

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 Guénaël 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 evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154’”

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I. INTRODUCTION

1. The Defence teams for Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (collectively, “the Defence”) are united in their concern, as expressed during the 15 February 2023 hearing,¹ about the volume of written evidence the SPO is seeking to introduce directly into the record of this case, as opposed to being presented through the live evidence of witnesses.

2. The purpose of Rule 154 is efficiency. It is an exceptional procedure,² which exists “to ensure an effective and expeditious trial while respecting the rights of the Accused”.³ The manner in which the SPO seeks to use it in these proceedings is inconsistent with this objective.

- (i) First, the SPO seeks to use Rule 154 to admit masses of unedited transcripts with variable relevance. Such misuse will give rise to a bloated and unmanageable case record, which will come back to haunt the parties and the Trial Panel in its later stages.

¹ KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023 (“Transcript of SPO Preparation Conference”), pp. 1926-1934, and particularly p. 1927, p. 1934: “Mr Emmerson: ...whereas in 92 ter cases in the ICTY there would be a witness statement which presents that witness's evidence, they would then testify to say that they accepted it and maybe give a short summary of certain details and would then be cross-examined by the Defence, here, you are getting seven, eight, nine, ten hours of interview transcripts, all of which go in, all of which will inevitably contain duplication, qualification, lack of clarity, possibly contradiction. And all of this material, relevant or irrelevant, useful, clear or unclear, instead of it being filtered and finessed and put before us and before the Trial Chamber in a coherent and logical fashion, it is going to be shovelled into the Trial Chamber in the hope that the Registry, in preparing summaries for the Bench of the evidence as what it shows and what it doesn't, will do what should really be the Prosecution's job for them.”

² See, e.g., ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, Appeals Chamber, Judgment on the appeal of the Prosecution against Trial Chamber X's “Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022 (“*Al Hassan* Rule 68 Decision”), para. 80.

³ ICTY, *Prosecutor v. Prlic et al.*, IT-04-74-T, Trial Chamber III, Decision on the Application of Rule 92ter of the Rules, 25 June 2007 (“*Prlic* Rule 92ter Decision”), p. 2; *Prosecutor v. Hadzic*, IT-04-75-T, Trial Chamber, Decision on Defence Motion for Admission of Evidence of DGH-053 pursuant to Rule 92 ter, 29 August 2014 (“*Hadzic* 2014 Rule 92ter Decision”), para. 6 – discussing Rule 92ter of the ICTY Rules of Procedure and Evidence, which is in essentially the same terms as Rule 154.

- (ii) Second, the SPO seeks to supplement its use of Rule 154 with lengthy examination-in-chief. At other Tribunals where the admission of prior statements was permitted through equivalent mechanisms,⁴ the proposing party was limited to a very short examination-in-chief to cover the requisite formalities.⁵ However, in these proceedings, the SPO seeks the admission of Rule 154 statements **in addition to** lengthy examinations-in-chief. For example, the SPO proposes **4.5 hours** of evidence in chief for W04744,⁶ as well as the admission of 267 pages of prior statements and hundreds more pages of exhibits. Similarly, the SPO proposes **3.5 hours** of evidence in chief for W02161, as well as the admission of seven prior statements or testimonies.⁷ As such, this SPO practice represents the worst of both worlds; lengthy examination-in-chief accompanied by voluminous documents.

3. 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 number of documents, often of cumulative nature, will neither expedite the proceedings, nor facilitate the fair adjudication of the case”.⁸ In a case with 312 proposed SPO witnesses,

⁴ See, e.g., Rule 92 *ter* of the ICTY Rules of Procedure and Evidence; Rule 68(3) of the ICC Rules of Procedure and Evidence.

⁵ See, e.g., ICTY, *Prosecutor v. Mladic*, IT-09-02-PT, Transcript of Pre-Trial Conference, 24 April 2012 (“*Mladic* Pre-Trial Conference”), pp. T-313-314, pursuant to which the Chamber recalled its guidance that in principle, examination-in-chief of Rule 92 *ter* witnesses should be limited to 30 minutes, with, at most, an additional 30 minutes to tender related documents through the witnesses.

⁶ KSC-BC-2020-06/F01262, Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154, 7 February 2023, Confidential (“Rule 154 Motion”), para. 17.

