

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

**Before:** **Pre-Trial Judge**  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

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

**Date:** 18 November 2022

**Language:** English

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**Public Redacted Version of Defence Preliminary Submissions on Admissibility of Evidentiary Material Disclosed under Rule 102**

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## I. INTRODUCTION

1. On 8 September 2022, the Pre-Trial Judge ordered the Defence to provide “any objections regarding the admissibility of evidentiary material disclosed to the extent possible” by 18 November 2022.<sup>1</sup>

2. Counsel for Hashim Thaçi, Counsel for Kadri Veseli, Counsel for Rexhep Selimi, and Counsel for Jakup Krasniqi (together, “the Defence”) have previously outlined the obstacles to formulating objections to the admissibility of evidence at this stage.<sup>2</sup>

3. The latest version of the SPO Exhibit List<sup>3</sup> was filed on 2 November 2022, and is 1,208 pages long. It contains 18,373 proposed SPO exhibits (“Items”), which are not organised by witness, or by category. No link is made between the Items and the charges in the Indictment, or to witnesses the SPO is seeking to call. The SPO has not indicated which Items it intends to tender through its witnesses, or if admission will be sought from the bar table. The SPO has not indicated whether it seeks to admit Items for the truth of their contents, or otherwise. Nor has the SPO indicated whether it will seek the wholesale admission of documents, reports and books that run to hundreds or thousands of pages, or whether specific excerpts will be identified that are purportedly probative of the charges.

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<sup>1</sup> KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, Oral Order 4, pp. 1583-1584; KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

<sup>2</sup> *See, most recently*: KSC-BC-2020-06, Transcript of Fifteenth Status Conference, 4 November 2022, Confidential, p. 1646 lines 5-15; KSC-BC-2020-06/F01070, Thaçi Defence Submissions for Fifteenth Status Conference, 31 October 2022, Confidential, para. 10; KSC-BC-2020-06/F01072, Selimi Defence Submissions for Fifteenth Status Conference, 31 October 2022, Confidential, paras. 8-9, KSC-BC-2020-06/F01073, Krasniqi Defence Submissions for Fifteenth Status Conference, 31 October 2022, Confidential (“Krasniqi Fifteenth Status Conference Submissions”), paras. 13-14, KSC-BC-2020-06/F01075, Veseli Defence Submissions for Fifteenth Status Conference, 31 October 2022, Confidential, para. 6.

<sup>3</sup> KSC-BC-2020-06/F01078/A02, ANNEX 2 to Submission of amended witness and exhibit lists Amended Exhibit list, 2 November 2022, Confidential (“SPO List”).

4. As such, the admissibility (or otherwise) of these 18,373 Items depends on information not currently known to the Defence.

5. However, in order to assist the Pre-Trial Judge and Trial Panel, and with the aim of contributing to efficient proceedings, the Defence makes the following general submissions on: (i) the approach to the evidential record; (ii) the procedure for admissibility; and (iii) the admissibility of select categories of material. These submissions are without prejudice to the right of the Accused to challenge the admissibility of any item tendered by the SPO in these proceedings.

## II. APPLICABLE LAW

6. Article 21 of the KSC Law<sup>4</sup> sets out the rights of the Accused, including the right to have adequate time for the preparation of his or her defence, and to be tried within a reasonable time.

7. Evidence is addressed in Chapter 9 (Trial Proceedings), Section III of the Rules, with Rules 137-140 governing its assessment and admission. Rule 137 provides that the Parties may submit evidence relevant to the case, and that the “Panel shall assess freely all evidence submitted in order to determine its admissibility and weight”.

8. Rule 138 of the Rules governs the admissibility of evidence, and provides:

(1) Unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. [...]

9. Rules 152-155 of the Rules address the admissibility of specific categories of evidence. Rule 153 provides that the Panel “may admit” in lieu of oral testimony the

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<sup>4</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“KSC Law”).

written statement of a witness, or a transcript of evidence provided by a witness in proceedings before the Specialist Chambers, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment. The Rule also includes factors for and against such admission, for the Panel's consideration.

10. 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:

- (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.

