

**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 Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

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

**Date:** 8 November 2023  
**Language:** English  
**Classification:** Public

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**Public Redacted Version of Joint Defence Response to Prosecution  
Submissions on Admissibility of Items Following W04769’s Testimony,  
With Confidential Annexes 1-3**

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## I. INTRODUCTION

1. As instructed,<sup>1</sup> and pursuant to Rule 76 of the Rules,<sup>2</sup> the Defence for Messrs Thaçi, Veseli, Selimi and Krasniqi (collectively: “Defence”) hereby respond to the Prosecution submissions on the admissibility of items used during judicial questioning of W04769.<sup>3</sup> The Veseli Defence also replies to the Prosecution response on the admissibility of items that it used with W04769.<sup>4</sup> These submissions are contained in Section III(C) below.
2. The Defence strongly objects to the admission of MFI P649 – P651 (“MFI Items”).<sup>5</sup> These two Items do not meet the threshold for admission – be it through W04769, or at all. Grave concerns remain over, *inter alia*, their authenticity and reliability, such that if they were to be admitted the rights of the Accused to a fair trial would be invariably prejudiced. The Defence notes that the Legal Framework and jurisprudence emanating from this Court and elsewhere militate against their admission into evidence. They should be rejected as such.

## II. APPLICABLE LAW

3. Pursuant to Rule 139(1) of the Rules, evidence that is declared inadmissible during the trial “shall not be considered by the Panel” for the purposes of its final Judgment.
4. The admissibility of evidence is governed by Rule 138(1) of the Rules, which states that “[u]nless challenged or *proprio motu* excluded, evidence submitted

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<sup>1</sup> Transcript, 17 October 2023, p. 9038; F01905, *Decision on Veseli Defence Request for an Extension of Time to Reply to F01892*, 3 November 2023, confidential.

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

<sup>3</sup> F01892, *Prosecution submissions on admissibility of items following W04769’s testimony*, 27 October 2023, confidential (“SPO Submissions”).

<sup>4</sup> The submissions to which the Veseli Defence replies are found at SPO Submissions, paras. 21-25.

<sup>5</sup> MFI P00649 (SITF00245547-SITF00245555; SITF00245555-SITF00245562); MFI P00650 (U003-1744-U003-1746); MFI P00651 (U000-6550-U000-6598).

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.”

5. The Trial Panel’s Bar Table Decision of 31 March 2023 further clarifies the requirements in Rule 138(1) of the Rules:

(i) **Relevance** hinges upon whether the proposed evidence is “connected, directly or indirectly, to the elements of the offence(s) or mode(s) of liability pleaded in the indictment, or other facts or circumstances material to the case of the Parties. Notably, for proposed evidence to be relevant a “more than tenuous or remote connection to the facts and circumstances of the case” is required.<sup>6</sup>

(ii) **Authenticity** is concerned with whether proposed evidence “is what it professes to be in origin or authorship.”<sup>7</sup> Whilst authenticity need not be fully established at the admissibility stage, the tendering Party is nonetheless enjoined to “provide indicators of a proposed exhibit’s authenticity, where that document does not, on its face, contain sufficient indicators of authenticity.”<sup>8</sup>

(iii) **Probative value** is the proposed evidence’s propensity to prove or disprove a relevant issue in the case. It is concerned with the “*prima facie* reliability” and “the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case.”<sup>9</sup> Yet again, the tendering Party need not provide “definite proof

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<sup>6</sup> First Bar Table Decision, para. 10.

<sup>7</sup> F01409, *Decision on Specialist Prosecutor’s Bar Table Motion*, 31 March 2023, confidential (“First Bar Table Decision”), para. 11 citing KSC-BC-2020-07, F00334, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, public (“Gucati and Haradinaj Decision”), para. 12; Similarly, ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber, [Decision on Prosecution’s Motion for Judicial Notice of Srebrenica Intercepts](#), 1 September 2008, para. 6.

<sup>8</sup> First Bar Table Decision, para. 11 citing F01226/A01, *Annex 1 to the Order of the Conduct of Proceedings*, 25 January 2023, public, paras 52, 62(iii).