⁷ Rule 154 Motion, para. 43.

⁸ 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.

including 168 proposed Rule 154 witnesses,⁹ the risk of an unmanageable trial record is acute.¹⁰

4. The SPO's reliance on Rule 154 is inappropriate in other instances too. For instance, the Defence submits that it has been inappropriately invoked to admit centrally important allegations concerning the acts and conduct of the Accused; testimony adduced via leading questions; or testimony that is simply duplicative, unclear, or contradictory. Nor can Rule 154 material be invoked to proffer significant volumes of unfairly prejudicial hearsay, which should properly be introduced through other witnesses.¹¹ Documents included in the present SPO Rule 154 Motion contain multiple layers of hearsay and information about which the SPO witness in question would be in no position to offer live evidence. Clearly there must be some filter through which this evidence is screened and reduced, rather than just admitted wholesale to the prejudice of the Defence.

5. Proceedings before the KSC are underpinned by the principles of orality, publicity, adversarial argument, and respect for the rights of the Accused.¹² The SPO's present approach to admission of evidence puts the application of all these principles at risk. In order to guard against this, the Defence asks that the SPO be ordered to indicate the excerpts of proposed Rule 154 material for which admission is being sought, and explain the relevance of these excerpts to the charges in the present case.

⁹ KSC-BC-2020-06/F01291/A02, Annex 2 – Amended List of Witnesses, 14 February 2023, Confidential (“SPO Amended List of Witnesses”). The risk of an unmanageable trial record is heightened by the fact that 70 witnesses are proposed to have material admitted through Rule 153, and 38 witnesses are proposed to have material admitted through Rule 155, leaving only 36 wholly live witnesses.

¹⁰ The Trial Panel has repeatedly drawn attention to the need to ensure that this trial is both fair and expeditious: KSC-BC-2020-06, Transcript of Trial Preparation Conference, 18 January 2023 (“Transcript of Trial Preparation Conference”), public redacted version, p.1812 line 10; KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, public redacted version, p. 1697 lines 8-9.

¹¹ ICTY, *Prosecutor v Milutinovic et al.*, IT-05-87-PT, Trial Chamber III, Decision on Prosecution's Rule 92 bis Motion, 4 July 2006, para. 18.

¹² See, Articles 21(2) and(4) and 37(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (“KSC Law”), and Rule 141(1) of KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

This information should be provided in relation to the present Rule 154 request, and those subsequently filed.

6. Finally, the Defence notes that the SPO's repeated reliance on entire transcripts as Rule 154 material creates obstacles to Defence agreement that a different approach would avoid. For example, rather than seeking to tender hundreds of pages of transcripts, the SPO could instead be required to tender a short statement from the witness, creating an efficient and workable framework for eliciting the witness's live evidence. This approach would provide a much clearer basis for the parties to discuss between themselves, to raise objections *inter partes*, and ultimately to agree what sections to include in a statement and what topics to elicit orally without litigation.¹³

7. Taking W04474 as an example, the SPO could produce a short, structured statement setting out the chronology of [REDACTED]. This approach would avoid many of the Defence objections and make agreement much more feasible. By contrast, the SPO's choice to tender the entire 267 page transcript, complete with sections containing multiple layers of hearsay and others that make direct allegations against the accused, creates a situation where the Defence will be obliged to oppose the SPO.¹⁴

8. In addition to the submissions that follow, the Defence asks the Trial Panel to take into account its preliminary objections on Rule 154 material filed on 13 February.¹⁵

¹³ *Mladic* Pre-Trial Conference, pp. T.322-323, finding that the Court is not compelled to admit transcripts from previous cases or any other specific form of testimony under Rule 92 *bis*, 92 *ter* or 92 *quater*. Instead, the Court reaffirmed its guidance to the Parties to tender witness statements rather than transcripts from other cases under those rules, on the basis that it would better ensure a fair and expeditious trial.

¹⁴ Working line by line through the entire transcript to reach agreement is not realistic for any Party, given the time pressure litigation necessarily involves.

¹⁵ KSC-BC-2020-06/F01286, Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information (F01243), With Confidential Annexes 1-12, 13 February 2023, Confidential ("Joint Response to First 12 Witnesses").

