

**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 Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Kadri Veseli

**Date:** 25 April 2025

**Language:** English

**Classification:** Public

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**Public Redacted Version of Veseli Defence Response to Prosecution motion for admission of evidence of W04747 pursuant to Rule 155 (F03069) with confidential Annexes 1 and 2**

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## I. INTRODUCTION

1. The Defence for Mr Kadri Veseli hereby responds to the Prosecution's Motion for Admission of W04747's evidence pursuant to Rule 155.<sup>1</sup>
2. The evidence of W04747 cannot be admitted via Rule 155 because the conditions under neither Rule 155(1) nor 155(2) have been met. It has not been established that W04747 is unavailable and the SPO has failed to take reasonable measures to secure his attendance. It would do fundamental and irreparable damage to the fairness of this trial to admit this evidence without cross-examination.
3. The evidence is inadmissible under Rule 138 due to its obvious unreliability and consequent lack of probative value, which is outweighed by its significant prejudicial effect. W04747 is not a truthful witness. He is inconsistent, his allegations are uncorroborated and his account demonstrably untrue. The Defence has conducted investigations into W04747's claims and obtained witness statements from [REDACTED].<sup>2</sup>
4. Central to W04747's evidence are the claims that he was [REDACTED]. These propositions form the basis for his many allegations, by giving him the opportunity to have witnessed events and accessed information. The evidence of [REDACTED] demonstrates that this is a total fabrication:  
[REDACTED].<sup>3</sup>
5. This evidence gathered by the Defence directly contradicts W04747 and shows that W04747 has grossly exaggerated [REDACTED], has a demonstrable

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<sup>1</sup> F03069, *Prosecution motion for admission of evidence of W04747 pursuant to Rule 155 with confidential Annex 1*, 1 April 2025, confidential ('Motion').

<sup>2</sup> See Annex 2 and paras. 49-56 below re ability of Panel to consider evidence not admitted when determining Rule 155 applications.

<sup>3</sup> Annex 2, p.9.

history of lies and exaggeration and has lied about many events described in interview.

6. This material is crucial to the credibility and reliability of W04747. If he is not called live the Defence will be unjustifiably deprived of the opportunity to confront W04747 with this critical impeachment evidence.
7. Admission of this witness's testimony in these circumstances would render any conviction unsafe and consequently, reversible.

## II. BACKGROUND

8. W04747 was scheduled to give evidence on [REDACTED]. [REDACTED], the Defence were informed by CMU that W04747 was unavailable on this date.<sup>4</sup> The parties later received an email from the SPO stating that "the Third State authorities have now sent an additional letter explaining why W04747 is unavailable to appear at the hearing tomorrow"<sup>5</sup> and provided a draft translation of the letter<sup>6</sup> which provided that, [REDACTED].
9. The SPO later clarified that the Third State had informed the court via email that [REDACTED].<sup>7</sup>
10. The SPO took no steps to enquire as to [REDACTED], how it contributed to W04747 being unable to attend or how it may impact his future ability to attend. Instead, the SPO immediately indicated in their email on [REDACTED] their intention to apply to admit the evidence of W04747 via Rule 155,<sup>8</sup> which it did on [REDACTED].

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<sup>4</sup> Email from CMU, [REDACTED].

<sup>5</sup> Email from SPO, [REDACTED].

<sup>6</sup> [REDACTED].

<sup>7</sup> Email from SPO, [REDACTED].

<sup>8</sup> Email from SPO, [REDACTED].

11. The Panel requested no further information, made no orders related to the witness and took no steps in furtherance of securing his attendance.

### III. SUBMISSIONS

12. Neither the requirements of Rules 155(2), nor Rule 155(1), have been met, and the interests of justice weigh heavily against admission of W04747's evidence.

13. The evidence does not meet the overarching admissibility requirements of Rule 138; it is demonstrably unreliable and therefore of little to no probative value. Any minimal probative value it may retain, is far outweighed by its prejudicial effect.

#### a. **W04747's failure to appear does not establish unavailability**

14. W04747 is not unavailable or unable to testify within the meaning of Rule 155(1) and the SPO has not exhausted all reasonable avenues to secure the attendance of the witness required by Rule 155(2).

