

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

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

Registrar: Dr Fidelma Donlon

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

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Public Redacted Version of Joint Defence Response to ‘Prosecution eighth motion for admission of evidence pursuant to Rule 155’ (F03028)

With Confidential Annex 1 and Annex 2

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I. INTRODUCTION

1. The Defence for Messrs Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi ("Defence") hereby responds to the Prosecution eighth motion for admission of evidence pursuant to Rule 155 ("Motion"). This filing is submitted confidentially because it responds to a filing with the same classification.¹

2. The Defence recalls its prior submissions on the immense volume of the case record, the admission of a wealth of untested evidence, and the principle of orality.²

II. APPLICABLE LAW

3. The Defence repeats and relies upon its previous submissions regarding the applicable law,³ and makes the following additional submissions.

4. Rule 155 regulates the case of "unavailable persons and of persons subjected to interference". Plainly, Rule 155(1) deals with unavailability while Rule 155(2) deals with the different factual scenario involving improper interference.

5. Rule 155(1) makes clear that a witness is "unavailable" only in two circumstances:

a. The witness has died or can no longer be traced with reasonable diligence;
or

b. The witness is "by reason of physical or mental impairment or other compelling reason **unable** to testify orally."

6. The SPO here does not argue that W04352, W04433, and W04427 have died or can no longer be traced. Accordingly, to establish a basis to admit the statements of

¹ Rule 82(4) of the Rules of Procedure and Evidence Before the KSC ("Rules").

² *Inter alia*, F01391, paras. 1-5; F02855, para. 8.

³ F01391, paras. 6-29; F01865, paras. 5-8.

these witnesses pursuant to Rule 155(1), the SPO must establish that W04352, W04433, and W04427 are unable (as opposed to “unwilling”) to testify because of some physical or mental impairment or other compelling reason. Where a witness is able, but unwilling to testify, the SPO must satisfy the *lex specialis* requirements of Rule 155(2) to seek admission of the prior statements of an unwilling witness.

7. As noted by the Trial Panel, Rule 155(1) “is specifically intended to deal with the statement of a person who has died or who can no longer be traced with reasonable diligence, or who is by reason of physical or mental impairment or other compelling reason unable to testify orally, and cannot therefore be cross-examined”.⁴ Another Trial Panel has plainly stated that “unavailable persons include deceased persons, as well as persons who are unable to testify for other compelling reasons, such a physical or mental impairment.”[sic]⁵ This Trial Panel found that [REDACTED].⁶

8. Chambers of other international tribunals have clarified that a witness’ simple unwillingness to testify is not sufficient to conclude that said witness is ‘unavailable’ within the meaning of the relevant rule.⁷ This principle extends to witnesses who ‘could choose to testify’.⁸

9. Along similar lines, Chambers have specifically distinguished situations where medical evidence demonstrates that a witness is incapable of testifying due to a medically certified mental health condition and those where a witness is deemed unavailable solely on the basis of an asserted “mental condition” or “emotional state”.⁹

⁴ F02013, para. 30.

⁵ KSC-BC-2020-04/F00562, para. 11.

⁶ Trial Panel, Oral Order, “[REDACTED]”, 14 January 2025; *see also* F01821, para. 26; F01603, para. 123; F01671, para. 18, referencing *Hadžić* Decision, paras. 41, 95; *Mladić* Decision, para. 5.

⁷ *Al Hassan* 2022 Decision, para. 23, referring to Rule 68(2)(c); *Al Hassan* 2023 Decision, para.16, reaching the same conclusion regarding the inability of a party to obtain a declaration under Rule 68(2)(b)(ii); *Tolimir* 2010 Decision, para. 33; *Tolimir* 2011 Decision, para. 30.

⁸ *Prlić* Decision, para. 48.

⁹ *Tolimir* 2011 Decision, para. 27, citing to: *Šešelj* Decision, p. 3; *Gotovina* 2009 Decision, paras. 8-10; *Gotovina* 2008 Decision, para. 16.

10. The Defence submits that the situation presented by the SPO with regard to W04352, W04433, and W04427 falls squarely within this latter category. Generic security concerns, fears, and distress do not make a witness “unable” to testify within the meaning of Rule 155(1), and cannot be used by the SPO to improperly circumvent the requirements of Rule 155(2), when the latter cannot be met.

11. The interpretation of Rule 155(1) proposed by the SPO is overly broad, and its reliance on the corresponding ICC rule and (very limited) case law in this respect is misplaced;¹⁰ in the decision referred to by the SPO, the finding of unavailability was based on different circumstances that led that Chamber to conclude that the witness was unavailable pursuant to Rule 68(2)(c), rule specifically including unavailability due to obstacles that cannot be overcome with reasonable diligence.¹¹ However, Rule 155 and the corresponding ICC rule are fundamentally different. While the ICC rule was intentionally drafted to broaden the ICTY provision in Rule 92 *quater* to include “a situation in which it was not possible to secure or reach a witness, although that witness could, with reasonable diligence be traced”,¹² Rule 155(1) is drafted in the same terms as Rule 92 *quater* and should be interpreted accordingly.

12. The SPO should not be allowed to stretch the meaning of ‘other compelling reason’ to a vast array of different circumstances that do not relate to a witness’ ‘unavailability’. Rule 155(1) requires the SPO to prove that the witnesses are unable to testify due to ‘other compelling reason(s)’. If the witnesses are able but unwilling to testify, then the SPO was required to move pursuant to the *lex specialis* requirements of Rule 155(2).

¹⁰ Motion, para. 27. *See also* F02952, para. 18.

¹¹ *Bemba* 2015 Decision, paras. 17-18.

¹² *Bemba* 2015 Decision, para. 16, citing to “Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, p. 26, para. 29”.