II. PROCEDURAL HISTORY

9. On 18 January 2023, the Trial Panel ordered the SPO to file its Rule 154 motion in respect of the first 12 witnesses by 7 February 2023 at 4.00pm.¹⁶ The Trial Panel also ordered the Defence to respond by 20 February 2023 at 4.00pm.¹⁷

10. The SPO Rule 154 Motion was filed on 7 February 2023. This application sought the admission of statements and associated exhibits for the seven identified witnesses pursuant to Rule 154 of the Rules, and contained seven annexes of material.

III. APPLICABLE LAW

11. Rule 154 sets 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:

- (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.

12. Material admitted pursuant to Rule 154 should also fulfil the criteria under Rule 138(1) of the Rules, which sets four cumulative conditions for evidence to be considered admissible: it must be relevant, authentic, and probative; and its probative value must not be outweighed by its prejudicial effect.

¹⁶ Transcript of Trial Preparation Conference, Oral Order 3, p. 1902.

¹⁷ *Ibid.*

13. The admission of material pursuant to Rule 154 is, and must be, an exceptional procedure.¹⁸ Consequently, any application for admission of material through Rule 154 must not undermine the principles of orality, publicity and the need for adversarial argument, which necessarily underlie the proceedings.¹⁹ The Trial Panel in *Mustafa* previously held that “[t]he admitted written statement/transcript **complements** the oral testimony of the witness”, since “[t]he non-calling Party has the opportunity to test the entirety of the witness’s testimony, both in relation to the in-court testimony and the written statement/transcript.”²⁰

14. The Trial Panel in *Mustafa* implicitly added a fourth condition to those set out in Rule 154 – namely, consistency with the rights of the accused – when it held that “the Panel shall interfere with the calling Party’s choice regarding its evidence presentation where potential prejudice arises to the rights of the Accused”.²¹ This is consistent with the jurisprudence of other international courts and tribunals, which required that the introduction of material through rules equivalent to Rule 154 should not be inconsistent with, or prejudicial to, the rights of the accused, and should not otherwise prejudice the fairness of proceedings.²² For example, in *Ntaganda*, the ICC Trial Chamber found that:

Rule 68(3) of the Rules²³ constitutes an exception to the principle of the primacy of orality before the Court. The Chamber considers that a cautious, case-by-case

¹⁸ *Al Hassan* Rule 68 Decision, para. 80.

¹⁹ See, Articles 21(2) and 37(2) of the KSC Law, and Rule 141(1) of the Rules.

²⁰ *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00169, Trial Panel I, Decision on the submission and the admissibility of evidence, 25 August 2021 (“*Mustafa* Admissibility Decision”), para. 31 (emphasis added).

²¹ *Mustafa* Admissibility Decision, para. 33.

²² See, e.g., ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-987-Red, Trial Chamber X, Public redacted version of the Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 21 October 2020, para. 10; *Prosecutor v. Bemba*, ICC-01/05-01/08 OA5 OA6, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, paras. 37, 53. See also the cases identified in footnote 3.

²³ Rule 68(3) of the ICC Rules of Procedure and Evidence is in essentially the same terms as Rule 154.

assessment is therefore required, and the impact of any such request on the rights of an accused and the fairness of the proceedings more generally should be considered.²⁴

15. As regards associated exhibits, the practice of the Tribunals was to permit admission of exhibits where they accompany written statements or transcripts and form an “inseparable and indispensable” part of the evidence.²⁵ In order to satisfy this requirement, the document must be one without which the witness’s testimony would become incomprehensible or of lesser probative value. Moreover, the evidence sought to be admitted, whether a written statement or a transcript of oral testimony, must still be relevant and have probative value.²⁶

16. As noted above, the purpose of Rule 154 is “to ensure an effective and expeditious trial while respecting the rights of the Accused”.²⁷ Its overuse risks producing an unmanageable evidential record, particularly when employed for a disproportionate number of witnesses, and extensively in combination with Rules 153 and 155.²⁸ As such, the Defence recalls the Trial Panel’s exhortation to make “effective” use of Rules 153-155, with a view to expediting proceedings whilst maintaining the principles of orality and publicity.²⁹

²⁴ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-845, Trial Chamber VI, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, para. 8.

