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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Trial Panel II** Judge Charles L. Smith, III, Presiding Judge Judge Christoph Barthe Judge Guénaël Mettreaux 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 Submission of List of First 12 Witnesses and Associated Information (F01243), With Confidential Annexes 1-12, dated 13 February 2023

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I. INTRODUCTION

1. The Defence for Mr Thaci, Mr Veseli, Mr Selimi, and Mr Krasniqi ("The Defence") hereby notify their preliminary objections to the admissibility of exhibits to be tendered through the first twelve SPO witnesses, as well as the anticipated length of their cross-examination for some of the witnesses, if any,[1] in response to the Prosecution submission of list of first 12 witnesses and associated information.[2]

2. The Defence stresses that these are only preliminary objections and estimates, prior to having heard the witness's evidence in chief and at a time when the Defence has just been disclosed 56 000 pages of documents. As the Defence indicated in its Joint Request for Relief,[3] the volume of material that the Defence must read, analyse and investigate in relation to just the first four witnesses exceeds 11,000 pages. Moreover, this material is not well-organised: as explained below, the Defence has faced a number of difficulties in identifying correctly the documents to which the SPO refers in its filings. In light of these circumstances, the Defence has not had the time to review each document in detail, to consider them in conjunction with other related documents to assess their reliability, or to carry out further investigations. Consequently, the Defence's time-estimates for the cross-examination of witnesses, to the extent that it has been able to provide them, are necessarily provisional.

3. The Defence reserves the right to withdraw or make further objections and reconsider the need to cross-examine witnesses, once each witness' examination-in-chief starts. Only then will the Defence be in a position to assess the relevance of the items and the merits of the SPO's request to tender exhibits through specific witnesses,

[1] *See* Annexes 1 to 12.
[2] KSC-BC-2020-06/F01243, 1 February 2023, Public.
[3] F01271, Joint Defence Request for Relief Pursuant to Article 21(4)of the Law and Rule 143 of the Rules, 9 February 2023, paras. 29-30.

as well as the scope of the witnesses' testimony and the necessity, or not, to cross-examine them.

4. The Defence highlights that the SPO's so-called list of 'Proposed documents and exhibits to be used with the witness' is so poorly presented, that it has immeasurably complicated the task of the Defence in identifying potential objections. In particular, the list is presented only as ERNs, without any other key information such as dates and descriptions. Complicating matters further, the ERNs are also often incomplete; for example, lacking indications of which (possibly redacted) version of a document is intended,[4] or citing only a range of ERNs instead of including the particular ERNs within that range, *i.e.* the corresponding excerpts.[5] Taken together, these factors make it difficult for the Defence to identify the relevant documents. In addition, the SPO has not consistently identified the particular language version of a document that it seeks to rely on. For example, while the working language of the proceedings is English, the SPO has often only identified an Albanian version of a document without linking its relevant English translation (which will also need to be used by the parties during the official proceedings).[6] In other instances, the SPO has identified an English translation without also including the Albanian original.[7]

5. The SPO's failure to provide the relevant information in a comprehensible format has severely encroached upon the limited time available for Defence

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[4] *See, e.g.*, 031096-031112 and SITF00069026-00069029, identified as proposed documents or exhibits to be used with [REDACTED], which are also marked with '[REDACTED]' in the versions disclosed to the Defence.
[5] *See, e.g.*, '067868-01 through 067868-22', as stated for [REDACTED].
[6] *See, e.g.*, U000-5395-U000-5395, identified as proposed document or exhibit to be used with [REDACTED]. No English translation is linked on Legal Workflow either. This particular issue is complicated further by the fact that some documents have a number of English translations – for example, where a large document has various English translations of smaller sub-parts, or individual pages.
[7] *See, e.g.*, SPOE00067084-SPOE00067089-ET, SPOE00067093-SPOE00067097-ET and SPOE00067098-SPOE00067101-ET, identified as proposed documents or exhibits to be used with [REDACTED].

preparation causing multiple team members to expend resources identifying the relevant documents, to the detriment of other pending obligations. To assist the Trial Panel, the Defence has identified most of the relevant documents on this occasion. However, the Defence therefore asks the Trial Panel to order the SPO, in future, to (a) provide a table of exhibits per witness containing the complete ERN (including the RED version and ET or ALB translations), the date, a description, and the source of the document (metadata already present in Legal Workflow),[8] and (b) create a specific 'Exhibits to be used during examination-in-chief' presentation queue in Legal Workflow, per witness, linking the relevant exhibits to the corresponding witness, at the time of filing the list.