III. SUBMISSIONS

A. W00092

13. The Defence objects to the admission of W00092's evidence pursuant to Rule 155 on the basis that it (i) is unreliable; and (ii) lacks corroboration.

14. The admission of W00092's evidence prejudices the Defence by denying it the opportunity to cross-examine a witness on the SPO's list who may testify about the alleged crimes charged in the Indictment and whose evidence is inconsistent and lacks corroboration on crucial aspects of the case.

15. *W00092's evidence authenticity and reliability.* Regarding the [REDACTED] Report on the statement of W00092 ("Report"),¹³ it is not apparent whether the statement in question was signed by W00092, or whether it was read back to, or otherwise verified by the witness. The Report neither notes the identity of the person who recorded the statement, nor where it was taken. As such, this document lacks indicia of authenticity and should not be admitted.

16. *W00092's evidence is inconsistent and unreliable.* The SPO intends to rely on W00092's evidence in relation to, *inter alia*, the identification of [REDACTED].¹⁴

17. W00092's evidence is that [REDACTED],¹⁵ and that the only way he could understand [REDACTED] was from allegedly overheard conversations.¹⁶ It is unclear how W00092 was able to [REDACTED].

18. W00092's evidence is further inconsistent in relation to [REDACTED], the account of which varies in each of the proposed statements.¹⁷ For instance, in his

¹³ SPOE00193955-00193957.

¹⁴ Motion, para. 4.

¹⁵ SITF00306707-00306714 RED, p.SITF00306708.

¹⁶ SITF00062579-SITF00062594-ET Revised RED2, p.SITF00062584.

¹⁷ SITF00062579-SITF00062594-ET Revised RED2, p.SITF00062589; SITF00306707-00306714 RED, p.SITF00306709; SPOE00193955-00193957, p.00193957; 066732-066733-ET RED, p.066733.

statement [REDACTED], W00092 stated that he [REDACTED], and in his [REDACTED], W000092 described his [REDACTED].

19. The SPO also intends to rely on W00092's evidence in relation to [REDACTED],¹⁸ previously submitting that "[REDACTED]"¹⁹ to support the allegation that [REDACTED].²⁰

20. First, it is clear from his evidence that W00092 did not recognise [REDACTED].²¹ Further, W00092 did not [REDACTED], and the supposed identification of this person is based on his own speculation.²²

21. Second, W00092 stated that [REDACTED].²³ However neither in his [REDACTED], nor [REDACTED] W00092 could remember [REDACTED] and was not sure whether he could recognise him.²⁴

22. Third, [REDACTED] put to W00092 inconsistencies in his evidence related to [REDACTED].²⁵ W00092 clarified that [REDACTED].²⁶ W00092 also failed to recognise anyone in the [REDACTED].²⁷

23. Thus, W00092's evidence is lacking in probative value with regard the identification of [REDACTED], or what role, if any, he played in the [REDACTED] of W00092, and should not be admitted.

¹⁸ Motion, para. 11.

¹⁹ F02944/A01, pp.114-115.

²⁰ *Ibid.*

²¹ SITF00306707-00306714 RED, p.SITF00306709.

²² SITF00062579-SITF00062594-ET Revised RED2, pp.SITF00062587-SITF00062588.

²³ [REDACTED]; SITF00062579-SITF00062594-ET Revised RED2, p.SITF00062588.

²⁴ *Ibid.*

²⁵ SITF00062579-SITF00062594-ET Revised RED2, p.SITF00062588.

²⁶ SITF00062579-SITF00062594-ET Revised RED2, p.SITF00062588.

²⁷ SITF00062579-SITF00062594-ET Revised RED2, pp.SITF00062592-SITF00062593.

24. W00092's evidence lacks corroboration in relation to the circumstances of his arrest.

The SPO's suggestion that W00092's evidence is corroborated [REDACTED]²⁸ is incorrect.

25. [REDACTED] stated that he recognised W00092 as [REDACTED]²⁹ and believed that W00092 [REDACTED].³⁰ However, despite the alleged familiarity [REDACTED].³¹

26. The circumstances of the [REDACTED] as described by both W00092 and [REDACTED] are markedly different in their respective accounts, in particular *vis a vis* (i [REDACTED].³² Further, [REDACTED], hence, contrary to the SPO's suggestion,³³ [REDACTED].³⁴

27. The Defence is deprived of the opportunity to test the inconsistencies through cross-examination of W00092 or other witnesses, which renders his evidence inherently unreliable and its admission under Rule 155(1) highly prejudicial to the Accused.

B. W04577

28. The Defence has consistently opposed any written tender of W04577's evidence.³⁵ It has minimal probative value. The Panel cannot ignore that W04577 lied to and sought to manipulate this Court and EULEX. His tendered evidence is riven with falsehoods, inconsistencies and speculation, including about the Accused's acts

²⁸ Motion, para. 11.

²⁹ [REDACTED] .

³⁰ [REDACTED] .

³¹ SITF00306707- 00306714 RED, p.SITF00306709; [REDACTED].

³² Compare [REDACTED] and [REDACTED].

³³ Motion, para. 11.

³⁴ [REDACTED].

³⁵ [REDACTED]; F01875, paras. 18-19; F01877, paras. 25-27.

and conduct. The prejudice of admission without cross-examination outweighs any probative value.

29. The Prosecution has not established that W04577 is unavailable. The Motion attempts to establish [REDACTED] within Rule 155(1), wholly relying on [REDACTED].³⁶ In October 2023, [REDACTED].³⁷ Since then, [REDACTED]. Neither W04577 nor [REDACTED] support W04577's alleged unavailability. In November 2024, W04577 told [REDACTED]³⁸ and [REDACTED].³⁹ [REDACTED] limited contact with W04577's [REDACTED]⁴⁰ elicited no direct answer about [REDACTED].⁴¹ No [REDACTED] have been disclosed.