<sup>9</sup> First Bar Table Decision, para. 12.

of reliability” at the admissibility stage.”<sup>10</sup> However, it must “ensure that the evidence placed before the Panel is capable of supporting a reasonable belief regarding the purpose for which it is being offered.”<sup>11</sup>

(iv) **Prejudice** is the extent to which an item’s probative value is outweighed by the deleterious effect its admission would have on the fair trial rights of the accused.<sup>12</sup>

### III. SUBMISSIONS

#### A. MFI P00650 U003-1744-U003-1746

6. MFI P00650 appears to be a letter dated 16 March 1999 from [REDACTED] addressed to the General Staff. The Defence submits that it should not be admitted through W04769. He was highly sceptical of the Item’s authenticity and reliability.<sup>13</sup> Whereas the Defence does not contest that the Item is related to P00500, a joint letter from [REDACTED] and [REDACTED], W04769 testified that he was unaware with the issues and individuals referenced therein.<sup>14</sup>
7. The decision to admit MFI P00650 as an associated exhibit of W04769 was contingent on the witness being able to speak to the document. W04769’s evidence was that he became aware of the document after the war via Facebook and the media. W04769 could provide no additional information concerning this letter other than to agree to propositions readily apparent from the face of the document. By contrast, the Defence notes that W04765 – who will testify [REDACTED] – is a [REDACTED] contains in the original compilation of documents made by the Serbian authorities and purports to be the

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<sup>10</sup> First Bar Table Decision, para. 12.

<sup>11</sup> First Bar Table Decision, para. 12.

<sup>12</sup> First Bar Table Decision, para. 13.

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

[REDACTED] of the speech.<sup>15</sup> Another SPO witness – W03873 – [REDACTED] the Item.<sup>16</sup> The Defence submits both W04765 and W03873 would be far more appropriate witnesses through which to tender this letter, and admissions should be deferred at least until their testimony.

**B. MFI P00651 U000-6550-U000-6598**

8. P00651 is presented as a handwritten KLA diary, pertaining to Prizren in 1998. The Defence strongly objects its wholesale admission. The Prosecution's submissions are designed to portray MFI P00651 as an authentic and reliable piece of evidence upon which the Trial Panel can base a finding of fact against the Accused in this case. It seeks to justify the Item's admission on the basis that certain pages were admitted in the *Dorđević* case.<sup>17</sup>
9. At the outset, the Defence notes that pursuant to established international jurisprudence, the requirements of evidential authenticity and reliability share significant overlap such that one necessarily informs upon the other:

[T]he fact that a document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value."<sup>18</sup>

10. The reliability of documentary evidence (such as that at issue) is largely dictated by (i) the nature of the document itself such as the presence of signatures, stamps and handwriting, (ii) chain of custody evidence, such as the location where the document was seized and testimony describing the chain of custody after seizure; and (iii) corroboration of the document with other

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<sup>15</sup> MFI P00650, p. 5.

<sup>16</sup> MFI P00650, p. 3.

<sup>17</sup> SPO Submissions, para. 15 citing *Prosecutor v. Dorđević* (IT-05-87/1-T).

<sup>18</sup> ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, [Trial Chamber I, Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole](#), 13 September 2004, para. 8.

evidence.<sup>19</sup> It is very clear that MFI P00651 falls short on all three of these indicia of reliability:

- (i) The nature of the document is inherently suspect. The most incriminating passages of this notebook upon which the Prosecution seek to rely are written in an entirely different handwriting and utilise vocabulary that is out of keeping with the rest of the notebook;
- (ii) The document's chain of custody is severely compromised with significant gaps during which it is unknown where, by whom, and under which conditions the document was held. Moreover, W04769 was entirely unable to speak to this issue; and
- (iii) P00651 is not strengthened by U001-9738-U001-9739, P00499/P00507, or P00074 (and vice versa)<sup>20</sup> as these items suffer from many of the same issues of authenticity and reliability as MFI P00651.

11. Taken together, the Defence submits that there are real and grave doubts over the authenticity and reliability of this Item. For these reasons, the Defence urges the Trial Panel not to admit MFI P00651 at this time.

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<sup>19</sup> ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber I, [Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole](#), 13 September 2004, para. 8 citing ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, [Appeals Chamber, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence](#), 4 March 1998, para 18; ICTY, *Prosecutor v. Kordi and Cerkez*, IT-95-14/2-T, Trial Chamber, [Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts](#), 1 December 2000, paras 43-44; ICTY, *Prosecutor v. Bradanin and Talic*, IT-99-36-T, Trial Chamber II, [Order on the Standards Governing the Admission of Evidence](#), 15 February 2002, para. 20.

<sup>20</sup> SPO Submissions, paras 16-19.