11. Rule 155 sets out the conditions under which written statements of unavailable persons or persons subjected to interference “may be admitted”, providing the Panel is satisfied:

- (a) of the person's unavailability or inability to testify orally; and
- (b) that the statement, the record or the transcript is prima facie reliable, having regard to the circumstances in which it was made, recorded and maintained. [...]

### III. SUBMISSIONS

#### A. THE LIMITS OF THE PRESENT SUBMISSIONS

12. The KSC framework for the presentation of SPO evidence largely mirrors that of other international courts and tribunals. The KSC Law provides that “[i]n principle, all evidence should be produced in the presence of the accused with a view to adversarial argument”,<sup>5</sup> and the principle of orality and preference for live evidence

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<sup>5</sup> KSC Law, Article 37(2).

is found in the procedural law.<sup>6</sup> Documentary or other physical evidence must meet 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.<sup>7</sup>

13. 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”.<sup>8</sup> The SPO has made no submissions on the relevance of the Items. Many exhibit no apparent relevance, such as photos of “men in civilian clothes”,<sup>9</sup> and “men in uniforms”,<sup>10</sup> or “Ministry of Public Order ID of [NAME]”,<sup>11</sup> without any further detail offered.

14. Evidence is considered to be **authentic** “if it is what it professes to be in origin or authorship.”<sup>12</sup> Authenticity must be “duly established”, meaning that unless origin and genuineness are apparent from the document itself, the tendering party must offer

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<sup>6</sup> See, e.g., KSC Rules, Rule 141(1), Rule 153.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> See, e.g., SPOE00222548-00222548, SPOE00222555-00222555.

<sup>10</sup> See, e.g., 056341-056341, U002-4989-U002-4991.

<sup>11</sup> See, e.g., Items 10,867-10,998.

<sup>12</sup> *Gucati & Haradinaj* Defence Bar Table Decision, para. 11: “it is for the tendering Party to provide indicators of a proposed exhibit’s authenticity, where the document does not, on its face, contain sufficient indicators of authenticity.”

evidence to prove authorship and integrity.<sup>13</sup> The SPO has made no submissions as to the authenticity of the Items. Many have no chain of custody indicated; documents are listed as coming from the ICTY/MICT when they originate from Serbia, or they consist of ‘notes’ or ‘lists’, often handwritten, that bear no date, signature, seals, or stamps.<sup>14</sup>

15. 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.”<sup>15</sup> The SPO has made no submissions as to the probative value of the Items. Without an indication as to probity, no submissions can reasonably be made on whether the probative value is outweighed by its prejudicial effect, being the fourth criteria in Rule 138(1).

16. Importantly, the admissibility of evidence turns, in significant part, on the means through which admission is sought. The practice of international criminal courts has been 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”.<sup>16</sup> The limited practice of the KSC has followed the same approach; documents have been deemed to be inadmissible unless a witness can be presented to attest to their truth and reliability.<sup>17</sup> As such, the Defence may well object to admission of many of the 18,373 Items, if they are not put to witnesses who can

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<sup>13</sup> 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.

<sup>14</sup> See, e.g., 090557-090558, 090618-090619, 091029-091029, 091133-091138.

<sup>15</sup> *Mustafa* Decision on Admission, para. 13.

<sup>16</sup> 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.

<sup>17</sup> See, e.g., *Gucati & Haradinaj* SPO Bar Table Decision, para. 57.

speak to and authenticate them. Others may be inadmissible even if they are presented to SPO witnesses, if they otherwise fail to meet the Rule 138(1) criteria. Regardless, when the means of admission of the Items remains unknown, the Defence is unable to raise these challenges or objections.

17. The extent of redactions is also an obstacle. 661 Items are listed as [REDACTED]. The SPO recently submitted that 46,000 pages of material will be disclosed for the first time or re-disclosed in lesser-redacted form 30 days before trial.<sup>18</sup> An unknown number of pages of material will be disclosed for the first time or re-disclosed with redactions lifted 30 days prior to the testimony of various witnesses.<sup>19</sup> Similarly, the Indictment currently has 66 paragraphs redacted, with redactions to 54 of these paragraphs lifted 30 days before trial and redactions to 12 paragraphs lifted 30 days before testimony.<sup>20</sup> These redactions limit the Defence's ability to make submissions as to admissibility. Without being able to read and analyse the documents, the Defence lacks the basic information it needs to do so.<sup>21</sup>

18. Within these significant limits, the Defence makes the following submissions on: (i) the approach to the evidential record; (ii) the procedure for admissibility; and (iii) the admissibility of categories of materials.