30. The Krasniqi Defence deprecates the Prosecution's attempt to link a legitimate Defence interview with [REDACTED] to W04577's alleged concerns about his family's safety.⁴² The interview complied with the Order on Conduct of the Proceedings⁴³ and was a necessary investigation into W04577's personal allegations. Whilst the Motion cites W04577's preparation notes,⁴⁴ it fails to mention that W04577 [REDACTED].⁴⁵ W04577's [REDACTED] is inconsistent with genuine concern, though his suggestion to [REDACTED] reveals W04577's mindset. Furthermore, W04577 stated [REDACTED],⁴⁶ confirming that the Defence did not reveal W04577's status. This

³⁶ Motion, paras. 13, 16.

³⁷ [REDACTED] 18 October 2023 Assessment, p.4.

³⁸ F02829, para. 4.

³⁹ F02829, para. 6.

⁴⁰ F02906, para.4.

⁴¹ F02906, para. 4.

⁴² Motion, para. 14.

⁴³ F01226/A01.

⁴⁴ Motion, footnote 31.

⁴⁵ 116049-116056 RED, para. 4.

⁴⁶ *Ibid.*

interview is unrelated to W04577's alleged unavailability, which the Motion alleges solely arises from [REDACTED].⁴⁷

31. Should the Panel accept that W04577 is unavailable, the tendered evidence should nevertheless not be admitted applying the Rule 138 criteria.⁴⁸

32. As set out in paragraph 46 below, much of the tendered material should be excluded as irrelevant to any charged incident.

33. Similarly, whilst the Defence does not challenge the authenticity of the tendered documents, W04577 himself disputed the authenticity of the [REDACTED] statement and his signature therein.⁴⁹ Whilst the Motion ignores W04577's testimony on this point, if the Panel accepts W04577's oral evidence, then the [REDACTED] statement is not authentic.

34. The minimal probative value of W04577's evidence is outweighed by the prejudicial effect of admission without cross-examination. W04577 has lied in his evidence; tried to manipulate the Court to gain advantages; and, as explained below, has [REDACTED] which affect the reliability of statements. The outweighing prejudice is that W04577 makes unique allegations about the Accused's acts and conduct, including allegations unrelated to any Indictment incident.

35. The submissions below rely on parts of W04577's evidence which the Prosecution has not tendered. Rule 155(4) allows the Panel to have regard to "any relevant evidence, including written evidence". The probative value of W04577's evidence cannot be assessed without close scrutiny of the inconsistencies – and

⁴⁷ Motion, para. 13.

⁴⁸ See e.g., F03012, paras. 13, 20, 27, 34, 41, 56; F02283, paras. 18, 31, 43, 55, 71, 84.

⁴⁹ Transcript of 11 October 2023, p.8684 lines 4-13.

outright lies – in W04577's prior testimony. The SPO engineers a misleading picture by failing to tender all the evidence.

36. W04577 lied in his SPO interview, prior testimony and before the Panel:

- a. W04577 lied during his testimony in [REDACTED], claiming that the Prosecutor [REDACTED] and [REDACTED].⁵⁰ The Prosecutor responded that this allegation [REDACTED].⁵¹ Nonetheless, when confronted with his testimony, W04577 claimed that he [REDACTED].⁵² It is clear from the transcript that the Prosecutor [REDACTED].⁵³ It is likely that W04577 lied under oath in [REDACTED], and tried to cover up his lie by lying further to the SPO;
- b. The Panel witnessed W04577's demeanour in court on 11 October 2023. W04577 denied giving a [REDACTED] statement to UNMIK, testifying that "this does not stand. This is not true". W04577 denied signing the statement,⁵⁴ although he had told the SPO that [REDACTED].⁵⁵ Either W04577 lied in Court, or he lied to the SPO;
- c. W04577 has acknowledged not telling the truth previously. On [REDACTED], W04577 said [REDACTED].⁵⁶ W04577 did not specify which parts of his prior evidence were untrue, and the [REDACTED]⁵⁷ is no longer possible;

⁵⁰ SITF00393380-00393392, p. SITF00393390.

⁵¹ *Ibid*, pp. SITF00393390-SITF00393391.

⁵² 088346-TR-ET Part 2 RED2, p.5, line 24; p.6, line 5.

⁵³ SITF00393380-00393392.

⁵⁴ Transcript of 11 October 2023, p.8684, lines 4-13.

⁵⁵ 088346-TR-ET Part 3 RED2, p.1, lines 23-24; p.2, lines 13-14.

⁵⁶ 116057-116057, para. 2.

⁵⁷ [REDACTED].

d. There are fundamental inconsistencies in W04577's account regarding [REDACTED]. In particular:

- i) W04577 told UNMIK [REDACTED],⁵⁸ but told the SPO [REDACTED].⁵⁹ This discrepancy is too large to be explained as a mistake;
- ii) W04577 told UNMIK [REDACTED],⁶⁰ but, sixteen years later, W04577 said that he saw [REDACTED];⁶¹
- iii) W04577 told UNMIK [REDACTED],⁶² but told the SPO that [REDACTED].⁶³

e. W04577 also lied about [REDACTED]. For example:

- i) W04577 said that he saw [REDACTED], and emphasised that this occurred in Spring by saying that [REDACTED].⁶⁴ Unchallenged evidence shows that [REDACTED];⁶⁵

⁵⁸ [REDACTED].

⁵⁹ 088347-TR-ET Part 3 RED2, p.23, line 5.

⁶⁰ [REDACTED].

⁶¹ 088346-TR-ET Part 3 RED2, p. 9, line 19.

⁶² [REDACTED].

