he said would confirm that rather than giving or receiving operational orders, the conversation was with family members. The video in question has no sound. W04576 then confirmed that the KLA **did not** use phones during this period for security reasons, testifying that “during the wartimes, it was not possible for us to have telephones.” The Presiding Judge then told the SPO that “[t]his has very little importance to the Panel. I would suggest you move on to another question line.”⁹ The SPO did not seek to admit this video through W04576 during his testimony, a decision which the Defence were entitled to rely on in deciding whether or not to cross-examine in relation to it.

6. The SPO’s attempt to admit these two videos through the bar table procedure, is indicative of its overall approach to this exercise. Here, an SPO witness W04576 directly refuted the SPO’s case on communication on the basis of a video (Item 93), for which no admission was then sought in the courtroom. Then, rather than showing W04576 a related video in which the SPO represents he is featured (Item 95), the SPO decided to keep this video under wraps. It then sought admission of both videos through a bar table motion. The description of Item 95 in the bar table motion refers to W04576 by name, rather than his SPO pseudonym, with the SPO putting “N/A” in the column titled “Related Witness”, giving the impression that this document is not directly related to a witness. Importantly, the SPO is seeking admission of this video on the basis that it [REDACTED],¹⁰ which is the very proposition that W04576 refuted under oath.

7. The bar table procedure is being used as an illegitimate workaround, to the SPO’s strategic advantage. The effect of which is to deprive the Trial Panel and the parties of the opportunity to properly assess authenticity of evidence. Rather than

⁹ KSC-BC-2020-06, Transcript of Hearing (W04576 Testimony), 22 February 2024, public (“Transcript of 22 February 2024”), pp. 12875-12879.

¹⁰ F02667/A01, Item 95.

subjecting evidence to authentication and debate in the courtroom, the SPO's bar table requests are becoming dumping grounds for a large volume of otherwise inadmissible proof.

8. This practice contravenes the Trial Panel's instruction, mirroring the practice of other international courts,¹¹ that "bar table motions should not be used as a way to render the principle of orality irrelevant to these proceedings." The Trial Panel has already been clear that "[w]hile the bar table procedure is in the interest of judicial economy, it should not become an alternative to presenting the most important exhibits through witnesses who are in a position to speak to them and to be cross-examined about them."¹²

9. Notably, the SPO is seeking admission of these two videos as Items 93 and 95, despite having been told by the Trial Panel that "[t]his has very little importance to the Panel."¹³ This is the second problem with the SPO's approach to the bar table procedure; many of the tens of thousands of pages of evidence submitted for admission through the bar table procedure are of insufficient relevance. In March 2023, the Trial Panel expressed concern that, unless reasonable limitations are placed on the amount of evidence admitted, a risk exists of creating an "unmanageable trial record".¹⁴ The Trial Panel was responding to Defence submissions that, at a certain point, the size of the evidential record would render it incompatible with a fair trial, and that the duty to ensure the fair and expeditious conduct of the proceedings

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

¹² First Bar Table Decision, para. 16.

¹³ Transcript of 22 February 2024, p. 12879.

¹⁴ KSC-BC-2020-06/F01380/RED, Trial Panel, *Public Redacted Version of Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, public, para. 29.

“includes keeping the case to a manageable size”.¹⁵ The kind of documents included in the SPO Request, are precisely the kind that should be kept out of an evidential record in order to ensure that it remains manageable. As such, pursuant to Articles 37 and 40 of the Law,¹⁶ Rules 137-138 of the Rules,¹⁷ and the Order on the Conduct of Proceedings,¹⁸ the Defence hereby files its response to the SPO Request.

II. DEFENCE OBJECTIONS TO THE ITEMS

10. As with its previous responses, the Defence has annexed a modified version of Annex 1 to the SPO Request, listing specific objections to the Items.¹⁹ For the convenience of the Trial Panel, the Defence relies on the same categories of objections formulated in response to the First Bar Table Request in March 2023,²⁰ and subsequently. In addition to the individual objections included in Annex 1, the Defence makes the following submissions on particular characteristics of the Items which render them unsuitable for admission from the bar table.