## B. APPROACH TO THE EVIDENTIAL RECORD

19. The admission of over 18,000 SPO exhibits would make this case a statistical anomaly. In the *Kupreškić* case against six accused, the Trial Chamber admitted 394 Prosecution exhibits. In the *Haradinaj* case against three accused, the Trial Chamber

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<sup>18</sup> KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, 5 September 2022, Public, para. 11.

<sup>19</sup> Currently, there are 23 witnesses with delayed disclosure until 30 days prior to testimony.

<sup>20</sup> KSC-BC-2020-06/F01064/A02, ANNEX 2 to Prosecution notice concerning Indictment redactions, 28 October 2022, Confidential.

<sup>21</sup> Krasniqi Fifteenth Status Conference Submissions, paras. 13-14.

admitted 1,044 Prosecution exhibits. In *Šainović*, with its six accused, the Trial Chamber admitted 1,455 Prosecution exhibits. In *Popović*, with its seven accused, the Trial Chamber admitted 2,906 Prosecution exhibits. ICTR figures are comparable, with the Trial Chamber admitting 975 exhibits in the *Government II* case against four ministers. At the STL, in the *Ayyash* case against five (reduced to four, approximately midway through trial) accused, the Trial Chamber admitted 2,478 Prosecution exhibits. As such, either the SPO intends to seek to admit ten times the number of exhibits as in comparable cases, or this is not a serious list.

20. Regardless, 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”.<sup>22</sup> 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.<sup>23</sup>

21. As noted by His Honour Judge Henderson at the ICC:<sup>24</sup>

There is no point in cluttering the case record with exhibits whose relevance to the charges cannot be demonstrated or that are of such doubtful probative value that no sensible Trial Chamber could reasonably base any findings upon them. In party-driven trials, particularly trials of great complexity or size, it is essential that judges prevent trial proceedings from being inundated by large amounts of irrelevant, unauthentic, non-probative [...] evidence.

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<sup>22</sup> 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.

<sup>23</sup> See, e.g., G. Mettraux, S.A. Fisher et al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court* (2014), p. 152.

<sup>24</sup> ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Anx, Appeals Chamber, [Separate Opinion of Judge Geoffrey Henderson](#), 8 March 2018 (“Separate Opinion of Judge Henderson”), paras. 43-44.



22. A bloated evidential record impedes expeditious proceedings and will “impose a heavy burden on the Chamber and opposing party or parties”.<sup>25</sup> Such a burden should not be imposed on the Trial Panel or parties in this case. An evidential record of 18,000 SPO exhibits will make the case unmanageable, and will violate the rights of the Accused to adequate time and resources to prepare, to know the case against them, and to be tried without undue delay.

### C. PROCEDURE FOR ADMISSIBILITY

23. For the evidential record to remain manageable, the Defence submits that the procedure adopted by Trial Panel II in the *Gucati* proceedings should apply in the present case. Namely that the Trial Panel “hear and rule upon submissions from the Parties about the admissibility of evidence of each exhibit at the time the exhibit is tendered into evidence.”<sup>26</sup> The parties can then raise objections to a particular Item “prior to or at the time that the tendering Party requests the admission in evidence of the proposed exhibit.”<sup>27</sup>

24. This approach to admissibility allows the evidential record to be cleared of unreliable and irrelevant evidence, facilitating expeditious proceedings.<sup>28</sup> The *Gucati* approach also goes to fairness; the parties will proceed through the case with a clear understanding of the underlying evidential matrix of the SPO case, meaning a clear picture of the case which the accused may choose to meet, and the evidence presented to support each of the elements.

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<sup>25</sup>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.

<sup>26</sup> *Gucati & Haradinaj* Order on Conduct, para. 13.