6. This would ensure that all parties, as well as the Trial Panel, are aware of exactly which documents (and versions of documents) are sought to be admitted for each witness. This will further facilitate the formulation of objections, if any, and the assessment of the merits of such objections by the Trial Panel, instead of having each team, the Victims' Counsel and the Trial Panel, separately, having to identify the relevant documents listed by the SPO. Such an approach will contribute to the expeditiousness of the trial, especially when considering the number of witnesses the SPO intends to rely on (323) and the number of exhibits on the latest SPO Exhibit List (18 560).[9]

7. The Defence further notes with concern that, of the first 12 witnesses, seven have been granted the protective measure of face and voice distortion during testimony and eight will have their names redacted from all court records.[10] These in-court protective measures will be applied to all the first five witnesses who are

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[8] *See*, for instance, KSC-BC-2020-06/F01262, Annexes 1 to 7 of Prosecution motion for admission of evidence of Witnesses [REDACTED] pursuant to Rule 154, 7 February 2023. In particular, the Defence notes that these tables include a detailed breakdown of ERNs and the associated descriptions.
[9] KSC-BC-2020-06/F01154/A02, Confidential.
[10] [REDACTED].

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scheduled to give direct evidence for around [REDACTED] hours. The effect of these protective measures is that for much of at least the first three weeks of the trial, the ability of the public to follow proceedings will be very considerably constrained.

8. The protective measures granted by the Pre-Trial Judge may be reviewed by the Trial Panel. The Accused have the right to a public hearing. It is particularly important that to the Defence that the public in Kosovo are able to follow proceedings, since it is an important safeguard that if a witness makes an untrue allegation in public proceedings, members of the public may come forward to the Defence with the material to refute that allegation. The Defence therefore requests the Trial Panel to closely scrutinise the justification for in-court protective measures and to lift any in-court protective measures that are no longer strictly necessary.

9. Last, the Defence stresses that there are significant evidentiary and procedural issues regarding the methodology advanced by the SPO regarding the admission of Rule 154 statements. For example, the SPO Rule 154 submissions include hundreds of pages of testimonies with no focus on the salient issues. While the use of 92*ter* was relied on extensively to streamline the proceedings at the ICTY, there were naturally occasions where it was found that the introduction of evidence via this rule would **not** enhance the efficiency of the proceedings. Thus, in *Dordevic*, the Trial Chamber denied the Prosecution's request to introduce the evidence of witness Aleksandar Vasiljevic via 92*ter* (equivalent to KSC Rule 154), where his prior testimony which the OTP sought to introduce, dealt with a wide range of issues not directly relevant to the case, the introduction of which would have **wasted significant time**. Finding that "an examination-in-chief in respect of Aleksandar Vasiljevic could direct his evidence to matters more directly relevant to the Indictment," the Chamber ruled that the witness would be heard in the ordinary way".[11] This matter will be

[11] ICTY, *Dordjevic*, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter, 10 February 2009, para 13.

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explored further in the Defence response to the 'Prosecution motion for admission of evidence of Witnesses [REDACTED] pursuant to Rule 154'.[12]

II. PROCEDURAL BACKGROUND

10. At the Status Conference on 16 December 2022, the Trial Panel decided that the trial should start on 1st March 2023 and ordered the SPO to provide, by 1 February 2023, the list of the first 12 witnesses it intends to call to testify, and to indicate the following in respect of each witness:

> The name and pseudonym of the witness; the order in which the witness will be called; all prior statements or transcripts of evidence of the witness; whether the SPO proposes that the witness should give evidence partly or wholly live; and whether the SPO intends to tender the witness's statement or transcript of evidence pursuant to Rule 154; five, the issues, facts, and circumstances in relation to which the witness will be examined; six, the estimated time for the direct examination; seven, documents and exhibits which the SPO proposes to use with each witness identified by their electric record number, ERN; and eight, protective measures ordered in relation to the witness with reference to relevant orders and any application for variation of such order. [13]

11. The Trial Panel then issued the following corresponding order to the Defence teams, the deadline for which was subsequently set to 13 February 2023[14]:

> each Defence team, as well as counsel for victims, are ordered to notify the Panel and other parties and participants in respect of each of the first 12 SPO witnesses: One, whether its intends to cross-examine the witness, and if so, the proposed duration of the cross-examination; two, whether it objects to the admission of the witness's statement pursuant to Rule 154, if offered by the SPO under the rule, and the general grounds on which objection is taken to its admission; three, whether it objects to the admission of any or all of the documents which the SPO proposes to use with that witness and the general grounds on which objection is taken.[15]

[12] KSC-BC-2020-06/F01262.
[13] Oral Order 3, 16 December 2022, pp. 1773-1774.
[14] Oral Order, 18 January 2023, p. 1904.
[15] Oral Order 3, 16 December 2022, p. 1774.

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III. SUBMISSIONS

12. The Defence hereby provides a general analysis of the admissibility of exhibits and more specific submissions on particular categories of items whose admission is sought by the SPO.

13. The starting point for the assessment of admissibility of evidence at the KSC, is the requirement in Article 37(2) of the KSC Law that "[i]n principle, all evidence should be produced in the presence of the accused with a view to adversarial argument".[16] Rather than the adjudication of criminal responsible through documentary or physical evidence, **the principle of orality and a preference for live evidence** is enshrined in the procedural law.[17]

14. As such, proceedings at the KSC follow the practice of the international criminal courts that "the most appropriate method for the admission of a document or another item of evidence is through a witness who can speak to it and answer questions in relation to it".[18] Documents in other KSC proceedings have been found inadmissible unless a witness can be presented to attest to their truth and reliability.[19]

15. The Trial Panel retains a discretion to admit documents with weight to be ascribed at a later stage. However, there is a point at which the **size of the evidential record renders it incompatible with a fair trial**. Trial Chambers have recognised that the duty to ensure the fair and expeditious conduct of proceedings "includes keeping the case to manageable size", and that "overwhelming the trial record with a large

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[16] KSC Law, Article 37(2).
[17] *See, e.g.*, KSC Rules, Rule 141(1), Rule 153.
[18] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on the Prosecution's First Bar Table Motion, 13 April 2010, paras. 8-9; ICC, *Prosecutor v Ntaganda*, ICC-01/04-02/06-1838, Trial Chamber VI, Decision on Prosecution's Request for Admission of Documentary Evidence, 28 March 2017, para. 13.
[19] *See, e.g.*, *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00334, Trial Panel II, Decision on the Prosecution Request for Admission of Items Through the Bar Table, 29 September 2021 ("*Gucati & Haradinaj* SPO Bar Table Decision"), para. 57.

number of documents, often of cumulative nature, will neither expedite the proceedings, nor facilitate the fair adjudication of the case".[20] Unsurprisingly, "ruling evidence inadmissible, […] thereby eliminating evidential debris and reducing the overall size and duration of cases" is cited as a key measure to streamline and reduce the duration of proceedings.[21]

16. Where a party seeks to introduce an item of documentary or physical evidence, there is a duty to ensure that it meets the four cumulative requirements in Rule 138(1); the evidence must be: (i) relevant; (ii) authentic; (iii) probative; and (iv) its probative value must not be outweighed by its prejudicial effect. [22]

17. Evidence is **relevant** where it is "connected, directly or indirectly, to the elements of the crime or the mode of liability pleaded in the indictment or other facts or circumstances material to the case".[23] Evidence is considered to be **authentic** "if it is what it professes to be in origin or authorship."[24] Authenticity must be "duly established", meaning that unless origin and genuineness are apparent from the document itself, the tendering party must offer evidence to prove authorship and

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[20] ICTR, *Prosecutor v Karemera et al.*, ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Motion to Admit Documents obtained from the RPF Archives in Kigali, 13 February 2009, para. 12.