A. THE SPO HAS NOT ESTABLISHED *PRIMA FACIE* AUTHENTICITY AND RELIABILITY

11. 89 of the 97 items included in the SPO Request are described as being “provided to the SPO by the ICTY/MICT”.²¹ This is, essentially, a haul of documents from the ICTY/IRMCT archives. Many are handwritten pieces of paper; unsigned, undated, with no letterhead, stamps or author. Importantly, these are **not** ICTY/IRMCT **exhibits**. Only two (2) of the 89 items are identified as having been admitted in a case

¹⁵ KSC-BC-2020-06/F01308, *Joint Defence Response to ‘Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154’*, 20 February 2023, para. 3.

¹⁶ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

¹⁷ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

¹⁸ Order on the Conduct of Proceedings, paras. 60-62.

¹⁹ Annex 1 to the present submissions.

²⁰ F01387/A07.

²¹ F02667/A01.

before the ICTY/IRMCT.²²

12. As to where the ICTY/IRMCT obtained these documents, the SPO submits that the majority of the Items “were seized by the Serbian authorities”.²³ The SPO then cites to “provenance documents” produced in ICTY proceedings, and submits that it does not intend to tender these provenance documents, considering that “the Panel may request such information”.²⁴ The Defence does not dispute that the SPO may well be able to trace a chain of custody from the Serb authorities through various ICTY investigators to the SPO. This does not circumvent the reality that this chain of custody necessarily passes through the Serb authorities.

13. Evidence originating from an adversary of an accused raises concerns about reliability which necessitates care.²⁵ The Defence has consistently raised concerns about the reliability of evidence originating from the Republic of Serbia.²⁶ Serbia has a long history of manipulating facts that includes: a series of brutal false flag operations aimed at incriminating the KLA;²⁷ using torture to extract false confessions;²⁸ crime

²² F02667/A01, Items 2, 19.

²³ SPO Response, fn. 80, citing Items 1, 3-5, 7, 9-17, 20-92.

²⁴ *Ibid.* The SPO cites to the Order on the Conduct of Proceedings, para. 46: “It is the Party’s responsibility to be in a position to provide information regarding the origin of an exhibit and what steps were taken to verify that the information in question is capable of reasonable belief, when requested to do so by the Trial Panel.”

²⁵ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, TC I, [Judgement](#), 3 April 2008, paras. 13-14; *Prosecutor v. Milutinović et al.*, IT-05-87-T, TC, [Judgement](#), 26 February 2009, para. 54; *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, TC II, [Judgement](#), 29 November 2012, para. 653; *Prosecutor v. Tolimir*, IT-05-88/2-T, TC II, [Judgement](#), 12 December 2012, para. 37.

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

²⁷ F00877, paras. 34-45.

²⁸ F00877, paras. 66-72.

scene manipulation, including the mass-removal of civilian bodies to cover up its own atrocities;²⁹ an ongoing misinformation campaign aimed at delegitimising Kosovo's claim to independence and undermining the existence of the State;³⁰ and attempts to introduce false testimony before international courts.³¹ SPO evidence in these proceedings indicates that Serbia has also attempted to have false evidence relied upon by the KSC.³² That the source of the majority of Items is the Serbian authorities weighs against their admission through the bar table.

14. Turning to their content, the SPO submits that the Proposed Exhibits are "contemporaneous KLA records".³³ The SPO has called three (3) KLA witnesses who have knowledge of operations in the Nerodime zone during the indictment period.³⁴ Were these 97 documents relevant and probative enough to warrant admission, they should have been authenticated by these KLA witnesses from the Nerodime zone. The bar table procedure is being used to circumvent authentication and contextualisation of Items that the SPO simultaneously argues are probative of issues at the centre of its case.³⁵

15. The SPO submits in extremely general terms that "documents forming part of the seized collections and/or their contents have been or will be authenticated by witnesses, which buttress the authenticity of the collections of a whole",³⁶ but gives no information about which past or future SPO witnesses have or will authenticate the Items. The "seized collections" (plural) are not identified, nor can any reasonable

²⁹ F00877, paras. 46-58.

³⁰ F00877, paras. 29-31.

³¹ F00877, paras. 59-62.

³² F01100, *especially* paras. 39-41.

³³ SPO Request, para. 1.

³⁴ W04576, W04741, W01453.

³⁵ SPO Request, para. 12: "Contemporaneous KLA records, including the proposed exhibits, show that brigades in the Nerodime OZ received orders and instructions, including from the General Staff and zone commanders, and that KLA members received instructions to adhere to rules and regulations, including on discipline and otherwise face sanctions according to the rules and regulations in place".