<sup>27</sup> *Gucati & Haradinaj* Order on Conduct, para. 14.

<sup>28</sup> Separate Opinion of Judge Henderson, para. 38.

25. The Defence would object to a procedure whereby decisions on the admissibility of Items are deferred to the end of the trial. This deferred approach leaves the parties in the dark as to the scope and strength of the SPO case. If this approach were adopted, the Accused would be required to formulate their Defence case, should they choose to present one, to confront evidence which may never form part of the Trial Panel's deliberations, leading to protracted and inefficient proceedings. Deferring the determination of admissibility until the deliberations phase also risks the question of admissibility being conflated with assessments of the weight of the evidence, resulting in admissibility no longer performing any threshold function in the proceedings.

D. ADMISSIBILITY OF CERTAIN CATEGORIES OF DOCUMENTS

26. The Defence makes the following preliminary observations on select categories of Items, while reserving its right to challenge or object to any Item for which admission is sought.

*1. Material from prior criminal proceedings or investigations*

27. The Items include statements and transcripts of evidence of people who are not on the SPO List of Witnesses, made in the course of proceedings before the ICTY,<sup>29</sup> Kosovo, UNMIK, and EULEX<sup>30</sup> courts.

28. The KSC Law provides that "in principle, all evidence should be produced in the presence of the accused with a view to adversarial argument."<sup>31</sup> However, Article 37(1) provides that:

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<sup>29</sup> See, e.g., Item Nos. 6067, 6256-6257, 6356, 6412-6413, 6443, 15760-15761, 15846, 15904, 16099, 16101, 18098.

<sup>30</sup> See, e.g., Item Nos. 5927, 5928, 7010, 7011, 8185-8186, 9553-9554, 9789-9890, 17731.

<sup>31</sup> KSC Law, Article 37(2).

[e]vidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF **may be admissible** before the Specialist Chambers. Its admissibility shall be decided by the assigned panels **pursuant to international standards on the collection of evidence** and Article 22 of the Constitution.<sup>32</sup>

29. Statements and testimony from other courts are, accordingly, not automatically admissible under Article 37(1). In *Mustafa*, the Trial Panel ordered the SPO to apply for the admission of Article 37 material, giving the Defence the opportunity to respond and object to particular items.<sup>33</sup> The SPO in *Mustafa* filed an application, submitting that the proposed documents were relevant, had probative value, contained sufficient indicia of authenticity, and that their admission would not cause undue prejudice.<sup>34</sup>

30. A formal SPO application will be particularly important in the present case, given that the SPO List includes Items considered inadmissible in other trials on the basis of substantive procedural violations. For example, the SPO List includes “Interrogation of Suspect [REDACTED]”.<sup>35</sup> The EULEX Court ruled this document inadmissible [REDACTED]. [REDACTED].<sup>36</sup> Documents found to be inadmissible in previous trials would seem to be incapable of meeting the requirements of Rule 138(1) of the Rules, and will be the subject of future Defence challenges should they be the subject of an Article 37(1) application by the SPO.

31. Moreover, material for which admission is sought under Article 37(1) will be inadmissible to the extent that it goes to proof of the acts and conduct of the accused.

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<sup>32</sup> Emphasis added.

<sup>33</sup> KSC, *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00169, Trial Panel I, [Decision on the submission and the admissibility of evidence](#), 25 August 2021, para. 36.

<sup>34</sup> KSC, *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00201/RED, Trial Panel I, [Public Redacted Version of ‘Prosecution Application for Admission of Material through the Bar Table’, KSC-BC-2020-05/F00201, dated 13 September 2021](#), 15 September 2021, paras. 2, 6.

<sup>35</sup> SPOE00121335-00121361 RED.

<sup>36</sup> [REDACTED].

This is consistent with the practice of international criminal courts and tribunals, where Chambers may admit the statements of witnesses which go to proof of a matter **other than** the acts and conduct of the accused as charged in the indictment.<sup>37</sup> It is also consistent with the right of the accused in Article 6(1)(d) of the ECHR and Article 21(4)(f) of the KSC Law to examine and have examined the witnesses against him.