²⁵ ICTY, *Prosecutor v Hadzic*, IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence of GH-003 Pursuant to Rule 92 *ter*, 18 October 2012 (“*Hadzic* 2012 Rule 92 *ter* Decision”), para. 4; *Prosecutor v. Djordjevic*, IT-05-87/1-T, Trial Chamber II, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *ter*, 10 February 2009 (“*Djordjevic* Rule 92 *ter* Decision”), para. 5; *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-T, Trial Chamber II, Public Redacted Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *ter* (ST012 and ST019), 2 October 2009, para. 5.

²⁶ *Hadzic* 2012 Rule 92 *ter* Decision, para. 4.

²⁷ *Prlic* Rule 92 *ter* Decision, p. 2; *Hadzic* 2014 Rule 92 *ter* Decision, para. 6.

²⁸ ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-685, Trial Chamber V, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, para. 31.

²⁹ KSC-BC-2020-06/F01226/A01, Annex 1 – Order on the Conduct of Proceedings, 25 January 2023, para. 51.

IV. SUBMISSIONS

A. RIGHT TO RAISE FURTHER OBJECTIONS

17. Consistent with the previous practice at the KSC, the Defence understands that the Trial Panel will issue a decision on the admissibility of the proposed Rule 154 materials prior to the in-court testimony of the relevant witnesses. However, the Defence also understands that the final determination as to admissibility will only be made “when the witness appears before the Panel and attests to the accuracy of his or her prior declaration sought to be introduced”.³⁰

18. The Defence therefore reserves its right to raise further objections at the time of the witness’ in-court testimony, in light of the witness’ observations about the material proposed to be admitted through Rule 154.

B. W04474

19. The Defence submits that W04474 is a key witness whose evidence should be heard *viva voce*. Of the 312 witnesses the SPO intends to call, this witness is one of only a handful to make allegations of [REDACTED].³¹ The Defence submits that there are clear advantages to hearing the evidence of central witnesses entirely live, which significantly outweigh the time-saving benefits of admitting the evidence via Rule 154.

20. The Defence questions the time saving advantages of Rule 154 with respect to this witness, given that the SPO has indicated that it needs **four and a half** hours to conduct the witness’s evidence-in-chief, pose supplemental questions, and “highlight,

³⁰ *Mustafa* Admissibility Decision, para. 31.

³¹ See KSC-BC-2020-06/F00999/A01, Annex 1 - Amended Indictment, 30 September 2022, paras. 41, 66 and 149.

clarify, or explain” the contents of the witness’s statements.³² The witness’s statements total 267 pages of SPO interview transcript, reflecting approximately **13 hours of questioning** by the SPO [REDACTED].³³ The cross-examination necessary to address the points raised in both the live testimony and [REDACTED] Rule 154 statements will be considerable.

21. With respect to the documents proposed for admission with the witness’s transcript, the Defence notes that several are duplicates of items that the SPO proposed to be tendered through the witness in its Submission on its First 12 Witnesses.³⁴ The Defence reiterates the specific objections set out in its response.³⁵ In particular:

- (i) [REDACTED] appears to be a note bearing [REDACTED] signature that purports to reflect what [REDACTED] told [REDACTED]. The Defence stresses that [REDACTED] is not an SPO witness and has disavowed the accuracy of that note during his SPO interview.³⁶ Moreover, this note, which relates to the acts and conduct of the accused, does not meet the criteria for Rule 153, 154 or 155 statements.
- (ii) [REDACTED] appears to be a note of a meeting between [REDACTED] and [REDACTED], which contains multiple layers of hearsay. The substance of this hearsay has been denied repeatedly [REDACTED]³⁷

³² Rule 154 Motion, para. 17.

³³ [REDACTED].

³⁴ KSC-BC-2020-06/F01243/A01, Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, 1 February 2023, Confidential (“SPO List of First 12 Witnesses”), pp. 2-3.

³⁵ KSC-BC-2020-06/F01286/A01, Annex 1 to Confidential Response to the Prosecution Submission of List of First 12 Witnesses And Associated Information, 13 February 2023, Confidential (“F01286/A01”).