³⁶ SPO Request, para. 17.

suggestion be made that because the documents were assembled into a “collection” at some point in the last two decades by the Serb authorities, the authentication of one document by a past or future SPO witness imbues the hundreds or thousands of others with authenticity. Particularly when the SPO does not intend to call any other witnesses with knowledge of the KLA structures in Nerodime.

16. Importantly, Annex 1 to the SPO Request lists the justification for admission by item, and includes a column titled “Related witness”. Only four (4) of the 97 items have been listed as having a “Related witness”, being W01453.³⁷ Three of the four documents listed as being “related” to W01453, were **not** shown to him during his testimony. Item 21, for example, is comprised of four pages of handwritten notes. The item is described by the SPO as “two handwritten documents”. Although they are copies rather than originals, their orientation, size and the positioning of punched holes indicate that they may be a compilation of four documents, rather than two. Regardless, W01453’s name appears on the second of four pages, where he is described as [REDACTED]. The pages have no KLA headers, stamps, seals, or signatures. They are handwritten pieces of paper, with no indicia of authenticity. The SPO **did not show** Item 21 to W01453 during his testimony, and it was not in the presentation queue of items that could have been used with the witness. Instead, the bar table is being used to circumvent presenting exhibits through witnesses “who are in a position to speak to them and to be cross-examined about them”,³⁸ thereby depriving the Trial Panel of relevant information to assess admissibility.

17. Of the four (4) documents listed by the SPO as being “related” to W01453, only Item 53 was shown to W01453 during his testimony, described as a “handwritten Daily Report” from the Nerodime OZ, 161 Brigade, 2nd Battalion,³⁹ and allegedly

³⁷ F02667/A01, Items 21, 51, 53, 70.

³⁸ First Bar Table Decision, para. 16.

³⁹ F02667/A01, Item 53.

signed by Commander Avdullah Rama. Item 53 was shown to W01453 by the SPO during his testimony on 5 November 2024. He did not recognise the document, or the signature. W01453 was asked if he could be the “Commander Sokoli” being referred to in therein. He responded “[a]ctually, I do not know because I didn’t have a pseudonym. I had a name and a surname, Zone Commander Shukri Buja. So this doesn’t make sense.”⁴⁰ Understandably, the SPO did not seek to admit Item 53 through W01453. For the same reasons, it cannot now be admitted through the back door. Following W01453’s testimony, Item 53 joins the other documents designated by the SPO as “KLA documents” for which SPO witnesses have denied knowledge, authorship or recognition.⁴¹ Testimony denying knowledge of certain documents undoubtedly calls authenticity into question, and therefore affects admissibility.

18. As such, the Defence’s position remains as set out in its First Bar Table Response; purported KLA documents should be authenticated through the SPO’s KLA witnesses to ensure their proper contextualisation, and to allow witnesses to speak to the documents’ background, authorship, and authenticity.⁴² The SPO has put the KLA’s internal functioning, structure and operation at the centre of this case. If the

⁴⁰ KSC-BC-2020-06, Transcript of Hearing (W01453 Testimony), 5 November 2024, pp. 22008-22010.

⁴¹ See, e.g., KSC-BC-2020-06, Transcript of Hearing (W04746 Testimony), 12 July 2023, p. 5582: “A. Yes, this must be my signature. However, I am surprised by this document. This is not one of the -- our documents that I would sign. The form and content seems to me unusual.”; p. 5656: “A. Allow me to say that I did not recognise the last document, and this is not the wording I would have used or my collaborators would have used. It must have been drafted by a journalist, a reporter or somebody else.”; pp. 5902-5904: “I don't know this document [...] Do you recognise that signature, sir? A. No, I don't. And this is the reason why I indicated that I'm unable to recognise the document [...] I believe I released Mr. Stankovic, but I did not draft this type of document, though.” See also KSC-BC-2020-06, Transcript of Hearing (W04765 Testimony), 4 December 2023, pp. 10457-10460: “A. It may be a truthful, accurate document. However, it doesn't bear no signature or stamp. And I don't know how Fatmir Limaj would have had the right to put here his own name when, to my knowledge, Sokol Dobruna was the legal adviser of the General Staff, not Fatmir Limaj; pp. 10473-10475: “This is not a document of the Pashtrik zone. I have no connection whatsoever with this document. I have not applied that... A. Yes, I see that. But it's not probable. It's not possible.” See also KSC-BC-2020-06, Transcript of Hearing (W04737 Testimony), 17 September 2024, p. 19770: [REDACTED]; pp. 19780-19781: [REDACTED] See also KSC-BC-2020-06, Transcript of Hearing (W04758 Testimony), 31 October 2024, p. 21684: “A. No. I cannot recognise it on this document as his signature. I can compare it with Remi's signature. I'm not quite sure about this one.”