⁶³ 088347-TR-ET Part 3 RED2, p. 19, line 15-23; p. 25, line 20; p.27 line 25 to p. 28, line 2.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

ii) W04577 insists that [REDACTED]⁶⁶ because of one article that W04577 alleges was published about [REDACTED].⁶⁷ Despite its apparent significance to him, W04577 did not produce a copy and claimed that he was not interested in knowing the publication's name.⁶⁸ The SPO cannot locate this article.⁶⁹ The Defence cannot trace it either. W04577 could not identify the publication, naming three different publications.⁷⁰ Whilst W04577 alleges that [REDACTED],⁷¹ the Defence is only aware that [REDACTED].⁷² It is therefore likely that this is another fabrication by W04577;

f. W04577 alleged that [REDACTED],⁷³ though these were [REDACTED] with unidentified individuals.⁷⁴ These allegations [REDACTED].⁷⁵ Similarly, W02144 testified that [REDACTED].⁷⁶

37. The SPO improperly seeks to tender the SPO interviews in their entirety, without identifying which portions of them the SPO actually believes and relies upon, although the SPO's interviewer plainly did not believe that the answers were true.⁷⁷ The SPO may not tender evidence that it "knows or suspects to be false".⁷⁸ Yet, the

⁶⁶ 088347-TR-ET Part 6 RED2, p. 26, lines 22-25.

⁶⁷ 088347-TR-ET Part 6 RED2, pp. 15-26.

⁶⁸ 088347-TR-ET Part 4 RED2, pp. 9-10, lines 25-2; 088347-TR-ET Part 6 RED2, p. 26, line 19.

⁶⁹ DJK00481-DJK00482.

⁷⁰ 088347-TR-ET Part 4 p.10 line 1-2; Part 6 p.26 line 19; 088347-TR-ET Part 4 RED2, p. 9 line 25 to p. 10 lines 1-2.

⁷¹ [REDACTED], p. 10 lines 24-25 to p. 11 lines 1-5.

⁷² [REDACTED].

⁷³ 088347-TR-ET Part 1, p. 6 lines 13-15; 088347-TR-ET Part 2, p. 29 lines 1-2; 088347-TR-ET Part 3 p. 23 lines 21-25, p. 26 line 15 – p. 27 line 21.

⁷⁴ 088347-TR-ET Part 3, p. 27 lines 7-9.

⁷⁵ [REDACTED]; 114948-114953, p. 2, para. 11.

⁷⁶ [REDACTED], p.16263, lines 3-18.

⁷⁷ See e.g., 088347-TR-ET Part 8 RED2, p. 12, lines 11-15; 088347-TR-ET Part 2 RED2, p. 34, lines 9-12.

⁷⁸ Order on Conduct, para. 46; Code of Conduct Article 14(3)(a) and 14(4).

SPO tenders W04577's allegation that [REDACTED]"⁷⁹ although this is contradicted by the SPO's own witnesses.⁸⁰ The SPO also tenders W04577's allegation that [REDACTED], despite its investigator clearly doubting the factual basis for the allegation.⁸¹ The investigator responded to another allegation by saying [REDACTED].⁸²

38. The Panel cannot properly evaluate W04577's evidence because there has been no investigation of whether W04577's [REDACTED] affect the reliability of his prior evidence. [REDACTED] assessed that W04577's [REDACTED] - plainly [REDACTED].⁸³ WPSO highlighted that W04577 has requested [REDACTED] "in the past".⁸⁴ This is consistent with other evidence. In May 2013, W04577 stated that he had [REDACTED].⁸⁵ In June 2018, W04577 said that "[REDACTED]".⁸⁶ In December 2020, W04577 informed the SPO, that [REDACTED],⁸⁷ although he subsequently denied [REDACTED].⁸⁸ In October 2023, records indicated that W04577 [REDACTED].⁸⁹ The Panel rejected requests for [REDACTED].⁹⁰ W04577's [REDACTED].⁹¹ It is inconceivable that they [REDACTED] in October 2023, and yet the Defence has been prevented from exploring [REDACTED].

⁷⁹ 088346-TR-ET Part 3 RED2, p. 5 lines 7-9.

⁸⁰ See *e.g.*, [REDACTED].

⁸¹ 088347-TR-ET Part 3 RED2, p. 16 lines 4 -12.

⁸² 088347-TR-ET Part 2 RED2, p. 34 lines 9-12.

⁸³ [REDACTED] 18 October 2023 Assessment, p. 1.

⁸⁴ *Ibid*, p. 2.

⁸⁵ [REDACTED].

⁸⁶ 103531-103531, p. 103531.

⁸⁷ 088346-TR-ET Part 2 RED2, pp 1-5.

⁸⁸ *Ibid*, p. 3, line 10.

⁸⁹ [REDACTED] Report, 15 October 2023, attached to CMU's email dated 18 October 2023 at 09:36 a.m., p. 3.

⁹⁰ F01896, paras. 20, 23-24.

⁹¹ [REDACTED].

39. Throughout communications with the SPO, W04577 sought to negotiate advantages for himself and avoid oral testimony. In [REDACTED], W04577 told the SPO that [REDACTED].⁹² In [REDACTED], W04577 told the SPO that [REDACTED].⁹³ In [REDACTED], W04577 suggested that [REDACTED].⁹⁴ In [REDACTED], W04577 said that the SPO promised [REDACTED]; the SPO denied making such a promise.⁹⁵ On [REDACTED], W04577 asked the SPO for [REDACTED]; the SPO stated that no action was necessary and no promises had been made.⁹⁶ In [REDACTED], W04577 apparently [REDACTED].⁹⁷ Matters came to a head in the preparation session, on 6 October 2023, when in addition to disagreeing with the SPO about what promises or assistance had previously been given,⁹⁸ W04577 stated that he “[REDACTED].”⁹⁹ W04577 later stated that “[REDACTED]e”.¹⁰⁰ He, again, claimed that the SPO promised to [REDACTED].¹⁰¹ Unless the Panel accepts that the SPO misled W04577, it must conclude that W04577 has wrongly asserted that promises were made to him on multiple occasions. This impacts his credibility generally.