³⁶ [REDACTED]

³⁷ See KSC-BC-2020-06/F01291/A01, Annex 1 – List of Witnesses Removed from the Witness List dated 2 November 2022, 14 February 2023, Confidential.

- (iii) [REDACTED] appears to be a note of a meeting between [REDACTED] and [REDACTED] which contains multiple layers of hearsay. The substance of this hearsay is highly prejudicial against the Accused and it is of low probative value. Both individuals referenced in this note ([REDACTED]) deny making such statements in their SPO interviews.³⁸ [REDACTED] is not an SPO witness.
- (iv) [REDACTED] appear to be identical [REDACTED] that do not meet the criteria for witness statements as set out in Rules 153, 154 155. Additionally, the Defence objects to the admission of this document pending the decision of the relevant co-accused to testify, and observes that Kosovar law prohibits the use of such statements [REDACTED].³⁹
- (v) [REDACTED] appear to be correspondence between [REDACTED]. The Defence notes that [REDACTED] is not in a position to authenticate these letters.
- (vi) [REDACTED] appears to be a collection of [REDACTED] written after the conflict. The witness merely describes the collection of documents [REDACTED] but cannot authenticate the articles. Much of this material lacks relevance. Additionally, the collection is of dubious provenance and low probative value. The Defence incorporates its previous objections to this material.⁴⁰

22. The Defence submits that the remaining exhibits that the SPO wishes to tender through this witness should be put to her live, given the importance of [REDACTED] evidence; and that the four-and-a-half hours which the SPO estimates it will take to elicit [REDACTED] evidence-in-chief will provide ample opportunity for this.

³⁸ [REDACTED].

³⁹ As previously stated in Joint Response to First 12 Witnesses, paras. 28-30.

⁴⁰ See F01286/A01.

C. W04421

23. W04421's Proposed Evidence and Associated Exhibits⁴¹ are *prima facie* reliable and authentic. The Defence notes that a significant portion of W04421's SPO interview⁴² has been devoted to *establishing* the indicia of authenticity and reliability of her prior statements taken in 2000,⁴³ 2001,⁴⁴ and 2002.⁴⁵ This includes explicit reinforcement by the SPO questioner designed to emphasise the truth and accuracy of the prior statements given by W04421.⁴⁶ As the SPO asserts that the statements in and of themselves meet the indicia for reliability and authenticity required for admissibility, it remains to be seen why such significant time is devoted in the SPO interview to establishing these indicia.

24. The SPO has stated that it requires **two hours** of direct examination to confirm W04421's statements, to pose supplemental questions, and to "highlight, clarify, or explain" the contents therein. This generates a risk of prejudice against the Accused, as the length of time allocated for supplementary direct examination is such that any time savings alleged by the SPO are likely not to be as significant as asserted in their submissions.⁴⁷ **Two hours** cannot reasonably be considered "brief oral testimony."⁴⁸ As a reference point, the Defence note that a Trial Chamber of the ICC rejected a request under the equivalent procedural rule for 1.5 hours of direct examination, on the grounds that the time saving would not be great.⁴⁹ Applying this standard,

⁴¹ See Annex 2 to the Rule 154 Motion.

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ Rule 154 Motion, para. 27

⁴⁸ *Ibid.*

⁴⁹ ICC, *Prosecutor v Gbagbo and Blé Goudé*, ICC-02/11-01/15-789, Trial Chamber I, Decision on the "Prosecution's Application to Conditionally Admit the Prior Recorded Statement and Related Documents in relation to Witness P0045 under Rule 68(3)", 2 February 2017 ("*Gbagbo* Rule 68(3) Decision"), para. 9.

requesting more than the time rejected by an ICC Trial Chamber for supplemental examination, runs contrary to expeditious proceedings.

25. Furthermore, the Defence will be required to devote additional cross-examination time to probing the inconsistencies⁵⁰ and instances of hearsay⁵¹ in W04421's various statements. The Defence have estimated seven combined hours of cross-examination of this witness, to fulfil this purpose.⁵² The necessary cross-examination resulting from the admission of these various statements casts doubt on whether the time savings alleged by the SPO will in fact achieve the intended purpose claimed in their submissions. In addition, hearsay evidence, which would not be otherwise admissible through W04421's live evidence, should not be rendered admissible through the use of Rule 154.