⁴² First Bar Table Response, paras. 14-15, and citations therein.

items are, in fact, contemporaneous KLA records that are probative of these questions, they should not be admitted *en masse* through the bar table, but explained by the very witnesses who signed them, created them, or can otherwise contextualise them.

19. It is also significant that the majority of the Items are handwritten.⁴³ The lack of KLA access to word processors/typewriters does not render all legitimate and contemporaneous documentation inadmissible. It does, however, raise real doubts as to creation and authorship of these handwritten records, particularly if the document is not the original.⁴⁴ More specifically, handwritten documents bearing no concrete and verifiable information as to their authorship, such as a stamp, signature, header or date,⁴⁵ should not be admitted from the bar table on account of the impossibility of establishing with certainty the authenticity of such documents, and often the author. The absence of such indicia necessarily deprives the Panel of its ability to determine “how [the] document was prepared, by whom, and on the basis of what information.”⁴⁶ The Trial Panel has recognised that “documents bearing no indication of a named source or which have yet to be corroborated are often considered to lack the requisite indicia of reliability”.⁴⁷

20. Perhaps because of the lack of indicia on the face of the Items, the SPO has repeatedly sought to bolster their claimed authenticity with reference to other documents. This approach is insufficient to establish authenticity, for a number of reasons. First, many of the “corroborating” documents have not been offered for

⁴³ 63 of the 97 Items are handwritten.

⁴⁴ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, TC, [Decision on Accused's Bar Table Motion: Municipality Component Documents](#), 14 April 2014, para. 19.

⁴⁵ See, e.g., ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, TC, [Decision on Pavković Second Motion for Admission of Documents from Bar Table](#), 28 November 2007, para. 7; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1181, TC VI, *Decision on Prosecution's First Request for the Admission of Documentary Evidence*, 19 February 2016, paras. 18, 20.

⁴⁶ ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, TC II, [Decision on Vlastimir Dordevic's Motion to Exceed the Word Limit and Motion to Admit Documents from The Bar Table](#), 23 June 2010, para. 18.

⁴⁷ First Bar Table Decision, para. 59.

admission. As such, the SPO's approach contravenes the Trial Panel's previous determination that it will not base assessments of admissibility on material that is not offered for admission.⁴⁸

21. Second, on 44 occasions the SPO attempts to authenticate Items through other Items which are tendered in this same SPO Request.⁴⁹ This approach is circular and illogical. The SPO describes the Items as being part of a "seized collection" from the Serb authorities, and places reliance on the "similar nature and format" of the Items being tendered, which "mutually corroborate their authenticity".⁵⁰ The tendering of numerous documents similarly devoid of the same indication of authorship, without any independent or reliable information that indicates provenance, does not meet the standard for admissibility set in these proceedings. At their highest, any similarities can only mean that the "similar" items were created with reference to each other. This does not move the Trial Panel towards a finding that they are authentic, it could just as easily mean that they the Items were fabricated together. Without a showing that the documents contain information that is within the sole knowledge of the KLA, which is both unreasonable in the context, and the SPO has not attempted, the same authenticity concerns remain.

22. Third, a large number of Items are offered as authentic on the basis that details such as the identity of the relevant Brigade Commander or Deputy Brigade commander are reflected in W04576's book 'KLA War in Nerodime Operation Area', and/or in Jakup Krasniqi's book 'Kthesa e Mahde'.⁵¹ The SPO does not explain how widely known information about positions in the Nerodime hierarchy demonstrates

⁴⁸ KSC-BC-2020-06/F01603, Trial Panel, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023 ("F01603"), para. 50.

⁴⁹ See, e.g., F02667/A01, Items 3, 5, 7, 11, 14, 16, 17, 19, 21, 22, 24, 29, 30, 40, 42, 43, 44, 45, 47, 50, 51, 53, 54, 55, 56, 57, 58, 59, 61, 65, 66, 67, 69, 71, 72, 79, 80, 81, 83, 86, 86, 90, 91, 92.