*i. The Nature and Substance of the Document Raises Grave Doubts as to Reliability and Authenticity.*

12. The Defence has identified an array of issues affecting MFI P00651's form and substance that undermine the Item's authenticity and reliability.
13. At the outset, it is important to note that the ERNs in the original and English Translation (ET), at the critical part of the document, are off by one page, thus, U000-6582 in the original contains an entry from 25 July 1998 which corresponds with U000-6581-ET.<sup>21</sup>
14. Moreover, the handwriting contained within this notebook changes at precisely the same pages which contain the most incriminating information. The handwriting that comprises the majority of the document is distinct. Pages U000-6550-U000-6582 are written in small, tidy, capitalised letters. They exhibit a small but distinct slant which is generally consistent across these pages.<sup>22</sup>
15. However, at pages U000-6583 to U000-6584 of the original, the handwriting changes. The presentation of letters on the page is more spaced out. The letters are larger. A heavy dot is seen above the i's and j's that previously did not appear. The l's and z's have distinct loops at their base which appear nowhere else in the document.<sup>23</sup>
16. At pages U000-6585 to U000-6586 of the original, the handwriting changes again, this time much more dramatically. The letters run together in a sloppy lowercase cursive. The size of the letters is larger than any other part of the notebook. The heavy dot over the i's and j's remain. It is obvious that these two

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<sup>21</sup> The Defence observes that the misalignment appears to begin at U000-6563 in the original, which corresponds with U000-6598 in the English translation. In other words, the English translation of U000-6563 has been inserted some 35 pages later than it appears in the original, for reasons unknown to the Defence. Consequently, the ERNs for all intervening pages of the original are one digit higher than the ET.

<sup>22</sup> MFI P00651, pp. U000-6550-U000-6582.

<sup>23</sup> MFI P00651, pp. U000-6583-U000-6584.



pages were written in a very different hand.<sup>24</sup> The following page U000-6587 of the original<sup>25</sup> returns to what appears to be the original handwriting, made up of small, tidy, capitalised letters.<sup>26</sup>

17. It is highly noteworthy that the information recorded at pages U000-6550 to U000-6582, which corresponds to the small tidy capital letters, is a record of innocuous and mundane affairs.<sup>27</sup> It is precisely where the handwriting changes that the document becomes incriminating:

- (i) The entry at U000-6583 of the original purports to create, within the local Prizren staff, a security service which includes *inter alia* an “intelligence service”, “counterintelligence”, and “prison police.”<sup>28</sup>
- (ii) The entry at U000-6584 of the original purports to assign units “with the approval of the chief of operations for assassinations and abductions.”<sup>29</sup>
- (iii) Most sensationally, as the handwriting changes a second time, at U000-6585 of the original it is noted that “[t]he special unit for assassinations and abductions has been appointed by the KLA Central Headquarters. The responsibility for it is taken by [REDACTED].”<sup>30</sup>

18. Then on page U000-6587 of the original, the document returns to the original handwriting – with more innocuous recordings of events.<sup>31</sup> It is clear to the naked eye that the incriminating passages of this notebook were written in a

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<sup>24</sup> MFI P00651, pp. U000-6585-U000-6586.

<sup>25</sup> MFI P00651, U000-6586-ET.

<sup>26</sup> MFI P00651, p. U000-6587.

<sup>27</sup> See generally, MFI P00651, pp. U000-6550-U000-6582.

<sup>28</sup> MFI P00651, U000-6582-ET.

<sup>29</sup> MFI P00651, U000-6583-ET.

<sup>30</sup> MFI P00651, U000-6584-ET.

<sup>31</sup> MFI P00651, p. U000-6587.



distinct and separate handwriting. The strong inference from this fact is that the incriminating pages are attributable to different and unknown individuals. The fact that the incriminating pages are bookended by the original handwriting means that, either unknown individuals came into possession of this notebook between 24 July 1998 and 25 July 1998 and then returned it to the original author, or these two pages were added or inserted into the notebook at a later date.

19. Neither the Prosecution nor the Defence are in a position to shed any further light on this issue because the original notebook cannot be inspected. The Defence requested an opportunity to inspect the original notebook on 19 October 2023,<sup>32</sup> and was informed that the Prosecution did not have the original notebook.<sup>33</sup> It merely had photocopies [REDACTED]. Further inquiry revealed that [REDACTED] did not have the notebook either, and only has the photocopied pages.<sup>34</sup> It appears the notebook remains in Serbia. [REDACTED].<sup>35</sup> [REDACTED].

*ii. Chain of Custody*

20. The chain of custody for MFI P00651 is severely compromised. What is known is that the document was purportedly seized by Serbian military forces during a major offensive around Lez village in September 1998.<sup>36</sup> It appears that Milan Petrović subsequently compiled photocopies of this notebook into a dossier, which was apparently provided to [REDACTED].<sup>37</sup> It does not appear that the original notebook was ever included in this dossier. Additionally, the Defence presumes that the diary – or a version of it - was one of the “tens of thousands”

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<sup>32</sup> Annex 3, pp. 3-4.