26. The Defence acknowledges that the proposed associated exhibit for W04421⁵³ does form an "inseparable and indispensable" part of her evidence, and that the witness explains the exhibit in her statement. The Defence thus has no objections to its admission through Rule 154.⁵⁴

D. W04355

27. The Defence has no objection to the admission of this witness's SPO interview and the associated photographs via Rule 154.⁵⁵ The Defence notes, however, that much of the witness's evidence consists of information that he claims to have learned from

⁵⁰ See, e.g., [REDACTED], p. 7, lines 7-23.

⁵¹ See, e.g., [REDACTED], p. 17, lines 6-10.

⁵² KSC-BC-2020-06/F01286/A04, Annex 4 to Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information (F01243), 13 February 2023, Confidential, p. 1.

⁵³ [REDACTED].

⁵⁴ *Hadzic* 2012 Rule 92ter Decision, para. 4.

⁵⁵ [REDACTED].

[REDACTED] neither of whom the SPO intends to produce for cross-examination.⁵⁶ While the Defence reserves the right to challenge such applications as appropriate, it appears possible that W04355 will ultimately be the **only** witness that will provide live evidence about the alleged victim in question. The Defence therefore gives notice that it may need additional time to cross-examine the witness and will endeavour to provide more specific information in this regard as soon as practicable.

E. W02161

28. The Defence submits that is a key witness whose evidence should be heard *viva voce*, in light of her [REDACTED]. The Defence particularly objects to the admission through Rule 154 of the excerpts of the Proposed Evidence which go to the acts and conduct of the Accused and/or relate to the alleged organisation of the KLA, alleged crimes committed by the KLA, alleged notification of crimes to the KLA, the issue of political opponents, and the alleged targeting of ethnic minorities.⁵⁷

29. That Rule 154 is inappropriate for this witness is further demonstrated by the fact that, while the SPO seeks admission of **seven** prior statements/testimonies of the witness and **nineteen** associated exhibits, it still intends to spend **three and a half** hours examining the witness live.⁵⁸ Thus, it does not appear that there would be any significant time saving through the admission in writing of W02161's prior evidence.

30. The Defence stresses that W02161's [REDACTED] statements and testimonies are particularly repetitive,⁵⁹ as acknowledged by the SPO,⁶⁰ focusing mainly on [REDACTED] and do not refer to the Accused. Therefore it appears counterproductive

⁵⁶ [REDACTED], is listed as a Rule 153 witnesses, whereas [REDACTED], is listed as a Rule 155 witness.

⁵⁷ [REDACTED].

⁵⁸ SPO Amended List of Witnesses, p. 6; Rule 154 Motion, para. 43.

⁵⁹ The SPO seeks leave to tender [REDACTED].

⁶⁰ See Annex 4 to Rule 154 Motion, p. 2.

to admit through Rule 154 five statements or testimonies which all relate to the same issues, already addressed in [REDACTED]'s subsequent SITF and SPO statements. Thus, the SPO fails to justify the necessity to admit W02161's [REDACTED] evidence. In addition, [REDACTED] is not on the SPO's Exhibit List and is therefore not admissible.

31. With respect to proposed Associated Exhibits, the Defence notes that several are duplicates of items that the SPO proposed to be tendered through the witness in its Submission on its First 12 Witnesses.⁶¹ The Defence reiterates the specific objections set out in its response⁶² and add the following observations:

- (i) [REDACTED]: W02161 states that these are [REDACTED] but she does not know who prepared them;⁶³ therefore she cannot confirm the truth of their content.
- (ii) [REDACTED]: While [REDACTED] states that she [REDACTED],⁶⁴ the Defence submits that this document, given its significance, should be first de-redacted and second put to the witness live. The redactions of the names of five alleged detainees should be lifted prior to any ruling on the admissibility and the witness should explain in Court the circumstances surrounding the interviews.

F. W01236

32. W01236's Proposed Evidence and its Associated Exhibits⁶⁵ are *prima facie* authentic and capable of reliance. As regards their suitability for admission through

⁶¹ SPO List of First 12 Witnesses, pp. 13-14.

⁶² KSC-BC-202-06/F01286/A06, Annex 6 to Confidential Response to the Prosecution Submission of List of First 12 Witnesses And Associated Information, 13 February 2023, Confidential.