⁵⁰ See, e.g., F02667/A01, Items 25, 27, 31, 33, 36, 38, 39, 75, 76, 77, 91, 92.

⁵¹ See, e.g., F02667/A01, Items 1, 13, 17, 21, 22, 29, 30, 51, 53, 87 (W04576's book); Items 2, 13, 19, 21, 22, 29, 30, 51, 53, 70, 87 (Jakup Krasniqi's book).

proof of authorship of the Items, let alone that it establishes that the contents of the document are otherwise true. Even if this was an evidentially sound approach to establishing authenticity, the SPO does not address W04576's testimony that his book was written in a way that was embellished, so as to be "the most interesting possible", and that he included events in the way he "wanted them to be portrayed and not as they were in reality, because the reality is something different", describing the book as a document that "shouldn't be considered very seriously in the context of this very important case".⁵²

23. Two of the items were seized from the houses of Mr Selimi and Mr Krasniqi.⁵³ The Defence reiterates its previously stated position concerning their admissibility.⁵⁴ Without further and specific information on the circumstances in which these documents were prepared, and by whom, the location of their seizure is not sufficient to establish authenticity or provenance.

B. ADMISSION WOULD CAUSE PREJUDICE

24. The SPO addresses the question of prejudice for all the Items collectively. The SPO submits that: (i) the Defence has had and will have ample opportunity to address and make submissions concerning the Items, put their contents to witnesses, and lead evidence to the contrary; and (ii) the Panel can assess weight at the end of the trial in light of the entire record.⁵⁵

25. The problem with the first submission, is that these Items relate to Nerodime witnesses who have already testified. Of the 97 Items, the SPO has linked only four (4)

⁵² KSC-BC-2020-06, Transcript of Hearing (W04576 Testimony), 21 February 2024, pp. 12635, 12637, 12655.

⁵³ F02667/A01, Items 6, 18.

⁵⁴ First Bar Table Response, paras. 31-51.

⁵⁵ SPO Request, para. 18.

Items to the testimony of SPO witnesses.⁵⁶ Of these four (4) documents, only one (1) was put to the witness in question, W01453. In the SPO's submission, the 93 other documents are not linked to SPO witnesses. Despite this, the SPO is suggesting that if the Defence has authenticity (or other) concerns as to these Items, they should have used court time to examine witnesses on these Items, despite the SPO not having put them to any SPO witnesses or even indicated, for the majority, that they would seek their admission in the future. The "ample opportunity" for the Defence to put their content to witnesses should be seen in this context. It is difficult for the Defence to seek to use limited courtroom time to examine witnesses on Items that were not put to witnesses by the SPO, on the basis that they may, at some future point, be included in an SPO bar table motion. The SPO should lay the proper foundation for the Items through relevant SPO witnesses, to ensure a meaningful opportunity for the Defence to challenge them.

26. The SPO then submits that no prejudice outweighs the probative value of these Items because "[a]t the end of the trial, the Panel will assess what weight to assign any admitted exhibits in light of the entire record".⁵⁷ Essentially, therefore, the SPO submits that admission should be favoured because the Panel will review all admitted exhibits at the end of the case to determine what weight they should be given, and that this will act as a safeguard.

27. This submission must be considered in the context of the overall approach to the presentation and admission of evidence in this case. A large number of prior recorded statements have been admitted over Defence objection. Repeated Defence objections have been made to the SPO's approach to questioning its witnesses, including the SPO's use and subsequent admission of documents unknown to the witnesses. Evidence from prior out of court statements have been regularly read into

⁵⁶ F02667/A01, Items 21, 51, 53, 70.

⁵⁷ SPO Request, para. 18.

the record under the rubric of “refreshing memory”, over Defence objection. The Defence has unsuccessfully challenged the scope of questioning by the Trial Panel. The overwhelming majority of documents admitted through the bar table, have been admitted over Defence objection. The approach to the presentation and admission of evidence has been, objectively, permissive.