[21] *See, e.g.*, G. Mettraux, S.A. Fisher et al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court* (2014), p. 152.

[22] KSC, *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00502, Trial Panel II, Decision on the Defence Request for Admission of Items through the Bar Table and Related Matters, 17 December 2021 ("*Gucati & Haradinaj* Defence Bar Table Decision"), para 9; *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00334, Trial Panel II, Decision on the Prosecution Request for Admission of Items Through the Bar Table, 29 September 2021 ("*Gucati & Haradinaj* SPO Bar Table Decision"), para. 11.

[23] KSC, *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00281/RED, Trial Panel I, Public Redacted Version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, 13 December 2021 ("*Mustafa* Decision on Admission"), para. 11; *Gucati* & *Haradinaj* Defence Bar Table Decision, para. 10, finding a demonstration of relevance "requires more than a tenuous or remote connection to the facts and circumstances of a case."; *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings, 17 September 2021 ("*Gucati & Haradinaj* Order on Conduct"), para. 19.

[24] *Gucati* & *Haradinaj* Defence Bar Table Decision, para. 11: "it is for the tending Party to provide indicators of a proposed exhibit's authenticity, where the document does not, on its face, contain sufficient indicators of authenticity."

integrity.[25] Evidence will be considered **as having probative value** when "it tends to prove or disprove an issue which is relevant to the case. Probative value is determined by: the prima facie reliability of the tendered evidence; and the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case."[26] A bloated evidential record impedes expeditious proceedings and will "impose a heavy burden on the Chamber and opposing party or parties".[27]

18. In addition, a party should produce a clear **chain of custody**, demonstrating an unbroken record of custody and a reporting of all movements of an item of evidence, in order to demonstrate provenance and integrity.[28]

19. Against this background, documents should be authenticated by a witness who can speak to them and be cross-examined about them, and a proper foundation should be laid establishing the knowledge of the witness of the item in question. As regards **documents purporting to be from organisations**, such as the KLA, or public authorities, "which do not bear extrinsic indications as to their origin and author must always be authenticated by way of attestation or affidavit from an identified representative of the originating organisation."[29]

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[25] ICC, *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-1263-AnxB-Red, Trial Chamber I, Reasons for Oral Decision of 15 January 2019, Reasons of Judge Geoffrey Henderson, 16 July 2019 ("*Gbagbo* Reasons of Judge Henderson"), para. 32.

[26] *Mustafa* Decision on Admission, para. 13.

[27] ICTR, *Prosecutor v. Karemera et al*., ICTR-98-44-T, Trial Chamber III, Interim order for the prosecution to identify relevant and probative passages of certain materials it intends to tender into evidence under Rule 89(C) of the Rules of Procedure and Evidence, 8 August 2007, para. 12.

[28] See, e.g. ICC, Regulations of the Office of the Prosecutor, Regulation 22 Chain of custody "1. The Office shall ensure an uninterrupted chain of custody of documents and all other types of evidence. All evidence shall constantly be in the possession of the collector or the individual authorised to have possession of the item."; KSC-BC-2020-07/F00005, Decision Authorising a Seizure, 7 September 2020, para. 18; ICTR, *Prosecutor v Bagosora et al*, ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole, 13 September 2004; ICTY, *Prosecutor v. Delić*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998.

[29] ICC, *Prosecutor v Katanga*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 24.