32. Importantly, this also aligns with the KSC's procedural framework governing the admission of evidence. Rule 153(1) permits the admission "in lieu of oral testimony [of] the written statement of a witness, or a transcript of evidence provided by a witness in proceedings before the Specialist Chambers, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment". Even for deceased witnesses, or witnesses demonstrated to be otherwise unavailable under Rule 155(5), if their evidence "goes to proof of the acts and conduct of the Accused as charged in the indictment, this may be a factor against the admission of such evidence, in whole or in part".

33. It cannot be the case that the KSC standards for admission are more permissive for transcripts and statements from the ICTY or EULEX courts than those generated in cases before the KSC. As such, any admission of Items under Article 37(1) is restricted to evidence other than that going to proof of the acts and conduct of the accused, and which otherwise fulfils the requirements of Rule 138(1).

## 2. *SPO "Notes of Contact" with non-witnesses*

34. Contact or screening notes are testimonial in nature. As such, they cannot be submitted unless introduced through a witness.<sup>38</sup> The ICC Appeals Chamber, for

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<sup>37</sup> See, e.g., ICTR, ICTY, Rule 92 bis; ICC Rule 68(2).

<sup>38</sup> ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1670, Trial Chamber IX, [Decision on Defence Request to Submit 470 Items of Evidence](#), 14 November 2019, para. 15.

example, held that a Trial Chamber erred in relying on an investigative report, prepared by investigators from the ICC Prosecution where the investigators did not testify and the document did not meet the requirements for admitting prior statements under Rule 68.<sup>39</sup> In the same way, unless a witness is being called to authenticate its contents, these SPO “Notes of Contact” are inadmissible. They must also fulfil the requirements of Rule 138(1) of the Rules.<sup>40</sup>

### 3. *Material seized from the Accused*

35. In addition to fulfilling the requirements of Rule 138(1), any material seized from the Accused must also fulfil the requirements of Rule 39(4), which requires the SPO to complete an inventory setting out a detailed description of the items seized at the time of the search, which must be signed by the Accused at the scene.

36. The SPO List includes Items described as having been “seized from Jakup KRASNIQI” and “seized from Rexhep SELIMI”, as well as associated transcripts and translations.<sup>41</sup> The SPO Inventory presented at the time of the search did not include a “detailed description” of the seized items, as required by Rule 39(4), but only vague descriptions such as [REDACTED]. It was not until more than five months later, respectively on 28 April 2021 and 18 May 2021, that the SPO produced an inventory for the Defence teams of Messrs. KRASNIQI and SELIMI said to contain a detailed description of documents found during the search. There is no way to verify whether those documents placed on the inventory in April and May 2021 were in fact found during the search in November 2020: the detailed description was not produced contemporaneously. Accordingly, the Items seized from Jakup KRASNIQI and

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<sup>39</sup> ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Appeals Chamber, [Public Redacted Judgment on the appeals of \[Bemba et al.\]](#), 8 March 2018, paras. 305-308.

<sup>40</sup> *Gucati & Haradinaj* SPO Bar Table Decision, paras. 84 and following.

<sup>41</sup> *See, e.g.*, SPOE00229217-SPOE00229217-ET; 101928-01; SPOE00226527-SPOE00226613-ET; SPOE00226466-SPOE00226466-ET.

Rexhep SELIMI are inadmissible pursuant to Rule 138(2) because the evidence was obtained in breach of Rule 39(4) and there is substantial doubt about its reliability.

*4. Documents originating with the Serbian authorities, including alleged intercepted communication and intercept reports*

37. On 12 July 2022, the Defence asked the Pre-Trial Judge to order the SPO to disclose all information in its possession coming from the Republic of Serbia, or which reasonably appears to have come from Serbia, and the provenance of any such material on which the SPO intends to rely in these proceedings.<sup>42</sup> A decision is pending.