<sup>33</sup> Annex 3, p. 3.

<sup>34</sup> Annex 3, p. 2.

<sup>35</sup> Annex 3, p. 1.

<sup>36</sup> Annex 1, p. 1 and Annex 2, p. 1.

<sup>37</sup> SITF00254223-00254552, p. SITF00254407 *et seq.*

of documents Zoran Mijatović provided to [REDACTED].<sup>38</sup> This accounts for two versions. A third version is found in the *Dorđević* case record, which has been annexed to this Response and is discussed below.

21. Other than that, Petrović and Mijatović were somehow involved with this document or versions thereof, the chain of custody during the years between seizure and transfer to [REDACTED] and [REDACTED], respectively, remain essentially unknown. No additional information is provided as to which other state officials might have handled the Item during this time, nor is there any indication as to where it might have been kept. Moreover, it is not known in which entity's custody the originals are currently located – should they still exist. There are accordingly well-founded concerns regarding the Item's authenticity.

a. Involvement of Serbian Officials Including Petrović and Mijatović

22. The Defence notes that the involvement of both Milan Petrović and Zoran Mijatović provides cause for caution and heightened scrutiny:

(a) Milan Petrović was a senior member of the Serbian intelligence service during the 1998-1999 conflict, and until recently, the head of the Serbian War Crimes Prosecution Office.<sup>39</sup> Crucially, he played a leading role in gathering evidence against Ramush Haradinaj.<sup>40</sup> The first version of this document that Defence was able to locate originated from a dossier compiled by Petrovic.<sup>41</sup> As part of the dossier he compiled, he included several documents containing allegations that the KLA abducted his

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<sup>38</sup> See generally, U002-4932-U002-4935.

<sup>39</sup> Marija Ristic, '[Switzerland Mulls KLA Ex-Guerrillas' Extradition to Serbia](#)' (Balkan Transnational Justice), 4 May 2016.

<sup>40</sup> See for instance, Tanjug, '[Serbia's case against Haradinaj: Murder, rape and beheaded baby](#)', 3 March 2017.

<sup>41</sup> See, SITF00254223-SITF00254552, p. STIF00254407 *et seq.*

parents from Gjakova.<sup>42</sup> The fact that a senior Serbian official had custody of these documents at some point in time and also held the KLA responsible for the abduction of his own parents provide cause for scrutiny of these documents. The Defence recalls the work to which Mr Petrović contributed has already been ventilated before the ICTY, which saw clear attempts on the part of Serbia to proffer falsified evidentiary material in order to weaken and ultimately destroy the new leadership in an emerging Kosovo. Prominent examples of this include the testimony of Witness 81 (whose testimony the Office of the Prosecutor opted exclude during closing statements),<sup>43</sup> and evidence that Serbian troops deliberately used Chinese ammunition to incriminate the KLA in crimes which they themselves committed.<sup>44</sup>

- (b) The involvement of Zoran Mijatović, former deputy head of the RDB, also raises concerns about the document's chain of custody. There was substantial evidence in *Dorđević* indicating, beyond a reasonable doubt, that the Serbian state security services were engaged in the manipulation of evidence and crime scenes in order to implicate the KLA in wrong-doing.<sup>45</sup> Mijatović wrote a book within which he heralds his efforts to provide tens of thousands of documents to the ICTY in order to prove the KLA committed crimes in Kosovo. He describes this work as the "crown jewel" of his career.<sup>46</sup>

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<sup>42</sup> SITF00254223-SITF00254552, pp. STIF00254491 *et seq.*

<sup>43</sup> IT-04-84bis T2743-T2854, p. 2753-2754.

<sup>44</sup> IT-04-84 D00086.E; ICTY, *Prosecutor v. Haradinaj et al.*, [Transcript](#), 23 May 2007, p.4685 *et seq.*

<sup>45</sup> See for instance, ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Trial Chamber II, [Public Judgement with Confidential Annex Volume I of II](#), 23 February 2011, paras 143, 1262-1380. See also, F00877/COR, *Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4* (F00877, dated 12 July 2022), 21 July 2022, confidential, paras 25-77.

<sup>46</sup> SITF00077620-00077822, pp. SITF00077816 – Z. Mijatović, OPELO ZA DRŽAVNU TAJNU - Svedočenje iz vrha Državne bezbednosti, (ITP "Pharos" Beograd, 2004.