20. **Letters, diaries, and books** should also be authenticated by their authors, particularly where admission is being sought for the truth of its contents. Notably, Trial Chambers have routinely held that that entire books (and other similarly lengthy documents) should not be admitted into evidence, where only certain sections are relevant to the evidence of the witness through whom the document is tendered.[30] Reports authored **by NGOs and Human Rights groups** should also be tendered through their authors, and have also been considered inadmissible given their reliance on anonymous sources and the inability of the Chamber to properly evaluable the reliability and authenticity of these sources and the information relied on.[31]

21. As for **media and press articles**, the Trial Panel in *Gucati* held that the probative value and, in particular, the reliability of these items may be more accurately determined through the testimony of witnesses who can contextualise their contents.[32] Moreover, media and press articles should not be admitted where they contain statements attributed to the Accused, which the Defence is not in a position to verify, as none of the authors of the articles, where known, have been listed to testify as to the truth of their content.[33]

22. As regards the **prior written statements of SPO witnesses**, Rule 154 sets out the conditions under which the Panel may admit the written statement of a witness or transcript of evidence given by a witness in proceedings before the Specialist Chambers that goes to proof of the acts and conduct of the Accused as charged in the indictment, in lieu of direct examination, namely:

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[30] ICTY, *Prosecutor v. Milošević*, IT-02-54-T, Trial Chamber, Order on admission of documents […], 7 February 2005; ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber I, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, para. 25.
[31] *Prosecutor v Prlić et al*, IT-04-74-T, Decision on Prlic Defence Motion for Admission of Documentary Evidence, 6 March 2009, para. 26.
[32] Gucati SPO Bar Table Decision, para. 39.
[33] Gucati SPO Bar Table Decision, para. 41.

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(a) the witness is present in court;

(b) the witness is available for cross-examination and any questioning by the Panel; and

(c) the witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined.

The admission must also otherwise fulfil the criteria under Rule 138(1) of the KSC Rules, meaning that the SPO must also demonstrate relevance, authenticity, probative value and the absence of prejudicial effect for its admission.

23. The decision to admit prior statements of testifying witnesses is one which must have the **fairness of the proceedings at its center**. The Trial Panel in *Mustafa* followed the practice of other international courts by reinforcing that the admission of evidence should not prejudice the rights of the Accused.[34] The Panel is required to carry out a "cautious item-by-item analysis". This assessment, sufficiently reasoned and explained, should be made on a case-by-case basis where the factors to be considered may vary per case and per witness.[35] While in certain circumstances, the interests of justice are better served by allowing the introduction of prior recorded testimony, under no circumstances can prior recorded testimonies be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused.[36] Moreover, in order for a statement to constitute prior recorded testimony the person providing it must have been questioned in their capacity as a

[34] *The Prosecutor v. Salih Mustafa*, Decision on the submission and the admissibility of evidence, 25 August 2021. See also ICC, *Prosecutor v Al Hassan*, Appeals Chamber: Judgment on the Appeal of the Prosecution against Decision on the Prosecution's Second Request for the Introduction of P-113's Evidence, 13 May 2022, para. 84.

[35] ICC, *Prosecutor v Gbagbo*, Appeals Chamber: Judgment on the Appeals…against the Decision on the Prosecutor's Application to Introduce Prior Testimony pursuant to Rules 68(2)(b) and 68(3), 1 November 2016, para. 69

[36] ICC, *Prosecutor v. Al Hassan*, Trial Chamber: Decision on Second Prosecution Request for the Introduction into Evidence of P-0113's Evidence, 15 November 2021, para. 18.

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witness, and must have understood that the information may be relied on in the context of legal proceedings.[37]

24. The admission of a prior recorded statement also depends on the centrality of the evidence in question to the SPO case. Where the evidence in question goes to matters **materially in dispute**, contains frequent **references to the accused** and his or her conduct, and in circumstances where the Defence challenges the credibility of the witness in question, the evidence should be presented orally.[38] The prior statements of a co-Accused represent a particularly prejudicial form of hearsay which may not be used for the truth of their contents as regards another co-Accused.[39]

25. Prior statements should not be admitted where **no real time-saving** can be demonstrated, and direct examination would allow the testimony to be more focused than in the written material.[40]

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[37] ICC, *Prosecutor v Ntaganda*, Trial Chamber: Preliminary Ruling on Prosecution Request for Admission under Rule 68(3) of the Prior Recorded Testimony and Associated Material of Witness P-0761, 27 February 2017, para. 13