⁶³ [REDACTED], pp. 573, 577.

⁶⁴ [REDACTED], para. 3.

⁶⁵ See Annex 4 to Rule 154 Motion.

Rule 154, they are over 530 pages in length. The SPO contends that its admission will “significantly reduce” the number of hours required for direct examination, but still intends to present **two hours of direct examination**.⁶⁶

33. The witness’s evidence is presented as being relevant for [REDACTED] 1998, and then [REDACTED] 1999.⁶⁷ W01236’s entire SPO interview, during which the SPO was presumably testing and seeking to verify the credibility of W01236’s information through follow-up questioning, spanned a total of just over six hours. Importantly, during these six hours, the SPO elicited hearsay information about W01236’s alleged knowledge of the experiences of third parties,⁶⁸ which would be largely inadmissible as live testimony.

34. As such, it is reasonable to assume that the examination-in-chief of this witness would not be significantly longer than the time now being proposed. This militates against the admission of W01236’s Proposed Evidence and Associated Exhibits through Rule 154, particularly in light of their length.

35. As regards the substance of the Proposed Evidence, the SPO interviews elicit purportedly inculpatory evidence from W01236 about the interaction between other third parties and the KLA.⁶⁹ The admission of this hearsay evidence is prejudicial to the accused; evidence which would not be admissible through W01236’s live testimony should not be rendered admissible through the use of Rule 154. Moreover, the ICTY transcripts of W01236’s evidence contain lengthy and irrelevant procedural debates between that bench and the parties,⁷⁰ for which there can be no justification for admission in these proceedings.

⁶⁶ Rule 154 Motion, para. 53.

⁶⁷ Rule 154 Motion, paras. 45-49.

⁶⁸ See, e.g., [REDACTED].

⁶⁹ See, e.g., [REDACTED].

⁷⁰ See, e.g. [REDACTED], pp. 5221-5226.

36. As regards the Associated Exhibits, the Defence does not object to their admission should the underlying statements and testimony be admitted.

G. W04337

37. W04337's Proposed Evidence and its Associated Exhibits⁷¹ are *prima facie* authentic and capable of reliance. As regards their suitability for admission through Rule 154, they are over 583 pages in length. The SPO contends that their admission will "significantly reduce" the number of hours required for direct examination, but still intends to present **three hours of direct examination**.⁷²

38. The witness has previously provided evidence pertaining to [REDACTED].⁷³ In addition to the 12 pages of [REDACTED],⁷⁴ the direct/re-direct [REDACTED] is memorialised in approximately 120 [REDACTED]. As such (assuming that the SPO does not intend to elicit a substantial number of the issues raised on cross-examination in these proceedings), in light of the three hours proposed,⁷⁵ the Defence contests the claim that the admission of these prior statements and transcripts would significantly reduce the number of hours required for examination-in-chief.⁷⁶

39. The Defence objects to the SPO's practice of submitting large numbers of items for admission through Rule 154 without any clarification by the SPO as to which pages it deems to be relevant to the stated goal of significantly reducing the hours for direct examination. As noted above, the transcripts from previous cases are replete with

⁷¹ See Annex 6 to Rule 154 Motion.

⁷² Rule 154 Motion, para. 63.

⁷³ [REDACTED]

⁷⁴ [REDACTED].

⁷⁵ Rule 154 Motion, para. 63.

⁷⁶ *Similarly, Gbagbo* Rule 68(3) Decision; *see also, ICC, Prosecutor v. Ntaganda*, ICC-01/04-02/06-961, Trial Chamber VI, Decision on Prosecution Application under Rule 68(3) of the Rules for Admission of Prior Recorded Testimony of Witness P-0055, 29 October 2015, paras. 10-11.

objections, procedural matters and interventions by Judges, as well as issues wholly irrelevant to the present case. The resulting burden on the Defence to review this many items is not conducive, and indeed is prejudicial, to a fair and expeditious proceeding.