28. The corollary of this approach to admission is, firstly, a large evidential record. In addition to volume, this approach also impacts the quality of evidence being admitted. Where the filter for the admission of evidence is lower, it is more likely that evidence has been admitted with questionable authenticity and reliability. The risk being that unreliable evidence, “rather like cancer cells... disguise themselves and gain sustenance by attaching themselves to genuinely probative evidence. Over the course of a trial lasting several months or a year evidential debris has ample opportunity to contaminate genuine and probative evidence”.⁵⁸ The counter-balance is, as the SPO suggests, an assessment by the Trial Panel of the weight that should be ascribed to each admitted item, following the end of the trial.

29. This post-trial assessment is undoubtedly essential. It becomes exponentially more difficult with an evidential record of this size. 5,404 items have already been admitted. The parties are waiting for a decision on approximately 1,500 other items submitted through bar table motions, while there still remains at least 43 witnesses to testify in court⁵⁹ and approximately the same number of witnesses whose evidence the SPO intends to seek admission of in writing. Considering the SPO’s exhibit list totals more than 20,500 items,⁶⁰ it appears inevitable that the SPO will file further, significant, bar table requests. It is difficult to see how, with an evidential record of this size, the

⁵⁸ P. Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials’, *Journal of International Criminal Justice*, Vol. 8(2), May 2010, pp. 539–573.

⁵⁹ KSC-BC-2020-06/F02693, *Prosecution notice of further changes to witness list*, 1 November 2024, fn. 10.

⁶⁰ KSC-BC-2020-06/F02511/A02, *Annex 2 - Prosecution submission of amended exhibit list*, 27 August 2024.

Trial Panel and the parties will be in a position to undertake the kind of full review that would be required, and which the SPO is now relying on to justify the admission of even more documents. As such, the admission of thousands of pages of documents through the bar table on the basis that weight can be ascribed later, is precisely the kind of approach that will give rise to actual prejudice, by leading to an unmanageable trial record. The safeguard proposed by the SPO, relied on to submit that there is no prejudice arising from admission of the Items, will be rendered ineffective precisely because of the size of the evidential record.

C. THE “ADDITIONAL DOCUMENT” IS INADMISSIBLE

30. The Defence position remains that there is no reasonable ground to believe that P01687_ET MFI / P01687 MFI is authentic. The Trial Panel’s decision not to admit this item was grounded in the lack of information about the handwritten Cyrillic pages, and on the understanding that there was further information presented to the Trial Panel in the *Mustafa* case that had been relied upon to warrant admission in those proceedings.⁶¹

31. These concerns remain. The purported additional information from the *Mustafa* proceedings has not been provided. As to the handwritten Cyrillic pages, the SPO points to their translation, but without offering submissions to explain their relation to the rest of the compilation, to counter the Defence position that these pages in fact suggest that the item is fabricated. The information that the compilation was seized by Serbian forces is a statement from an ICTY investigator which has not been offered for admission in these proceedings and who is not a witness in this case, in contravention of the Trial Panel’s determination that it will not base assessments of admissibility on material that is not offered for admission.⁶² The evidence said to

⁶¹ KSC-BC-2020-06, Transcript of Hearing (W04669 Testimony), 26 September 2024, [REDACTED].

⁶² F01603, para. 50.

corroborate some of the information contained in the compilation adds nothing in terms of either provenance or authorship.⁶³ No witness has authenticated this compilation of documents, which contains different handwriting and different languages, and the SPO has failed to establish when, where, by whom and for which purpose the compilation was created. P01687_ET MFI / P01687 MFI does not come anywhere near the standard required for admission.

III. CLASSIFICATION

32. These submissions contain confidential information about witnesses and documents, and as such, are filed confidentially. A public redacted version will be filed as soon as possible.

IV. CONCLUSION AND RELIEF SOUGHT

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

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

[Word count: 5,980 words]

⁶³ See SPO Request, fn. 91: the paragraphs of the Annex referred to by the SPO indicate that: (i) the document forms part of a range of documents received by the ICTY Office of the Prosecutor from the Serbian authorities in October 2001 in 64 binders; and (ii) that the Serbian authorities stated that the documents in question "*were found in regional and local KLA headquarters, after anti-terrorist actions of the security forces of the Ministry of Interior of the Republic of Serbia carried out during 1998 and 1999 in the regions where KLA armed terrorist groups were active [...]*" and "*handed over to the then RDB by the MUP of the Republic of Serbia consecutively, depending on the place and time of the antiterrorist action, i.e. when there was possibility for it*".

Respectfully submitted on 15 November 2024



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