40. When testifying, W04577 continued trying to [REDACTED].¹⁰² W04577 stated “[REDACTED]”.¹⁰³ Further, [REDACTED] reported on [REDACTED].¹⁰⁴ His [REDACTED] are not the actions of a reliable witness.

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ 116049-116056 RED, paras 5-10.

⁹⁹ *Ibid*, para. 13.

¹⁰⁰ [REDACTED].

¹⁰¹ *Ibid*, para. 10.

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED]; *See also* [REDACTED].

41. After W04577's testimony was adjourned, [REDACTED].¹⁰⁵ On interview, [REDACTED]¹⁰⁶ and stated that [REDACTED].¹⁰⁷ [REDACTED] provided examples of W04577's propensity to lie to achieve his goals, including [REDACTED].¹⁰⁸ [REDACTED] also confirmed that W04577 categorically [REDACTED].¹⁰⁹

42. Other witnesses have undermined W04577's credibility.¹¹⁰ Although [REDACTED].¹¹¹ [REDACTED].¹¹² [REDACTED] account is also fundamentally inconsistent with W04577 on key issues.

43. W04577's evidence is also tainted by his connection to [REDACTED].¹¹³ [REDACTED]¹¹⁴ and he advised W04577 to [REDACTED]. [REDACTED] gave the SPO W04577's contact details.¹¹⁵ The SPO interviewed W04577 in [REDACTED] – after the Accused's arrest. [REDACTED], however, had second thoughts about W04577, informing the SPO that W04577 "[REDACTED]".¹¹⁶

44. These factors demonstrate that W04577's evidence has very little to no probative value to weigh against the prejudice demonstrated below.

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ *Ibid.*

¹¹⁰ Motion, para. 24.

¹¹¹ [REDACTED].

¹¹² [REDACTED]

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ *Ibid.*, para. 3.

¹¹⁶ [REDACTED]. The Defence does not concede that [REDACTED] is generally credible or reliable but on this point, [REDACTED]'s assessment appears consistent with the evidence.

45. W04577's evidence goes to the Accused's acts and conduct, which weighs against admission.¹¹⁷ The Panel's finding that "the contacts and sightings of three of the Accused alleged by W04577 are relatively limited in scope and only remotely connected to their acts and conduct",¹¹⁸ does not address W04577's wide-ranging allegations against all the Accused. W04577 blames [REDACTED] because of the alleged article described above.¹¹⁹ The Defence cannot confront any other witness about this specious allegation. W04577's hatred of [REDACTED].¹²⁰ His evident bias led him to make highly prejudicial allegations without any factual basis, including that [REDACTED].¹²¹ No witness has made these allegations in oral evidence and hence the Defence cannot fairly confront them.

46. The SPO did not plead these allegations in the Indictment or Pre-Trial Brief. W04577's allegations about the [REDACTED]¹²² – including the outlandish allegation that [REDACTED]¹²³ - were not pleaded. Nor did the SPO plead W04577's allegation that [REDACTED].¹²⁴ If the SPO intended to pursue these allegations, the Defence were entitled to a proper notice. Although other witnesses testified on relevant topics, the SPO elected **not** to elicit evidence relating to W04577's allegations. By failing to put W04577's allegations to its witnesses, the SPO removed the possibility of corroboration and of confrontation. To the extent that it was possible to ask [REDACTED], he contradicted W04577. [REDACTED] testified that, in 2019, W04577 was trying to figure out [REDACTED] and [REDACTED] told W04577 that the

¹¹⁷ Rule 155(5) of the Rules.

¹¹⁸ Motion, para. 23; relying on F01595/COR, para. 33.

¹¹⁹ 088347-TR-ET Part 6 RED2, p. 26, lines 15-25.

¹²⁰ *Ibid*, p. 14, lines 18-23.

¹²¹ [REDACTED].

¹²² 088347-TR-ET Part 4 RED2, pp 9-12; 088347-TR-ET Part 6 RED2, 14-29; 088347-TR-ET Part 8 RED2, p. 14; [REDACTED].

¹²³ 088347-TR-ET Part 4 RED2, p. 9 lines 18-25, p. 10, lines 1-7.

¹²⁴ 088347-TR-ET Part 3 RED2, p. 11 lines 12-17; 088347-TR-ET Part 2 RED2, p. 34 lines 13-23.

incident stemmed from a personal allegation [REDACTED].¹²⁵ W04577's lack of knowledge [REDACTED] and this information from [REDACTED] are wholly inconsistent with W04577's attempt to blame [REDACTED].

47. Similarly, W04577 proffered evidence which goes directly to the acts and conduct of [REDACTED]. W04577 places [REDACTED]¹²⁶ and [REDACTED].¹²⁷ Further, W04577 alleges that [REDACTED],¹²⁸ a wild and wholly unsupported allegation based on vague and unverifiable references to the media and unidentified soldiers.¹²⁹ Admitting this unique evidence relating to [REDACTED], is highly prejudicial to the Accused as it deprives the Defence of any opportunity to challenge the source and scope of W04577's knowledge.

48. W04577 also places [REDACTED] at what W04577 asserts was [REDACTED].¹³⁰ W04577 suggests that [REDACTED],¹³¹ proceeding to speculate on [REDACTED].¹³²

49. W04577 further alleges that [REDACTED],¹³³ the day after W4577 had seen [REDACTED].¹³⁴ While it is unclear [REDACTED], the prejudicial nature of this insinuation is clear. W04577 claimed to know both [REDACTED]¹³⁵ and elaborates on the alleged seniority and rank [REDACTED] without providing any factual basis for such statements.¹³⁶

¹²⁵ [REDACTED]; [REDACTED].