23. The Defence submits that the absence of the original notebook combined with the involvement of direct adversaries in handling this document before it came into the possession of [REDACTED] gives rise to genuine concern that the evidence in question may have been tampered with at some point prior to it being given to [REDACTED]. With this in mind, the Defence recalls the case of *Prosecutor v. Šešlj*, notebooks allegedly authored by Ratko Mladić were denied admission over doubts “as to the exact date and the chain of custody and handover.”<sup>47</sup> In that case, the Trial Chamber simply could not exclude the possibility that the documents were not what they purported to be, thus undermining their reliability and, by implication, their probative value.<sup>48</sup> It is the Defence’s position that a similar decision ought to be reached in respect of MFI P00651.

b. Versions used in *Dorđević*

24. Disparities between the version tendered in these proceedings and the version admitted in *Dorđević* only raise further chain of custody concerns. Whereas the Prosecution has urged the Trial Panel to accept this document in part because certain pages of the same document were admitted in *Dorđević*,<sup>49</sup> it neglects to mention that what is presented as the “same” notebook in the *Dorđević* Trial actually contains additional pages not included within U000-6550 and is also missing pages that are included in this notebook.<sup>50</sup>

25. Thus, even simply between the *Dorđević* trial and the current proceedings the pages within U000-6550-U000-6598 have changed. Pages have been added into

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<sup>47</sup> ICTY, *Prosecutor v. Šešlj*, IT-03-67-T, Trial Chamber III, [Decision on Prosecution’s Motion for Admission of Evidence Relating to Mladić’s Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached](#), 22 October 2010, para. 37.

<sup>48</sup> ICTY, *Prosecutor v. Šešlj*, IT-03-67-T, Trial Chamber III, [Decision on Prosecution’s Motion for Admission of Evidence Relating to Mladić’s Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached](#), 22 October 2010, para. 38

<sup>49</sup> See generally, Annexes 1 and 2.

<sup>50</sup> Compare generally, Annexes 1-2 and MFI P00651/MFI P00651\_ET.

this notebook whereas other pages have disappeared from it.<sup>51</sup> The Defence notes that pages U000-6551, U000-6563, U000-6567, U000-6571, U000-6594 and U000-6598 appear in MFI P00651 but do not appear in the Petrović version.<sup>52</sup> Another page U000-6594 appears in a different location between these notebooks. Finally, as is dealt with in more detail below, another “rogue” page from this notebook has been assigned a completely separate ERN and does not appear in any of the versions of this notebook.<sup>53</sup> The Defence submits that given these circumstances, MFI P00651 is not a “notebook” but rather a collection of photocopies to which pages have been added and removed on different occasions. Under such circumstances this notebook cannot be considered reliable or authentic.

26. The Defence observes that the language used in the most incriminating passages of this notebook suggests it is not authentic. The Defence submits that statements such as “units are assigned with the approval of the chief of operations for assassinations and abductions,”<sup>54</sup> and “The special unit for assassinations and abductions has been appointed by the KLA Central Headquarters,”<sup>55</sup> are incongruous and unlikely statements to be made and committed to writing by individuals who considered themselves part of a liberation army. These terms are much more likely to be used to describe actions by an adversary. They are, coincidentally, echoed in the additional pages included in the *Dorđević* Notebook also compiled by Milan Petrović. There, a “letter” warns “We in the KLA are involved in the ABDUCTION, MALTREATMENT and DISAPPEARANCE of several people, so don’t be

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<sup>51</sup> The notebook submitted in the *Dorđević* case appears to be an identical photocopy to MFI P00651 however the following pages appear to have been added to MFI P00651 and do not appear in the *Dorđević* notebook: U000-6563, U000-6567, U000-6594 and U000-6598. Additionally pages 1,2, 46, 48,49, and 50 appear to have been removed from the *Dorđević* notebook and do not appear in MFI P00651.

<sup>52</sup> Compare, MFI P00651 with SITF00254223-00254552, p. SITF00254405-SITF00254456.

<sup>53</sup> See U001-9738-U001-9739 and *infra* at paragraphs 31-38 below.

<sup>54</sup> MFI P00651, p. U000-6583.