15. The ICC, when considering the mirroring provisions under Rule 68(2)(d)(i), found that "[i]n determining what constitutes 'reasonable efforts' to secure the attendance of a witness, the Chamber notes the drafting history of Rule 68(2)(d) of the Rules, where it was highlighted that 'reasonable efforts' must have been 'exhausted.'"<sup>9</sup>

16. The position on [REDACTED] was that W04747 failed to attend due [REDACTED] was only obtained upon a disclosure request from the Defence.

17. The SPO elected to make a Rule 155 application without taking the most basic of steps. It has demonstrated a clear preference for the admission of the

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<sup>9</sup> ICC, *Prosecutor v. Yekatom and Ngaïssona*, Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, 31 October 2023; *Citing Working Group Report, ICC-ASP/12/37/Add.1, Annex II.A, para. 35* ('Yekatom and Ngaïssona').

evidence of this witness via Rule 155 and, as a result, made this application prematurely, without making necessary enquiries or taking reasonable steps to secure the attendance of the witness as required under the Rules.

18. [REDACTED].

19. [REDACTED].

20. No efforts were made to facilitate his attendance at a later time. No effort was made for W04747 [REDACTED]. There is simply no evidence before the court that in fact shows [REDACTED]. The test for unavailability [REDACTED] under Rule 155(1) is not met.

*All reasonable efforts to secure W04747's evidence have not been exhausted*

21. The Third State can oblige a witness to appear via video-link pursuant to their (compulsive) summons.<sup>10</sup> It appears that such a summons was in fact issued, however, the SPO exercised its discretion not to execute it. The SPO is of the view that “the reasonably foreseeable consequences of enforcing a summons or taking further measures would cause undue and disproportionate hardship.”<sup>11</sup> The SPO provide no evidence or reasoning to support this assessment, no explanation as to what hardship they suggest would or could arise or how it would be undue or disproportionate in the circumstances.

22. While it is within the discretion of the SPO not to seek execution of a summons, where it makes this choice, it cannot then assert it has exhausted all reasonable means. The absence of this step, coupled with the blatant failure to enquire into [REDACTED], or effort to delay his evidence, makes it impossible to suggest that the SPO has exhausted all reasonable efforts. The SPO has not “pursued

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<sup>10</sup> Motion, para. 10.

<sup>11</sup> Motion, para. 15.

the possibility of W04747 testifying to its logical end,” but to its own chosen end.

23. [REDACTED]. No justification has been provided as to why the court was not asked to wait [REDACTED].
24. The Panel did not order the execution of the summons or take any steps *proprio motu* to secure his attendance, which it can do in the interests of justice.

**b. Improper interference is not established**

25. For Rule 155(2)(b) to be met, there must be a sound evidential basis for any finding by the Panel; findings cannot be based on bare assertion or speculation. The SPO must prove that the witness (a) has been the subject of interference and (b) that interference materially influenced his failure to attend. The Panel must conduct an objective assessment, based on the evidence, of whether this limb has been met.
26. [REDACTED].<sup>12</sup>
27. No security concerns have ever been reported by W04747's family [REDACTED]. No statements have been taken from them to determine whether they share these concerns. It is unknown whether W04747 is in contact with family [REDACTED].<sup>13</sup> [REDACTED].<sup>14</sup>
28. W04747 has also made the highly questionable assertion [REDACTED].<sup>15</sup> These alleged incidents were inexplicably not reported to authorities.

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<sup>12</sup> F02990/CONF/RED/A01/COR, p.4, paras 4, 7.

<sup>13</sup> Annex 2, p.36.

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

<sup>15</sup> 126459-126460, para. 3.

29. W04747 has clearly told lies about his family's safety, stating [REDACTED].<sup>16</sup>
30. W04747, for reasons set out more thoroughly below, is not a credible source of information and is demonstrably unreliable and untruthful. As such, an allegation like this requires close scrutiny and circumspection and his account of perceived threats simply cannot be relied upon in the absence of supporting evidence, of which there is none.
31. It is asserted that [REDACTED] W04747 [REDACTED];<sup>17</sup> this is incorrect. These contain [REDACTED].
32. [REDACTED].
33. These [REDACTED] must also be considered in their proper context. [REDACTED].<sup>18</sup> [REDACTED].
34. [REDACTED].
35. [REDACTED],<sup>19</sup> [REDACTED].
36. The witness now asserts for the first time [REDACTED], when faced with the prospect of making his allegations under oath, that he has safety concerns. There is no credible or independent evidence to suggest that W04747 has been the subject of improper interference and his account is not credible or reliable.
37. The SPO assert that "the climate of witness intimidation in Kosovo [...] has now pressured W04747 into silence."<sup>20</sup> There are 258 prosecution witnesses in this

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<sup>16</sup> F02990/CONF/RED/A01/COR,p.40; *inter partes* email from SPO, [REDACTED].