¹²⁶ [REDACTED]; 088347-TR-ET Part 8, p. 9 lines 2-12.

¹²⁷ 088347-TR-ET Part 8, p. 9 lines 7-12.

¹²⁸ [REDACTED].

¹²⁹ *Ibid.*

¹³⁰ [REDACTED].

¹³¹ *Ibid.*, p.20 lines 20-24.

¹³² *Ibid.*, pp20-25.

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ 088347-TR-ET Part 1 RED2, p.17.

50. The above evidence in relation to W04577's knowledge about [REDACTED] is notably inconsistent as W04577 also states that he didn't know the Accused and the sort of power they had back in 1998.¹³⁷ None of W04577's vague assertions detail the specific individuals involved, the nature and content of the supposed orders, or indeed if and how they were supposedly followed. The evidence of W04577 is therefore contradictory, unique, unsubstantiated and goes directly to the acts and conduct [REDACTED].

51. The obvious prejudice to the Accused is magnified by the baseless nature of W04577's allegations, outside his personal knowledge, often allegedly from unidentified sources.¹³⁸ W04577 told the SPO that [REDACTED],¹³⁹ although, W04577 did not see [REDACTED],¹⁴⁰ and only justified his allegation by referring to a [REDACTED].¹⁴¹ When pressed by the SPO, W04577 could not provide any basis for his claim that [REDACTED].¹⁴²

52. Moreover, W04577 alleges seeing [REDACTED].¹⁴³ Admission of this evidence would be unfairly prejudicial to [REDACTED], without the opportunity to cross-examine. At one point in his interview, W04577 appears to forget having placed [REDACTED] and requires prompting from the SPO to bring his evidence back in line

¹³⁷ *Ibid*, p.11, lines 12-13.

¹³⁸ See e.g., [REDACTED]; 088346-TR-ET Part 2 RED2, pp 13-14, lines 17-2; 088347-TR-ET Part 2 RED2, pp 34-35; 088347-TR-ET Part 3 RED2, pp 27-28, lines 5-2 ; 088347-TR-ET Part 6 RED2, pp 6-7; [REDACTED].

¹³⁹ 088347-TR-ET Part 3 RED2, p. 11 lines 12-17, 088347-TR-ET Part 2 RED2, p. 34 lines 13-20.

¹⁴⁰ 088347-TR-ET Part 3 RED2, p. 16 lines 8-12.

¹⁴¹ 088347-TR-ET Part 2 RED2, p. 31 lines 7-8.

¹⁴² *Ibid*, p. 34, lines 4-6, p. 35 lines 4-6.

¹⁴³ See e.g., 088347-TR-ET Part 5, p. 14, lines 8-19; 088347-TR-ET Part 8, p. 7, line 5 – p. 9, line 1.

with his previous account.¹⁴⁴ [REDACTED]. There is no other corroborative evidence of his presence there during this period.

53. Similarly, W04577 places [REDACTED].¹⁴⁵ He further mentions a photo that allegedly shows [REDACTED],¹⁴⁶ again producing no evidence whatsoever. As an uncorroborated claim that cannot be tested with this or any other witness, its admission would be highly prejudicial.

54. W04577 also refers to [REDACTED],¹⁴⁷ premising his allegations on rumours and unidentified sources and [REDACTED].¹⁴⁸

55. The Defence attaches as Annex 1 further instances of W04577 making allegations concerning acts and conducts of the accused with no factual basis. To admit these allegations onto the record without the Defence having been able to challenge them would cause an irreparable prejudice to all the accused and should not be allowed. The Defence therefore seeks the exclusion of W04577's references to the Accused, in the event that any part of the Motion is granted.

56. Whilst the SPO submits that W04577's evidence is corroborated,¹⁴⁹ the allegedly corroborative evidence relates to limited aspects of W04577's evidence. The SPO suggests that documents corroborate W04577's [REDACTED]. W04577 told the SPO that [REDACTED],¹⁵⁰ although he previously testified that [REDACTED].¹⁵¹ Contrary

¹⁴⁴ [REDACTED]

¹⁴⁵ 088347-TR-ET Part 7, p. 1, line 17 to p. 3, line 20; p. 9, lines 22-25; [REDACTED].

¹⁴⁶ 088347-TR-ET Part 5, pp. 30-31.

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ Motion, para. 21.

¹⁵⁰ 088346-TR-ET Part 3 RED2, p. 3 lines 9-10.

¹⁵¹ [REDACTED].

to his SPO interview, at least some of the documents support [REDACTED],¹⁵² revealing inconsistencies instead of providing corroboration.

57. Finally, the Motion's reliance on the Panel's Rule 154 Decision¹⁵³ does not assist. The Rule 154 decision assumed that W04577's testimony could be "adequately explored in the course of cross-examination".¹⁵⁴ This safeguard no longer applies. The loss of the opportunity to cross-examine W04577 means that the prejudice outweighs any probative value.

C. W04352

58. The Defence reiterates its submissions regarding the requirements of Rule 155(1)(a). The Defence also notes that the Panel has found W04352's Statements *prima facie* authentic,¹⁵⁵ and accepts that the conditions under Rule 155(1)(b) are met.

59. In its Rule 153 Decision, the Panel determined that the proposed evidence of W04352 did not appear capable of corroboration through any other live or Rule 154 witness which the Defence could cross-examine. It further took the view that the prejudicial effect of admitting such evidence under Rule 153 without cross-examination outweighed its probative value at this stage due to its incriminatory character with regards to the detention and arrest of [REDACTED], an alleged victim included in the Indictment.¹⁵⁶ This prejudicial effect persists regardless of whether the evidence is admitted under Rules 153 or 155. The Defence maintains that the inability to cross-examine in relation to the circumstances of the alleged detention and arrest of

¹⁵² [REDACTED].