<sup>55</sup> MFI P00651, p. U000-6585.

surprised!" It ends with the warning, "This is the last letter. FROM NOW ON WE PLAN TO ACT! Good luck! Regards, KLA."<sup>56</sup>

27. Language describing "abductions", "kidnapping", "assassinations", "executions", "maltreatment" is incongruous with the vast tranche of written statements provided by KLA members during the 1998-1999 conflict. Where this language appears in MFI P00651 it should be treated with caution. The fact that this language repeatedly appears in a separate handwriting from the rest of the document only enhances the need for heightened scrutiny.

c. W04769 did not authenticate the document

28. W04769 is not an appropriate authenticating witness for this Item of evidence. MFI P00651 should not be admitted through W04769, as his testimony was limited to five pages,<sup>57</sup> and entirely uninformative for the purposes of admission. Aside from expressing his lack of knowledge of various individuals mentioned in MFI P00651,<sup>58</sup> the witness made a number of crucial remarks which further undermine MFI P00651's proposed admission. For instance, he noted that:

(i) [REDACTED]."<sup>59</sup>

(ii) [REDACTED] "[REDACTED]" which was allegedly [REDACTED].<sup>60</sup>

29. Indeed, W04769 indicated that his knowledge was limited to (i) [REDACTED];<sup>61</sup> and (ii) [REDACTED] "[REDACTED]" to the [REDACTED].<sup>62</sup> These answers, without more, do not constitute a valid ground upon which

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<sup>56</sup> Annex 1, p. 4; Annex 2, p. 3.

<sup>57</sup> See generally, [REDACTED] where questions were asked in respect of MFI P00651, pp. U0006567/U0006568, U0006573/U0006574, U0006574/U0006575, U0006582/U0006583, U0006585/U0006586.

<sup>58</sup> [REDACTED]

<sup>59</sup> [REDACTED].

<sup>60</sup> [REDACTED].

<sup>61</sup> [REDACTED].

<sup>62</sup> [REDACTED].

admission of the entire document can be based. Indeed, the answers W04769 gave during the Defence's cross-examination on the Judges questions are further demonstrative of this issue. The witness acknowledged that:

(i) [REDACTED];<sup>63</sup>

(ii) [REDACTED].<sup>64</sup>

(iii) [REDACTED] "[REDACTED]."<sup>65</sup>

(iv) [REDACTED] "[REDACTED]."<sup>66</sup>

(v) "[REDACTED]" [REDACTED].<sup>67</sup> [REDACTED] "[REDACTED]"<sup>68</sup> and that [REDACTED].<sup>69</sup> [REDACTED] "[REDACTED]."<sup>70</sup>

30. It follows that W04769's testimony tends to cut against the admission of the most incriminating pages from MFI P00651 and that this document cannot be admitted wholesale through this W04769. Whereas the Prosecution makes the general claim that his discussion of the Item is sufficient for admission,<sup>71</sup> further inspection of his answers does nothing to justify their position. If anything, it serves to diminish the Item's probative value, necessarily militating against its admission.

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<sup>63</sup> [REDACTED]

<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED].

<sup>68</sup> [REDACTED].

<sup>69</sup> [REDACTED].

<sup>70</sup> [REDACTED].

<sup>71</sup> SPO Submissions, para 15.



iii. *Inability to Effectively Corroborate Related Evidence*

31. Contrary to the Prosecution submissions, MFI P00651 does not corroborate and is not corroborated by (i) U001-9738-U001-9738;<sup>72</sup> (ii) P00499/P00507; or (iii) P00074.<sup>73</sup> The Defence avers that these items suffer from many of the same issues of authenticity and reliability as MFI P00651.

32. U001-9738-U001-9738 furthers the Defence's argument that exceptional scrutiny must be used in assessing MFI P000651's authenticity and reliability. A glance at this document reveals it is from the same notebook as MFI P00651.<sup>74</sup> The heading from the notebook page reads "GRAFIX G IMPEX" it is unmistakable and distinct. In fact, U001-9738-U001-9738 is simply a rogue page from the very notebook the Prosecution argues is a complete and reliable document. There is no explanation in the metadata or from the Prosecution as to why this page is not included in the notebook but instead floats independently in disclosure.

33. The handwriting appears similar to other incriminating sections of the original notebook. It contains a heavy dot over the 'i' and is larger and less tidy than the other pages.<sup>75</sup> The clear inference to be drawn from the distinct similarities between MFI P00651 and U001-9738-U001-9738 is that it is from the same bundle as the original notebook but that it was not inserted into the original notebook. It is common sense that a document cannot be corroborated by itself. Moreover, without access to the original notebook there is no way to understand how these pages fit together. These issues raise extreme concerns over this document's reliability.

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<sup>72</sup> The SPO incorrectly lists this as U001-9738-U001-9739, when, in fact, the document is a single page.

<sup>73</sup> SPO Submissions, paras 16-19.

<sup>74</sup> Compare generally, U001-9738-U001-9739 with MFI P00651.