38. In the Serbia Disclosure Motion, the Defence also indicated that it “will oppose any request that the SPO makes for any documents obtained via the Republic of Serbia to be tabled from the bar. As the *Haradinaj* retrial panel observed such evidence cannot be considered reliable in the absence of an authenticating witness.”<sup>43</sup>

39. At the ICC, Judge Henderson held in *Gbagbo* that “in a case where much of the evidence was essentially provided by the current government, which is headed by political opponents of the accused, the Prosecutor is expected to take further steps to ensure that important documentary evidence was properly and demonstrably authenticated.”<sup>44</sup> These concerns are only heightened in this case. Serbia remains engaged in an ongoing disinformation campaign against Kosovo and the KLA, aimed at destabilising the State.

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<sup>42</sup> See KSC-BC-2020-06/F00877/CORR, Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, with Public Annexes 1-3 and Confidential Annex 4, 21 July 2022, Confidential (“Serbia Disclosure Motion”).

<sup>43</sup> Serbia Disclosure Motion, para. 76.

<sup>44</sup> *Gbagbo* Reasons of Judge Henderson, para. 36.

40. The Serbia Disclosure Motion sets out concrete examples of Serbian attempts to influence the KSC proceedings,<sup>45</sup> and manipulating evidence to self-serving ends.<sup>46</sup> These include attempts to buy false testimony from Kosovo Albanians to implicate the KLA in organ trafficking;<sup>47</sup> incentives on the part of the Serbian government to cooperate with the SPO, with the Serbian government even contacting potential witnesses;<sup>48</sup> and documents in the SPO's possession from Serbian State Security that [REDACTED].<sup>49</sup>

41. In these circumstances, Items from this category are unlikely to be able to meet the requirements of Rule 138(1), particularly if admission is sought other than through an authenticating witness. This is particularly true for Items that purport to be "intercepted communication" and "report[s] on intercepted communication", which bear no independent indicia of authenticity, and for which the originals have not been produced.

##### 5. *Manipulated or Falsified Items*

42. Rule 68(1) requires that exhibits at the KSC must be "authentic". The SPO has included among the Items documents that would be manifestly unable to meet this criteria. For example, the SPO has included an Item purporting to be a "KLA Handwritten Diary" which refers to [REDACTED].<sup>50</sup> [REDACTED].

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<sup>45</sup> Serbia Disclosure Motion, para. 30.

<sup>46</sup> Serbia Disclosure Motion, paras. 33-65.

<sup>47</sup> Serbia Disclosure Motion, para. 63.

<sup>48</sup> Serbia Disclosure Motion, para. 64.

<sup>49</sup> Serbia Disclosure Motion, para. 64.

<sup>50</sup> U000-4844-U000-4859; U000-4853-U000-4853-ET.

43. [REDACTED].<sup>51</sup> [REDACTED].<sup>52</sup> Additionally, the first two pages of the document are in Serbian Cyrillic text, corroborating the witness' claims of Serbia as the document's source. [REDACTED] Zoran Mijatović, the deputy chief of the Serbian State Security Service during the conflict,<sup>53</sup> who describes handing over tens of thousands of documents "outside the regular procedure" in order to incriminate Kosovo Albanians for crimes committed during the 1998-1999 conflict under the jurisdiction of the ICTY.<sup>54</sup>

44. Other Items are described as, for example, "Prizren State Security Department Centre, statement by [REDACTED]",<sup>55</sup> and "Statement of [REDACTED]".<sup>56</sup> Rule 138(3) provides that evidence obtained under torture or any other inhumane or degrading treatment is inadmissible and shall be excluded. Numerous people captured by Serbian forces during this period describe corroborating experiences of torture and forced confession. [REDACTED], for example, describes being badly tortured and being coerced into signing the statement now included on the SPO List. He was captured around the same time as [REDACTED].

45. In *Limaj*, an ICTY Trial Chamber found that it could not rely on evidence provided by Prosecution witness Dragan Jašović in part because, "a significant amount of material [...] which contain allegations of detention, interrogation, mistreatment and torture at the police station where Dragan Jašović served".<sup>57</sup> In *Haradinaj*, the Trial Chamber treated with caution the "large amount of written evidence originating from the Serbian MUP, a participant in the conflict, which

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<sup>51</sup> The third individual was killed in September 1998 by Serbian forces and can provide no additional evidence about this document.

<sup>52</sup> See also, 077601-TR-ET Part 4, pp. 1-2; 077596-TR-ET Part 4, p. 28.