¹⁵³ Motion, para. 18.

¹⁵⁴ F01595/COR, para. 33.

¹⁵⁵ F02421, para.33.

¹⁵⁶ F02421, para.35.

[REDACTED] is incurable,¹⁵⁷ rendering this evidence unsuitable for admission under Rule 155.

60. The Panel previously stated that “the importance of proposed evidence is not, in and of itself, ground to refuse admission.”¹⁵⁸ However, its prior decisions to admit ‘important’ evidence have relied on the ability of the Defence to question other witnesses or on supporting adjudicated facts.¹⁵⁹

61. Contrary to the SPO’s submissions, no evidence has been presented in this trial providing any insight into the arrest and detention of [REDACTED]. The presented evidence—hearsay in nature—has been immaterial and contradictory to W04352’s account.¹⁶⁰

62. The SPO argues that [REDACTED]’s arrest and detention are corroborated by adjudicated facts.¹⁶¹ The adjudicated facts in question [REDACTED]. In particular, [REDACTED] refers to the arrest and abduction of the victim from his home and [REDACTED].¹⁶² The SPO’s own Rule 95 Summary confirms that **no other witness** saw [REDACTED].¹⁶³ Contrary to the SPO’s claim and in line with the SPO’s own proposed Rule 95 Summary and the Panel’s previous finding, W04352 is the only witness to [REDACTED]’s arrest. The Prosecution’s attempt to admit W04352’s evidence by relying on an adjudicated fact that derives from W04352’s own account [REDACTED] is improper. Such reasoning is inherently circular and cannot serve as a valid basis for admission.

D. W04427

¹⁵⁷ F02251, paras. 16-19.

¹⁵⁸ F02283, para. 51.

¹⁵⁹ F02283, paras. 51-53.

¹⁶⁰ See [REDACTED].

¹⁶¹ Motion, fn. 75.

¹⁶² F01534/A01, Facts [REDACTED].

¹⁶³ F01594/A02, [REDACTED]”

63. The Defence objects to the admission of W04427's Proposed Evidence pursuant to Rule 155.¹⁶⁴

64. The SPO are tendering W04427's Proposed Evidence pursuant to Rule 155(1),¹⁶⁵ but have not satisfied the conditions for admission through this rule. First, W04427's circumstances do not render him unavailable; he is neither deceased, nor unable to be traced. W04427 is also not unable to testify orally, based on the limited information available in the Motion. While the SPO submits [REDACTED],¹⁶⁶ this assertion is unreferenced, and the Defence has been unable to identify any discussion of [REDACTED] within the witness' disclosed materials. Further, this was not the reason given in the letter [REDACTED] confirming W04427's refusal to testify.¹⁶⁷ In any event, there is no evidence in the Motion that W04427's seemingly self-reported and unsubstantiated [REDACTED] concerns would rise to the level of a physical and mental impairment that would prevent him from testifying orally.

65. The only other justification provided by the SPO is W04427 has refused to testify, citing concerns for [REDACTED].¹⁶⁸ These vague assertions lack any discernible foundation, with neither the Motion nor the letter [REDACTED] citing any examples beyond the witness' own words. W04427 was asked explicitly by the SPO about any concrete basis for his fears, and was unable to provide any.¹⁶⁹ From prior contacts with the SPO, it is evident the only support offered by the witness to found these concerns is events that happened to other individuals more than 25 years ago.¹⁷⁰ In the absence of any other factors or evidence, simple refusal to testify in circumstances where testimony is unable to be compelled cannot amount to a

¹⁶⁴ See Motion, Annex 5.

¹⁶⁵ Motion, paras. 26,48.

¹⁶⁶ Motion, para. 48.

¹⁶⁷ F03028/A06, p. 6.

¹⁶⁸ Motion, paras. 47-48.

¹⁶⁹ 066895-TR-ET Part 7 RED2, pp. 9-10.

¹⁷⁰ See, e.g., 110887-110887 RED.

“compelling reason” that W04427 is unable to testify orally, and does not justify admission pursuant to Rule 155(1).¹⁷¹

66. Further, the SPO has not sought admission of W04427’s Proposed Evidence pursuant to Rule 155(2) which is the *lex specialis* for allegations of improper interference. For the sake of completeness, the Defence submits that the SPO has also not satisfied the test in Rule 155(2), for the same reasons set out above; namely, W04427’s vague and unsubstantiated submissions of [REDACTED] concerns do not adequately demonstrate he has been materially influenced by improper interference in the course of these proceedings. As the Rule 155(2) criteria are cumulative, there is no need to consider whether the other criteria are satisfied.

67. Further, the Defence stresses the limited probative value of W04427’s evidence, particularly considering: (i) clear issues with language, which impacted the accuracy and reliability of the overall record;¹⁷² (ii) the interview was not given under oath, and W04427 has never been subject to cross-examination;¹⁷³ (iii) the statement is replete with information based entirely on hearsay and rumours, including W04427’s knowledge of the KLA,¹⁷⁴ [REDACTED]¹⁷⁵, other incidents charged in the Indictment, related to [REDACTED],¹⁷⁶ and of efforts taken by others to locate W04427;¹⁷⁷ and (iv) contrary to the SPO submissions, W04427’s evidence is largely uncorroborated by other witnesses, particularly on key issues. For example, [REDACTED],¹⁷⁸ and W04427 was not mentioned in the testimony or admitted evidence of the other alleged

¹⁷¹ See paras. 4-12 above.

¹⁷² F02507, para. 41 and fn. 60. One example of the impact of these language issues is the protracted discussion regarding [REDACTED]: 066895-TR-ET Part 3 RED2, p. 57.

¹⁷³ F01603, para. 178.