<sup>75</sup> Compare, U001-9738-U001-9738 with MFI P00651, pp. U000-6583-U000-6586.

34. The Prosecution further contends that P00499/P00507 and P00074 corroborate MFI P00651. At the outset the Defence notes that these are the same documents. P499/507 is merely a single page which has been cut out and excerpted from P00074.<sup>76</sup> P00074 appears to correspond with pages U000-4847-U000-4852, whereas P00499 corresponds with U000-5851-U000-5851. Nevertheless, these two exhibits, which contain widely different ERN ranges, are, in fact, extracted from the same document. This is easily understood by comparing both P00074 and P00499/00507 to the original document from which they were extracted. In this respect, the Defence directs the Trial Panel's attention to document U000-4844-U000-4859. This document is not linked to a full English translation but, upon examining the Albanian version, it clearly appears to be the full notebook containing pages from which both P00074 and P00499/P00507 were extracted.<sup>77</sup> It also contains a Cyrillic cover page indicating it was recovered during a Serbian military operation around Vrrin in August/September 1998.<sup>78</sup> It is clear from looking at U000-4844-U000-4859 that P00074 and P00499/P00507 are not independent documents. They are extracts from the same notebook.

35. Bizarrely, P00074 appears to have been extracted in such a way that both the Cyrillic cover page describing where the document came from as well as the critically incriminating pages U000-4853-U000-4857 were excised and omitted from P00074. Meanwhile, only the incriminating page (namely, U000-4853) was cut-out of the original notebook, assigned a separate ERN U000-5851-U000-5851 and tendered as P00499. U000-4853 and U000-5851 are identical. But by failing to tender the original notebook in its entirety and instead selectively providing excerpted pages without explicitly linking them to the original

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<sup>76</sup> Compare, P00499/P00507 with P00074, p. U000-4853.

<sup>77</sup> See, P00074; P00499/P00507 and U000-4844-U000-4859.

<sup>78</sup> U000-4844-U000-4859, p. U000-4844.

notebook the Prosecution failed to provide the Trial Panel with the full picture of this evidence.

36. Indeed, even now the original notebook is not linked to any substantive English Translation in legal workflow. As a result, no links can be made between these documents through English searches in Legal Workflow. The only way the Defence discovered the relationship between U000-4844-U000-4859, P00074, P00499/P00507 was by comparing the original Albanian versions. Upon making this discovery the Defence notes the following similarities between U000-4844-U000-4859 and MFI P00651:

- (i) Both notebooks were discovered by Serbian military forces during operations at around the same time (August/September 1998) and in a similar area in Kosovo (Lez/Vrrin);
- (ii) Both notebooks came into the possession of [REDACTED] from Serbian officials;
- (iii) In both cases the original notebook has disappeared and is not in the possession of [REDACTED];
- (iv) Both notebooks begin with handwriting of one distinct style which then changes dramatically to record the most incriminating information;
- (v) The incriminating passages of both notebooks use languages such as “assassinations” and “abductions” which incongruent with any other part or any other language for of either notebook.

37. The Defence has made substantial submissions concerning the authenticity and reliability of U000-4844-U000-4857 in prior submissions,<sup>79</sup> and specifically the page U000-4853 which the Prosecution claim corroborates MFI P00651. This includes assessing the handwriting differences between this page and the rest of the notebook, as well as the fact that the individuals who purportedly signed this page now deny having signed it.

38. The Defence submits the above information was not before the Trial Panel when it considered the admissibility of P00074, P00499/P00507 because the Prosecution failed to provide the entire notebook to the Trial Panel. The Defence submits that as a result these exhibits do not corroborate MFI P00651's authenticity. Instead examining the document U000-4844-U000-4857 further reinforces the Defence's argument that MFI P00651 must be treated with extreme caution. In light of the similarities highlighted above, P00074 and P00499/P00507 do not advance or corroborate MFI P00651. They raise further questions concerning MFIP00651's authenticity.

### **C. Veseli Request for Admission of Documents**

39. It was in response to these obvious issues of authenticity and reliability that the Defence filed its Request of 19 October 2023, for the admission of three items that were used during W04769's cross-examination.<sup>80</sup> In reply to the Prosecution Response,<sup>81</sup> the Defence makes the following submissions.

40. First and foremost, the argument that the signature of [REDACTED] is forged,<sup>82</sup> is not based solely on the different appearance of the signature appearing in P00499/P00507 and DKV0801-0802. In reality, this is merely one of several

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<sup>79</sup> F01387, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8*, 21 March 2023, confidential, paras 74-77.