<sup>53</sup> Z. Mijatović, *OPELO ZA DRŽAVNU TAJNU - Svedočenje iz vrha Državne bezbednosti*, (ITP "Pharos" Beograd, 2004), Document 11, page 365.

<sup>54</sup> *Ibid.*, pp. 117-139.

<sup>55</sup> U000-5076-U000-5079-ET Revised.

<sup>56</sup> 099956-099960-ET.

<sup>57</sup> ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, [Judgement](#), 30 November 2005, para. 27.



includes written reports, notes, or other documents.”<sup>58</sup> As such, evidence that Serb forces used torture to obtain information during the period these statements were created and signed, heightens the need for their provenance not only to be established, but to be shown to be lawful and conform with Rules 138(2) and (3) of the Rules.

46. That these Items nonetheless appear on the SPO List is demonstrative of the quality, integrity, and authenticity of proposed SPO Exhibits, and the likelihood of future Defence challenges on this basis.

## 6. Books

47. 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.<sup>59</sup> While it is unclear whether the SPO is seeking to admit the books on the SPO List in their entirety, the Defence notes the practice before other courts, whereby parties have been required to excerpt only those passages relevant to the charges.<sup>60</sup>

48. However, publication is by no means an indicator of the authenticity or reliability required for admission. The SPO List includes, for example, a book written *after* the conflict by a journalist, Baton Haxhiu, which purports to be a “dialogue” with Mr Veseli.<sup>61</sup> A very similar book written by Bardh Hamzaj, described as a “dialogue with Ramush Haradinaj” was not admitted in *Haradinaj*, after an ICTY Trial Chamber

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<sup>58</sup> ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, [Public Judgement](#), 29 November 2012, para. 13.

<sup>59</sup> 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.

<sup>60</sup> ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, [Decision on Praljak Defence Request for Reconsideration](#) [...], 12 November 2008, pp. 5-6; ICTY, *Prosecutor v. Stanišić & Simatović*, MICT-15-96-T, Trial Chamber, [Decision on Prosecution Submission on Exhibits Marked for Identification](#), 11 February 2019, p. 4.

<sup>61</sup> SPOE00052992-SPOE00053035-ET.

considered the content as being of “low probative value”. The Chamber knew “little about the statements’ context, when they were made, for which purpose and whether [...] Ramush Haradinaj approved the text. They might have been given for propagandistic purposes, to mislead, or to tell the truth”.<sup>62</sup> In the absence of evidence addressing these issues, the same objections would apply to the Haxhiu book included on the SPO List, and to other such books and publications.

## 7. *Media Articles*

49. The Items include hundreds of newspaper articles, newspaper clippings, and other media reports. Newspaper articles and media reports are often not considered sufficiently reliable to serve as evidence unless they have been tendered through a witness.<sup>63</sup> In particular, the SPO List includes articles from BOTA Sot, a tabloid publication, regularly sanctioned and fined by the Press Council of Kosovo for violating the Press Code of Kosovo through its publication of false, misleading and often racist articles,<sup>64</sup> and which, in February 2000, prompted the OSCE and UN to introduce a

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<sup>62</sup> ICTY, *Prosecutor v. Haradinaj*, IT-04-84-T, [Decision on Prosecution's Motion to Tender Documents on its Rule 65ter Exhibit List](#), 30 November 2007, paras. 6-7. A very limited excerpt of the book was admitted in the *Haradinaj* retrial, but only after a witness was able to give direct testimony as to a specific event described therein.

<sup>63</sup> ICTY, *Prosecutor v. Stanišić & Simatović*, MICT-15-96-T, Trial Chamber, [Decision on Prosecution Motion for Admission of Documents and Videos from the Bar Table](#), 11 February 2019, p. 3; *Prosecutor v. Stanišić & Simatović*, MICT-15-96-T, Trial Chamber, [Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Croatia\)](#), 11 February 2019, p. 2; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component](#), 11 May 2012, paras. 19-20.