¹⁷⁴ See, e.g., 066895-TR-ET Part 1 RED2, pp.17-18; 066895-TR-ET Part 3 RED2, pp.4-5; 066895-TR-ET Part 4 RED2, p.11.

¹⁷⁵ 066895-TR-ET Part 3, p. 40; Part 4, p. 5;

¹⁷⁶ F02507, paras. 42-43, fn. 62; 066895-TR-ET Part 1 RED2, p.19 line 14-p.28, line 23; 066895-TR-ET Part 2, p.1 line to p.5 line 23; 066895-TR-ET Part 3 RED2, p.5 lines 15-20.

¹⁷⁷ 066895-TR-ET Part 6, pp. 8-14.

¹⁷⁸ [REDACTED].

corroborating witnesses from the same site.¹⁷⁹ [REDACTED] reported only hearsay information of what W04427 stated about his own detention;¹⁸⁰ it is circular to consider such evidence as corroborative. In the absence of any ability to cross-examine W04427, and when viewed in totality, such issues now undermine the overall reliability and probative value of W04427's Proposed Evidence.

68. If the Panel finds that the SPO has satisfied the requirements for admissibility pursuant to Rule 155, the Defence also objects to the admission of W04427's evidence in its totality. In particular, the Defence objects to the admission of the parts of W04427's Proposed Evidence discussing an alleged [REDACTED], as it is unreliable, and highly prejudicial to the Accused. W04427 is the only witness to provide evidence regarding this [REDACTED].¹⁸¹ W04427 stated that he was [REDACTED], but was unable to provide any reliable information about [REDACTED]. W04427 stated that he [REDACTED].¹⁸² In the absence of any further information, the Defence is unable to meaningfully investigate and challenge this allegation, which goes to an issue at the centre of these proceedings; namely, the alleged targeting of Opponents. Without cross-examination of W04427, and in the absence of other witnesses that could have discussed this issue, the Defence also have no fair opportunity to confront this account.¹⁸³ In these circumstances, the prejudicial effect of admission of evidence on this issue would outweigh its probative value.

E. W04433

69. The Panel denied admission of W04433's evidence pursuant to Rule 153.¹⁸⁴ Crucially, the Panel was clear that the prejudicial effect of admission of W04433's

¹⁷⁹ Motion, para. 50, citing [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ 066895-TR-ET Part 3 RED2, p.38, line 10-p.39, line 8; p.57; 066895-TR-ET Part 7 RED2, p.9, lines 13-20.

¹⁸² 066895-TR-ET Part 3 RED2, p.38, line 10- p.39, line 8.

¹⁸³ F01603, para. 107.

¹⁸⁴ F02779, paras. 63-64.

untested evidence would outweigh its probative value. Nothing has occurred since that decision that would alter this reasoning.

70. W04433 remains the only witness who physically links [REDACTED]. As observed by the Panel, the related witnesses [REDACTED] do not provide such evidence. Despite this clear finding, the SPO incorrectly submits that “W04433 provides crime base evidence, which does not concern the acts and conduct of the Accused and is corroborated and complementary to adjudicated facts and other evidence.” The inability to cross examine the only witness who [REDACTED] was, and remains, highly prejudicial. This prejudice is insurmountable.

71. The SPO states that “W04433 remained firmly unwilling to testify, both in The Hague or by video-conference”¹⁸⁵ and “W04433 reiterated to the SPO, in the strongest possible terms, his unwillingness to testify even if he were to be ‘tied up and shipped to The Hague.’”¹⁸⁶ It is clear therefore from the SPO’s application that W04433 is simply a reluctant witness, not an unavailable witness within the meaning of Rule 155.

72. The requirements of Rule 155(1) are not met in this instance: W04433 has been traced; the SPO does not submit that the witness suffers physical or mental impairment or that other compelling reason exists which renders him unable to testify, nor is there any evidence in this respect. W04433 does not wish to testify; he is unwilling, not unable. As outlined above, this does not satisfy the requirements of Rule 155(1).¹⁸⁷

73. The choice not to execute the summons based on the consideration that it “would not be appropriate or proportionate” to do so¹⁸⁸ is simply an exercise of the SPO’s discretion. There is no independent medical or other evidence which would

¹⁸⁵ F02779, para. 39.

¹⁸⁶ F02779, para. 40.

¹⁸⁷ See paras. 4-12 above.

¹⁸⁸ F02779, para. 41.

support the assertion made in this regard. The SPO cannot simply choose not to take the additional and final reasonable step to secure the evidence of this witness, and then claim it has taken all reasonable steps required.

74. The Defence submits, for completeness, that the test under Rule 155(2) is also not met and cannot be relied upon in the alternative. The SPO has not shown that W04433 has been materially influenced by improper interference in the course of these proceedings. As the Rule 155(2) criteria are cumulative, there is no need to consider whether the other criteria are satisfied.

75. Finally, admission of this evidence would clearly not be in the interests of justice for the reasons identified by the Panel in their Rule 153 decision in relation to prejudicial effect.¹⁸⁹

76. The SPO has not met the required test under of Rule 155. However, even if the Panel is of the view that the witness is unavailable, the SPO's request must be refused for the same reasons as the Panel's previous Rule 153 motion, as its admission would cause prejudice to the Defence which outweighs the probative value of the evidence.

IV. CONCLUSION

77. The Defence requests the Trial Panel to dismiss the motion in relation to W00092, W04352, W04427, W04433, and, in relation to W04577, to dismiss the motion, or, alternatively, to exclude all references to the accused indicated in Annex 1 and any other reference contained in W04577's evidence.

[Word count: 8674 words]

Respectfully submitted on 4 April 2025,



¹⁸⁹ F02779, paras. 63-64.

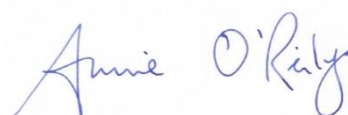
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