<sup>17</sup> Motion, para. 6; [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> Annex 2, p. 35.

<sup>20</sup> Motion, para. 14.

case.<sup>21</sup> W04747 is the *only* witness who the SPO has argued has failed to attend due to improper interference *in the lifetime of these proceedings*.<sup>22</sup>

38. The SPO now asserts that W04747's [REDACTED] is that he will not testify.<sup>23</sup> [REDACTED], the Panel enquired as to whether the consent of the witness to testify could be sought that week. The SPO stated that "[f]ollowing the discussion in the courtroom yesterday and KSC-BC-2020-06/F03052/CONF/RED, para.5, the SPO has spoken with the Third State authorities about the possibility of seeking W04747's [REDACTED]."<sup>24</sup> This representation was made when the SPO was aware that the Third State had spoken to W04747 [REDACTED], in their presence, and had indicated he was not prepared to testify.<sup>25</sup> The Defence requested an explanation as to how the SPO reconciled the submissions made in the [REDACTED] email with the note [REDACTED].<sup>26</sup> The SPO responded [REDACTED] that, [REDACTED]. It was therefore the position of the SPO as of [REDACTED] that the consent or otherwise of the witness had *not* in fact been established and as such there was no "final answer."
39. The Defence agrees that were W04747 to give live evidence, it would lead to a 'circus' and a 'theatre production' where he would only talk 'nonsense', however this is not due to any interference, but because W04747 is a thoroughly dishonest witness with no regard for the integrity of these proceedings, or law and order more broadly.

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<sup>21</sup> F02962/A02, ANNEX 2 to Prosecution submission of amended witness list, 25 February 2025, confidential.

<sup>22</sup> The Defence acknowledges that the SPO submits that W04352 and W04738's attendance has been influenced by improper interference or security concerns (F03028; F03056 respectively). However such concerns do not concern current proceedings, but past; namely, *Selim Krasniqi et al* and *Sali Veseli et al*.

<sup>23</sup> Motion, para. 7.

<sup>24</sup> Email from SPO, [REDACTED].

<sup>25</sup> 126751-126759, p.5.

<sup>26</sup> Email from Defence, [REDACTED].

**c. W04747's evidence is uncorroborated, demonstrably unreliable and its admission would cause undue prejudice to the defence and undermine the integrity of proceedings**

40. The SPO makes their primary application under Rule 155(2), which requires that the Panel be satisfied that the admission of evidence is in the interests of justice. In the alternative, the SPO seeks admission under Rule 155(1) which requires the statement be *prima facie* reliable. Rule 138 requires all evidence be relevant, authentic, have probative value and its probative value not be outweighed by its prejudicial effect. The SPO's motion fails in each of these three respects, the reasons for which are inherently interconnected and as such will be dealt with together below.

41. W04747 is untruthful on many key issues, including accusations going to acts and conduct of the Accused. Contrary to the SPOs assertions, his evidence on these issues is mostly uncorroborated. In the absence of live evidence, the extensive impeachment evidence available to the Defence cannot be used to challenge his truthfulness. Such cross-examination would unquestionably have a profound effect on the reliability and credibility of his evidence, reducing it to nil probative value. The inability of the Defence to cross-examine in these circumstances would be highly prejudicial and such prejudice would be insurmountable, irreparable and bring the fairness of the proceedings into disrepute.

***The evidence of W04747 is uncorroborated***

42. The SPO conflates the issues of authenticity and reliability. The fact that an interview was formal and recorded has no bearing on reliability, only authenticity.