<sup>80</sup> F01871, *Veseli Defence Request for Admission of Items Used During the Cross-Examination of W04769, With Confidential Annexes 1-3*, 19 October 2023, confidential ("Veseli request").

<sup>81</sup> SPO Submissions, paras 21-25.

<sup>82</sup> SPO Submissions, para. 22.

factors which support the Defence's contention that the signature and, indeed, the entirety of P00499/P00507 is forged. As indicated above, P00499/P00507 is necessarily affected by the same authenticity and reliability issues shared by MFI P00651 given that it was extracted from a broader collection of KLA documents which, although obscured by the metadata, was evidently provided to [REDACTED] by Serbian intelligence. The Defence observes, in this regard, the P00499/P00507 forms part of a larger document that includes, as a cover page, a Serbian version of the document in typed Cyrillic script,<sup>83</sup> and is believed to have formed part of the handover of documents to [REDACTED] by Zoran Mijatović,<sup>84</sup> who, in turn, included the impugned exhibit in his biography,<sup>85</sup> and spoke strongly for the work done to uncover crimes allegedly committed by the KLA.<sup>86</sup>

41. Secondly, the Defence is fully aware of the Trial Panel's guidance on the admission of statements, however, it did recently admit certain extracts of W04746's prior statements via Rule 138(1) of the Rules in order to further contextualise and understand W04746's evidence.<sup>87</sup> In this regard, the Defence submits that the same reasoning ought to apply insofar as the very limited extracts of [REDACTED] and [REDACTED] are concerned. As matters stand, their statements are indispensable to W04769's cross-examination and, more generally, the Trial Panel's assessment of P00499/P00507.

42. With respect to specific claims made by the Prosecution the Defence notes that:

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<sup>83</sup> U000-4844-U000-4859, p. U0004844.

<sup>84</sup> See, F01115, paras 42-43; U002-4932-U0024935.

<sup>85</sup> SITF00077620-00077822, p. SITF00077816.

<sup>86</sup> SITF00077620-00077822, pp. SITF0077679- SITF0077690.

<sup>87</sup> F01903, *Decision on Prosecution Request for Admission of Items Used During the Examination of W04746*, 3 November 2023, public, paras 22-26.

- (i) The Prosecution's belief that [REDACTED] and [REDACTED] "had transparent incentives to lie,"<sup>88</sup> is fallible given the clear issues concerning P00499/P00507's authenticity and reliability.
- (ii) It is equally possible, on the basis of [REDACTED]'s SPO interview, that the affirmation to which the Prosecution refers was simply in response to the reminder of what he had previously said – namely, the phrase: "You mentioned before "Unless my signature is at the bottom of the document, this means nothing."<sup>89</sup> The Prosecution has not (and presumably cannot) provide any evidence to support its position.

43. Lastly, the Defence observes that the Prosecution tendered these documents in full knowledge that the purported signatories denied their authenticity; that there was a clear and obvious difference in the handwriting in different portions of the diary; and that the Defence had produced evidence that tended to show that the document had indeed been tampered with. Despite these circumstances, the Prosecution apparently did nothing further to inquire into the integrity of this evidence which it intended to place before the court. Indeed, throughout the pre-trial and trial process, the Prosecution kept P00499/P00507 distinct from other documents that were identical in substance by assigning all the versions different ERNs, which only obfuscated the authenticity issue identified by the Defence.

44. Accordingly, the Prosecution's request should be rejected. The contested MFI Items lack sufficient *indicia* of reliability and authenticity, containing highly prejudicial; and unsourced statements which, invariably, fail to meet the threshold for admission. Contrarily, the evidence proposed for admission by

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<sup>88</sup> SPO Submissions, para 23.

<sup>89</sup> Veseli Request, Annex 2, p. 3.

the Defence fulfils the requirements for admission and should be treated accordingly.

IV. CLASSIFICATION

45. This response is classified confidentially pursuant to Rule 82(4) of the Rules.

V. CONCLUSION

46. In light of the foregoing, the Defence respectfully requests that the Trial Panel:

- (i) **DEFER** admission of MFI P00650 until after the testimony of either W04765 or W03873.
- (ii) **DENY** admission of MFI P00651.
- (iii) **GRANT** the Veseli Defence request for admission of items used during W04769's cross-examination.

**Word Count: 5,988**

Respectfully submitted on Wednesday, 8 November 2023, in The Hague.



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**Gregory W. Kehoe**  
Counsel for Hashim Thaçi





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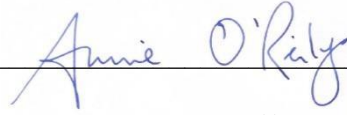
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