[38] *See*, e.g. ICTY, *Prosecutor v Stanisic & Zupljanin*, IT-08-91-T, Decision on Denying Prosecution's Motion for Admission of Evidence of Pedrag Radulovic Pursuant to Rule 92 ter, 1April 2010, para. 10; ICC, *Prosecutor v Al Rahman*, Trial Chamber: Decision on the Prosecution's Second and Third Requests to Introduce Prior Recorded Testimonies under Rule 68(3), 8 February 2022, paras. 72, 78; ICC, *Prosecutor v Ntaganda*, Trial Chamber: Decision on Defence Request under Rule 68(3) for Admission of Prior Recorded Testimony of Witness D-0017, 22 November 2017, para. 8; ICC, *Prosecutor v Ntaganda*, Decision on Defence Request to Admit the Prior Recorded Testimony of Witness D-0243, 30 November 2017, para. 13;

[39] ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 53; ICTY, *Prosecutor v. Boskoski and Tarculovski,* Decision on Prosecution Motion for Admission into Evidence of Documents MFI P251, P379, and P435, para. 46.

[40] ICC, *Prosecutor v Gbagbo*, Trial Chamber: Decision on the Prosecution's Application to Conditionally Admit the Prior Recorded Statement and Related Documents in relation to Witness P0045, 2 February 2017; ICTY, *Prosecutor v Dordjevic*, IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter, 10 February 2009, paras. 13,15.

Communiqués

No KLA communiqués should be admitted unless the SPO can tender such evidence through a witness who is able to authenticate it.[41] Without an authenticating witness, the communiqués have insufficient reliability, authenticity and probative value to meet the test for admission. They are unsigned. They do not bear stamps, seals or any other indicia of authenticity. They do not indicate their author. Often the document produced is not the original communiqué, but a newspaper report of the communiqué. The Defence notes that in at least one EULEX case, a communiqué was dismissed due to the inability to attribute authorship and to ascertain the veracity of the document source.[42] Additionally, during the *Haradinaj* retrial at the ICTY, it was also found that some communiqués contained factually untrue statements.[43]

26. Despite the heavy reliance placed upon the communiqués by the SPO, there appears to be no more clarifying evidence as to the origin and content of the communiqués than was submitted before the ICTY. The Defence re-emphasises that the ICTY considered the very same communiqués and concluded that they did not establish a common criminal plan. In *Haradinaj* the ICTY Trial Chamber noted that communiqués were part of the KLA's propaganda materials, compiled during particularly difficult and chaotic conditions, with the aim of boosting morale and making the KLA seem more organised than they really were.[44] They were found to be

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[41] The Defence do not in principle object to the SPO attempting to put certain communiqués to [REDACTED] and [REDACTED], but stresses that they should not be admitted if the witnesses cannot authenticate them.
[42] Note the queries related to the reliability of the Military Police Communiqués, as emphasised in: Court of Appeals for Kosovo, *The Prosecutor v. Fatmir Limaj* (Belanica), PaKR no. 206/2018, 30 October 2018, para. 7, which states that Press Release No. 4 "in no way can…be taken as evidence allegedly issued by the General Headquarters of the Kosovo Liberation Army."
[43] *Haradinaj* Retrial Judgment, para. 635; IT-04-84 T5000-T5086, pp. 5011, 5044-5045.
[44] *Haradinaj* Trial Judgment, para. 472; *Haradinaj* Retrial Judgment, para. 635; IT-04-84 T5000-T5086, p. 5035.

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variously exaggerated, altered, vague, and lacking important particulars.[45] Moreover, they were not indicative of any intent on the part of the General Staff, nor did they constitute policy.[46] The SPO has not adduced any additional evidence relevant to the communiqués beyond that which was adduced at the ICTY, which is capable of changing that conclusion. All of these factors suggest that the communiqués have insufficient probative value to establish facts in criminal proceedings. For these reasons, the Defence puts the SPO on notice that it will strongly object to the admission of communiqués through bar table motions.