43. An analysis of the assertion by the SPO that the evidence of W04747 is corroborated by other evidence reveals that this is positively incorrect. The SPO's assertions misrepresent the true evidential picture and ignore many aspects of W04747's evidence which are uncorroborated.
44. The Panel cannot take the submissions of the SPO at face value. The SPO states that W04747 corroborates the evidence of [REDACTED].<sup>27</sup> The evidence of [REDACTED] does not corroborate W04747's evidence, as their accounts concern [REDACTED].<sup>28</sup> [REDACTED].
45. The SPO suggest that [REDACTED].<sup>29</sup> [REDACTED].<sup>30</sup> [REDACTED]<sup>31</sup> i.e., [REDACTED],<sup>32</sup> [REDACTED].<sup>33</sup>
46. Further, the serious allegations set out in paragraph 19 are not corroborated. In support of these assertions the SPO point to weak, tenuous and unreliable documentary evidence, the credibility of which has been wholly undermined during trial. The allegations are simply not made out and it is wrong to suggest that the highly unreliable evidence of W04747 is corroborated or supported by a piecemeal collection of unreliable evidence cited in a vacuum.
47. The witness also makes numerous allegations, including some concerning acts and conduct of the Accused, which are not corroborated. See **Annex 1(a)** for a non-exhaustive list of examples of uncorroborated allegations. W04747 cannot be challenged on the content of these serious allegations in the absence of cross-examination.

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<sup>27</sup> Motion, para. 18.

<sup>28</sup> P01355.14\_ET, p.20; p.17134-17135; P01097.8\_ET, p.4-6; P00492.4\_ET, pp.27-29; pp.5606-5607; P02027.1, p.2073.

<sup>29</sup> Motion, para. 18.

<sup>30</sup> P00623.

<sup>31</sup> Trial Hearing 1 July 2024, T.17400.

<sup>32</sup> Trial Hearing 2 April 2024, T.14164.

<sup>33</sup> Annex 2, pp.9 and 43.

*The evidence of W04747 is demonstrably untruthful*

48. The evidence of W04747 is demonstrably untrue. Were W04747 to have been called to give live evidence, the Defence would have had the opportunity to confront him with a large body of credible impeachment evidence demonstrating his untruthfulness. This evidence includes, but is not limited to, that contained in **Annex 2**. Crucially, this evidence can only be deployed by the Defence by way of cross-examination, as it is otherwise inadmissible.
49. The Defence is aware that in F01603 the Panel commented that it would “not base its assessment on reliability or probative value on material not offered for admission” and “[s]hould the Defence wish to rely upon the statement of another witness to challenge the **weight** [...] it would have to produce that statement evidence at trial.”<sup>34</sup>
50. Firstly, a common sense and correct reading of Rule 155 demonstrates that the only requirement for evidence to be considered is that of relevance. Rule 155(4) expressly provides that the Panel “may have regard to **any relevant evidence**, including written evidence, for the purpose of applying this Rule.” The use of the term “any” is significant, rendering the provision intentionally broad. There is no requirement that the evidence the Panel may consider under Rule 155 be admissible at the time the application is being considered or be tendered for admission. The evidence in **Annex 2** is unquestionably relevant. The Panel may consider any relevant evidence. As the provision reads “including written evidence”, the Panel is also not limited to written evidence but may consider live, video or real evidence.

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<sup>34</sup> F01603, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, confidential, para. 126.

51. Further, throughout this trial, the Panel has consistently interpreted the Rules as permissive where silent on an issue and considered itself entitled to act, unless prohibited by the Rules. Fundamental common criminal law principles also dictate that where two possible interpretations exist, the one that should be adopted must be preferable to the Defendant in the interests of fairness.
52. To find that the Defence cannot refer to highly relevant evidence when making submissions on *admissibility* arguments as part of the prosecution case would be unfair and irreconcilably inconsistent with the approach taken to applications from the SPO.
53. Firstly, in relation to unfairness, the witness evidence upon which the Defence wishes to rely cannot be tendered as part of the prosecution case. This evidence should not be refused consideration on the basis it is not being tendered, as the Defence simply cannot tender the evidence at the *admissibility* stage. To refuse the Defence the ability to rely upon it, these circumstances, would clearly be contrary to the interests of justice and not what was intended by the drafters of Rule 155, who included no such limitation.
54. Secondly, in terms of inconsistency of approach, the SPO has been permitted throughout this trial to rely upon material not in evidence to support its submissions on *admissibility*. One need only look at every one of the recent bar table motions to see this practice in action; it has never been prohibited by the Panel, who has taken a permissive approach. Further, the SPO in their own Rule 155 motions has also sought to rely on material not in evidence and not tendered, including throughout its application for this witness<sup>35</sup> and recently that of W04738.<sup>36</sup> The Defence is entitled to equal treatment. It is irreconcilable

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<sup>35</sup> F03056, *Prosecution consolidated motion for the admission of evidence pursuant to Rules 153 and 155 and related requests with confidential Annexes 1-5*, 24 March 2025, confidential.