<sup>64</sup> See, e.g., Press Council of Kosovo, ‘Adjudication of the Press Council of Kosovo on the Complaint of Dr Agim Vinca, versus the “Bota Sot” newspaper Portal’, 22 September 2011, available <http://presscouncil-ks.org/adjudication-of-the-press-council-of-kosovo-on-the-complaint-of-dr-agim-vinca-professor-in-prishtina-university-and-writer-versus-the-bota-sot-newspaper-portal/?lang=en#>; Press Council of Kosovo, ‘Vendim i Këshillit të Mediave të Shkruara të Kosovës ndaj ankesës së z. Pashk Berisha kundër gazetës “Bota Sot”’, 28 March 2014, available <https://presscouncil-ks.org/vendim-i-keshillit-te-mediave-te-shkruara-te-kosoves-ndaj-ankeses-se-z-pashk-berisha-kunder-gazetes-bota-sot/>; Press Council of Kosovo, ‘Vendim i Këshillit të Mediave të Shkruara të Kosovës ndaj ankesës së presidentit të Kosovës, Hashim Thaçit kundër gazetës Bota Sot’, 29 April 2016, available <http://presscouncil-ks.org/vendim-i-keshillit-te-mediave-te-shkruara-te-kosoves-ndaj-ankeses-se-presidentit-te-kosoves-hashim-thacit-kunder-gazetes-bota-sot/>.

regulation prohibiting the spread of “hatred, discord, or intolerance.”<sup>65</sup> BOTA Sot has also been regularly cited by the OSCE for its publication of, for example, manipulated images,<sup>66</sup> its political bias,<sup>67</sup> and violation of Kosovan electoral laws.<sup>68</sup> Accordingly, its articles are unlikely to meet Rule 138(1)’s requirements and will prompt challenges should their admission be sought.

#### 8. *Associated exhibits*

50. The Defence adopts the position taken before other courts, whereby in order to admit a document as an “associated exhibit” of an SPO witness, the witness must discuss the document, and the document must be one without which the witness's testimony would become incomprehensible or of lesser probative value.<sup>69</sup> Associated exhibits must also satisfy the requirements of Rule 138(1).

### IV. CONCLUSION

51. In filing an Exhibit List of 18,373 Items, the SPO is essentially asserting that, in order to establish its case beyond a reasonable doubt, it will need to admit and rely on approximately ten times the documentary evidence admitted in other international criminal trials against four or more accused. For the reasons set out above, it is difficult to contemplate how an evidentiary record of this size could be compatible with fair and expeditious proceedings.

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<sup>65</sup> R.J. Smith, ‘Racist’ Newspaper Riles U.N. In Kosovo’, *Washington Post*, 3 April 2000, available <https://www.washingtonpost.com/wp-srv/WPcap/2000-04/03/021r-040300-idx.html>, para. 6.

<sup>66</sup> OSCE, ‘Altering news agency photos considered professional misconduct’, 26 March 2001, available <https://www.osce.org/kosovo/53399>.

<sup>67</sup> OSCE, ‘Kosovo Albanian newspaper fined for political bias’, 31 October 2001, available <https://www.osce.org/kosovo/53947>.

<sup>68</sup> OSCE, ‘Kosovo newspaper sanctioned for breaking electoral rules’, 16 November 2001, available <https://www.osce.org/kosovo/53995>.

<sup>69</sup> ICTR, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Prosecution Omnibus Motion for Admission of Evidence pursuant to Rule 112, 11 April 2022, para. 13.

52. Regardless, without any SPO submissions as to reliability, authenticity, probative value, or the means of admission, the Defence is precluded from forming objections to assist in the SPO List's inevitable reduction. What is clear, however, is that the list contains many Items that, regardless of the means of their admission, could never fulfil the requirements of Rule 138(1) of the Rules. The Defence again reiterates its joint position that the SPO should streamline and reduce its case to ensure manageable and expeditious proceedings, and otherwise reserves its rights as to forthcoming challenges to the admissibility of any item tendered by the SPO.

[Word count: 5,789 words]

Respectfully submitted,



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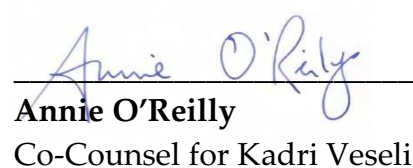


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