Materials Seized from Jakup KRASNIQI and Rexhep SELIMI

27. The Defence for Mr. Krasniqi and Mr. Selimi object to the admission of materials seized at the time of their arrest. The Defence will develop this argument further in response to the SPO's Bar Table Motion.[47] In outline, the SPO failed to comply with the Rules regarding search and seizure. Rule 39(4) requires the SPO to "prepare an inventory with a detailed description of and information regarding each item seized" which must be signed by the accused at the scene. In breach of this Rule, during the search on 4 November 2020 the SPO prepared an inventory containing vague descriptions such as "[REDACTED]" or "[REDACTED]".[48] It was not until five months later, on 28 April 2021, that the SPO produced an inventory said to contain a detailed description of documents found during the search. This was a flagrant breach of Rule 39(4).[49] As a result, there is no way to verify whether those documents placed on the inventory in April 2021 were in fact found during the search in November 2020:

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[45] *Haradinaj* Retrial Judgement, para. 635.
[46] IT-04-84 T5000-T5086, pp. 5035-5037, 5044, lines 18-21.
[47] KSC-BC-2020-06, F01268, Specialist Prosecutor, Prosecution Application for Admission of Material through the Bar Table with Public Annexes 5 and 8, and Confidential Annexes 1-4, 6 and 7 , 8 February 2023, confidential.
[48] [REDACTED].
[49] KSC-BC-2020-06, F00251, Pre-Trial Judge, *Decision on the Request of the Veseli Defence Regarding Documents Seized during the Search* ("Decision Veseli Request"), 16 April 2021, confidential, para. 15.

the detailed description of each item was not produced contemporaneously and signed by Mr. Krasniqi. Accordingly, the Items seized are inadmissible pursuant to Rule 138(2) because the evidence was obtained in breach of Rule 39(4), which casts substantial doubts as to its reliability. In this regard, the obligation remains on the SPO to demonstrate that any documents which were obtained pursuant to a search and seizure fully complied with the applicable provisions and therefore, it must fully disclose to the Defence all relevant information in its possession or control relating to this question. Absent this information, it must not be made incumbent on the Defence to prove the existence of an illegality.

Statements of Co-Accused

28. The Defence objects to the use with/admission through [REDACTED] of [REDACTED],[50] [REDACTED]. The Defence submits that it would be fundamentally unfair to admit these statements for use against any of the Accused, as they pertain to a central issue in the case, yet lack sufficient indicia of reliability, given that they were given neither under oath, nor with the benefit of legal advice.[51]

29. The use of these statements as against [REDACTED]'s Co-Accused would pose even greater difficulties, given that the other Accused – namely [REDACTED] – were not present when the statements were taken and had no opportunity to challenge [REDACTED] claims. Moreover, it does not appears that any other evidence in the case is capable of corroborating these statements, casting even further doubt on their reliability.

[50] [REDACTED] items 10, [REDACTED] and item 11, [REDACTED].

[51] *Prosecutor v. Boskoski and Tarculovski,* Decision on Prosecution Motion for Admission into Evidence of Documents MFI P251, P379, and P435, para. 42.

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30. The Defence's submissions in this regard are further supported by Article 123 of the Kosovo Criminal Procedure Code,[52] related to 'Pretrial Interviews, Pretrial Testimony and Special Investigative Opportunities', which provides that:

> *5. Statements provided by a defendant in any context, if given voluntarily and without coercion, are admissible during the main trial against that defendant, but not co-defendants. Such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction.*

IV. CONCLUSION

31. For the above reasons, the Defence respectfully requests that the Trial Panel:

- **TAKE** notice of the Defence preliminary objections and estimates of cross-examination;

- **ORDER** the SPO, for any upcoming list of witnesses and related exhibits, (a) to provide a table of exhibits per witness containing the complete ERN (including the RED version and ET or ALB translations), the date, description field and source of the document , and (b) to create a specific 'Exhibits to be used during examination-in-chief' presentation queue in Legal Workflow, per witness, linking the relevant exhibits to the corresponding witness, at the time of filing the list;

- **SCRUTINISE** the justification for in-court protective measures for each SPO witness and lift any in-court protective measures that are no longer strictly necessary.

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