<sup>36</sup> See F03056/A03.

to allow the SPO to rely on evidence not tendered to support admissibility in its own Rule 155 applications and bar table motions but prevent the Defence from doing the same – who unlike the SPO, cannot tender the evidence upon which they wish to rely.

55. There is no limitation on the material that the Panel may consider when determining admissibility under Rule 138; which is required to do in this instance.
56. The Defence do not rely upon this evidence for consideration of weight, only admissibility. The Defence is entitled to rely upon any and all relevant evidence in support of admissibility arguments under both Rule 155 and Rule 138.
57. Further, crucial to any assessment of credibility and reliability of a witnesses is how a witness responds to impeachment. In the absence of cross-examination, the Panel is deprived of this critical opportunity. Were the witness to appear live, the Defence would have been to in a position to put to him evidence showing that he repeatedly lied to authorities and his response would be critical to any proper assessment of his credibility and reliability.
58. In *Tadić*,<sup>37</sup> the Trial Panel considered the matters to be considered when deciding whether to exclude hearsay evidence under Rule 89(D) which states that “[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” The Chamber observed the following:

In determining whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber "will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as by the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In

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<sup>37</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996.

bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.<sup>38</sup>

59. Contained in **Annex 1(b)** is a selection of the most egregious examples of W04747's dishonesty, but by no means a complete list of the demonstrable untruths within W04747's account. Considering the volume and seriousness of these untruths, the totality of W04747's evidence must be considered unreliable.
60. Prejudicial evidence that is demonstrably untruthful and unreliable is of nil probative value and as such not admissible pursuant to Rules 138 or 155.

*The evidence of W04747 is internally inconsistent*

61. The evidence of W04747 is internally inconsistent in several respects, compounding its unreliability. See **Annex 1(c)** for a non-exhaustive list of examples of W04747's internal inconsistencies.
62. [REDACTED].<sup>39</sup> [REDACTED].<sup>40</sup>

*W04747 has previously been [REDACTED]*

63. [REDACTED].<sup>41</sup> [REDACTED];
- [REDACTED].<sup>42</sup>
64. [REDACTED].

*Acts and Conduct of the Accused*

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<sup>38</sup> *Ibid.*, para. 19.

<sup>39</sup> Annex 2, p.36.

<sup>40</sup> *Ibid.*, p.21.

<sup>41</sup> [REDACTED].

<sup>42</sup> *Ibid.*, p.50

65. As is clear from the Motion,<sup>43</sup> the evidence of W04747 goes to central allegations in this case.
66. The nature of the allegations concerning acts and conduct is highly relevant to any assessment of admissibility under Rule 155. Where a reliable witness discusses acts and conduct of an Accused in a tangential or trivial way, it may well be that no prejudice arises that would bar the admission of that evidence via Rule 155. However, where a witness's evidence comprises of serious allegations against the Accused, which go to the core of the prosecution case, weighs heavily against the admission of such evidence. Admission of such evidence absent cross-examination should be reserved only, if ever, for the most exceptional cases. In cases where the reliability and credibility of such evidence is in serious doubt, such evidence cannot be properly or fairly admitted via Rule 155 due to the insurmountable and irreparable prejudice it would cause to the Defence by being deprived of the opportunity to cross-examine on key allegations against them.
67. The evidence of W04747 is littered with serious allegations concerning the acts and conduct of the Accused, both explicitly and implicitly. See **Annex 1(d)** for a non-exhaustive list of examples.
68. While evidence concerning acts and conduct of the Accused does not bar admission under Rule 155, the Panel must account for this fact when exercising its discretion whether to admit such evidence.<sup>44</sup> As set out in Rule 155(5), this may be a factor against the admission of such evidence, in whole or in part.<sup>45</sup>
- The importance of the proposed evidence and whether it goes to acts and

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<sup>43</sup> Motion, para. 19.

<sup>44</sup> F01603, paras 15, 116; F01864, *Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155*, 17 October 2023, confidential, para. 41; F02013, *Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155*, 15 December, confidential, para. 44.

<sup>45</sup> F02283, *Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155*, 3 May 2024, confidential, para. 14.

conduct of the Accused, coupled with other factors such as concerns about reliability, credibility and prejudice, clearly provide a strong basis to refuse admission of such evidence.