40. As regards the substance of the Proposed Evidence, the Defence's specific objections to W04337's prior statements and testimony concern allegations related to the acts and conduct of the accused; first, W04337's belief, based on hearsay information allegedly uttered by a now-deceased person, that [REDACTED];⁷⁷ second, [REDACTED]'s unfounded allegations regarding [REDACTED];⁷⁸ and third, W04337's purported identification of an accused, not known to the witness at the time, allegedly present [REDACTED].⁷⁹ These objections are raised on two grounds; first, that their substance is of such high prejudice to the accused that they must be heard in-court from the witness, in keeping with the principle of orality; and second, that they lack *prima facie* reliability because they are, to a large extent, based solely on hearsay information received from a now-deceased person, or on the witness' own unsubstantiated beliefs as to the structure of the KLA and role/conduct of an accused. These aspects of the witness' prior testimony in particular are not suitable for admission pursuant to Rule 154 and must be reserved for direct examination.

41. The Defence further objects to the inclusion of a statement which addresses a matter to which W04337 has not [REDACTED],⁸⁰ related to an alleged killing which is neither charged in the indictment, nor described in the SPO Pre-Trial Brief, and as such, contends that not only should this evidence not be admitted through Rule 154, but should be excluded in its entirety from testimony *viva voce*.

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED], pp. 3 – 6.

42. In addition, the Defence objects to the inclusion of W04337's [REDACTED] in the Rule 154 Request,⁸¹ which is, almost in its entirety, W04337's speculative allegations, phrased as rhetorical questions directed towards various named individuals, which are devoid of relevance or probative value to matters in this case.

43. As regards the Associated Exhibits, the Defence does not object to their admission should the underlying statements and testimony be admitted.

H. W03165

44. The Defence notes that W03165's statement under Rule 154 is *prima facie* authentic and reliable, and that his [REDACTED] statement meets these indicia. The Defence takes note of the SPO's assertions that it intends to "significantly reduce"⁸² the amount of time required for direct examination, while simultaneously expressing its intention to present **two hours of direct examination**.⁸³

45. The Defence objects to the admissibility through Rule 154 of newspaper articles⁸⁴ presented as associated exhibits to W03165's statement. Firstly, the provenance of the information contained in the newspaper articles has not been investigated, is untested, and contains hearsay information⁸⁵ – it therefore carries very low evidentiary weight and should be used cautiously with witnesses. Secondly, the use of [REDACTED] is particularly problematic, as it contains information provided by a third party and is only briefly mentioned by the witness in his statement, to note in a superficial manner "I agree with everything said in the article."⁸⁶ In *Dordevic*, the

⁸¹ [REDACTED].

⁸² Rule 154 Motion, para. 71.

⁸³ *Ibid.*

⁸⁴ [REDACTED].

⁸⁵ *See* [REDACTED].

⁸⁶ *See* [REDACTED].

Trial Chamber has emphasised that, for an exhibit to be admitted, it must be actually discussed in the witness' statement.⁸⁷ The Defence dispute that the briefest mention of this article in the statement is sufficient to merit inclusion as an associated exhibit. Furthermore, the article contains hearsay allegations by a third party who cannot be questioned directly by the Defence. The article has very low probative value and its admission into evidence would be prejudicial to the Defence. Therefore, there is insufficient justification for its admission in these proceedings.

46. Whilst the Defence note that [REDACTED] alleged to have been found by the witness is discussed in his witness statement,⁸⁸ the exhibit which the SPO seeks to admit is a copy – not the original – and appears to be torn and partially illegible.⁸⁹ When combined with the facts that the document is unsigned and bears no stamp or other indicia of authenticity, and the impossibility of ascertaining its source, the probative value which could be attached to this document is minimal.

V. RELIEF SOUGHT

47. Accordingly, the Defence respectfully requests that the Trial Panel:

TAKE notice of the Defence objections to the proposed Rule 154 material;

ORDER the SPO to indicate the excerpts of proposed Rule 154 material for which admission is being sought, and explain the relevance of these excerpts to the charges in the present case; and

⁸⁷ *Djordjevic* Rule 92 *ter* Decision, para. 5.

⁸⁸ See IT-03 [REDACTED].

⁸⁹ IT-03-66 P184, p. 03072515.

PERMIT subsequent Defence submissions following receipt of this precision from the SPO in relation to the present Rule 154 request.

[Word count: 6,379 words]

Respectfully submitted on 20 February 2023,



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