69. In the case of this witness, it cannot be said that the Defence can simply make submissions in relation to any such aspects of the proposed evidence in final submissions which would be accounted for by the Panel when evaluating issues of weight and probative value. The impeachment material that would have been put to this witness is largely not admissible, as it takes the form of witness statements. As such, no closing submissions can be made upon it. The Defence cannot fairly be denied the opportunity to put that material to the witness.
70. The fact that W04747's evidence concerns acts and conduct that go to central issues of the SPO's case is a factor that weighs heavily against admission of such evidence unchallenged; the prejudicial impact would be insurmountable.

*The prejudice caused by W04747's evidence far outweighs any potential probative value*

71. At the ICC, the introduction of evidence under Rule 68 is not permitted if it is prejudicial to, or inconsistent with, the rights of the Accused. The Chamber may consider a number of factors in this assessment of prejudice including whether the evidence: (i) relates to issues that are materially in dispute; (ii) provides background information or is central to core issues in the case; or (iii) is cumulative or corroborative of other evidence.<sup>46</sup> In this case, each of these factors weigh against the admission of the evidence; the evidence is materially

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<sup>46</sup> Yekatom and Ngaissona, para. 32.

- in dispute, central to the issues in the case and not cumulative of or corroborated by other evidence.
72. Considering the credibility and reliability issues set out above, the probative value of W04747's evidence is significantly reduced, if not eradicated. The lower the probative value of the evidence, the more the interests of justice weigh against its admission, where admission would cause prejudice. Evidence of little to no probative value, which would cause significant prejudice to the Defence, should not be admitted.
73. The reliability and credibility issues that affect this witness are so significant that it is impossible to credibly assert that the inability to cross-examine can be adequately addressed in the Panel's final, holistic assessment of the evidence; they cannot. Cross-examination would profoundly alter the nature and substance of the evidence. Depriving the Defence of this opportunity would cause irreparable prejudice.
74. It is disingenuous for the SPO to assert that the Defence has had ample opportunity to question other witnesses on many of the same topics, in the knowledge that W04747 is the only witness that makes many of his key allegations. In any event, this goes no way to curing the unique prejudice caused here. Fundamentally, the core issue concerning this witness is that he is lying, and demonstrably so. This cannot be put to other witnesses in relation to uncorroborated allegations they know nothing about.
75. To say any assessment of this evidence is a matter of weight is to completely disregard the intention and purpose of the Rules. Questions of admissibility and questions of weight are fundamentally distinct. Not all evidence is *prima facie* admissible. The purpose of the Rules is to ensure the fairness and integrity of the proceedings and that only evidence which meets the requirements under

the Rules is admitted; Rules are not mere inconveniences. The Panel has a duty to act as gatekeepers. Evidence cannot simply be waived through; it must meet each limb of the requisite tests for admission. Weight is a matter only to be considered *after* these hurdles have first been overcome, and they have not been here.

76. To suggest that credibility of this witness can be adequately assessed on a video, when answering questions only from the SPO, is incorrect. The viewing of a lengthy and unchallenged account given to a prosecutor keen to hear it is of little to no assistance when assessing credibility. The credibility of such a witness can only be properly assessed when confronted under cross-examination.
77. It is no answer to say that the Defence can deal with these matters, or call its impeachment evidence, as part of a defence case. This is impermissible burden shifting. This cures no prejudice. The Defence does not bear the burden of proving W04747 is a liar. The SPO bears the burden of proving he is truthful. The evisceration of the right of cross-examination cannot be cured by placing a burden on the Defence to call a case. The impact and effect of this evidence were W04747 to have been confronted with it would have a markedly different impact on his testimony and the Panel's ability to assess it. The prejudice that arises from the inability to do so cannot be cured in a defence case.
78. Finally, while it is correct that the improper interference required need not be attributable to the Accused in order for it to be relevant under Rule 155, the Accused's involvement – or lack thereof – can nonetheless be a factor in determining whether the introduction of the prior recorded testimony is in the interests of justice.<sup>47</sup> Rule 155(3)(b)(ii) provides that the interests of justice test

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<sup>47</sup> See also Ruto & Sang Rule 68 Decision, ICC-01/09-01/11-1938-Corr-Red2, para. 44; Working Group Report, ICC-ASP/12/37/Add.1, Annex II.A, para. 34 re Rule 68(2)(d)(i).

includes an assessment of “the apparent role in the improper interference of a Party or someone acting on behalf of a Party to the proceedings.”

79. While it is not accepted that W04747 has been the subject of improper interference, the SPO case in this respect is not that the Accused are responsible for any alleged interference. This is relevant when considering any prejudice that would be borne by the Accused, were the evidence to be admitted in writing, and weighs against the admission of the evidence in such circumstances.

### *Irrelevant post-war evidence*

80. In the Panel’s Rule 154 decision concerning W04747’s evidence, the Panel stated that the Rule 95 summary and Rule 154 application only provided “some indication of the general aspects of this witness’s account which the SPO considers material to its case.”<sup>48</sup> It instructed the SPO to focus its direct examination of W04747 on highlighting and expanding on aspects of his evidence upon which it seeks to rely.<sup>49</sup>
81. In its Rule 155 application, the SPO has applied to admit the totality of W04747’s interviews, along with numerous exhibits. The SPO has failed to conduct any narrowing exercise. Only evidence upon which a party intends to rely can and should be tendered; one must therefore assume that the SPO relies upon the totality of this witness’s evidence.
82. As set out in the “Veseli Defence Request for Exclusion of Evidence,”<sup>50</sup> which is yet to be determined, W04747’s evidence is riddled with prejudicial and

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<sup>48</sup> F02720, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W02586, W03873, W04264, W04393, W04401, W04679, and W04747 pursuant to Rule 154*, 14 November 2024, confidential, para. 81.

<sup>49</sup> *Ibid.*

<sup>50</sup> F02864, *Veseli Defence Request for Exclusion of Evidence*, 27 January 2025, confidential.

irrelevant evidence concerning post-war events. The Defence maintains the submissions made in that filing.

83. It is also noted that since this Request, additional evidence has come to light further undermining these aspects of W04747's evidence, namely the evidence of [REDACTED].<sup>51</sup> [REDACTED].

### *Conduct of the SPO*

84. Rule 62 provides that "the Specialist Prosecutor shall contribute to the establishment of the truth." A relevant factor to consider in addition to the above is the wholesale intentional and highly questionable failure of the SPO to further investigate the allegations made by W04747 when there were clear, reasonable, identifiable and accessible avenues of further enquiry that should have been pursued with a view to bolstering or undermining W04747's claims.
85. W04747 is the only witness the SPO interviewed [REDACTED]. [REDACTED]. This is inconsistent with the approach taken with [REDACTED].
86. Considering the nature and severity of the sensationalist accusations made by W04747, it is inexplicable that the SPO would fail to interview any other witness, who may be able corroborate or undermine these allegations, or other aspects of W04747's more generic evidence in relation to [REDACTED]. The fact that W04747 is the only person to make such sensationalist allegations is all the more reason for a fair prosecutor to legitimately query their truthfulness and indicate the need for heightened scrutiny.

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<sup>51</sup> Annex 2, pp.18-27.

87. One unfortunate but potential explanation for this failure is that the SPO were concerned that further investigation of the sensationalist allegations made by W04747 may in fact undermine his account.

88. The Defence have made these enquiries. The results are appended in **Annex 2**.<sup>52</sup>

#### IV. CONCLUSION

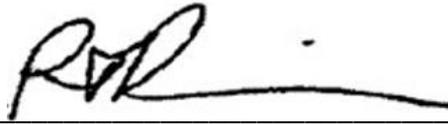
89. For the reasons set out in the Request and above, the Panel should refuse the SPO's Motion. The evidence is not admissible under Rule 155(2) as conditions 155(2)(b), (c) and (e) have not been met. The SPO has not established that the failure of W04747 to attend is due to improper interference and all reasonable efforts have not been made to secure W04747's attendance. It would not be in the interests of justice to admit this evidence on paper, as W04747's evidence is demonstrably untruthful, inconsistent, and unreliable and substantial and irreparable prejudicial would be caused to the Defence were his evidence to be admitted without the opportunity to challenge it in cross-examination. It is not admissible under Rule 155(1) as the SPO has failed to show W04747 is unavailable and his evidence is demonstrably unreliable. Admission of the evidence should be barred under Rule 138 as it is of little to no probative value considering its unreliability, which is outweighed by its prejudicial effect.

90. The Defence reserves the right to make further submissions on admissibility of specific passages of the evidence concerning the acts and conduct of the Accused and central issues in the case, should the Panel find the requirements of Rule 155 to be met in principle.

**Word Count: 6,986**

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<sup>52</sup> See Annex 2.



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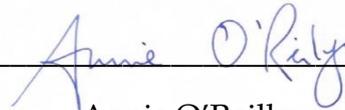


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