



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-04**

The Specialist Prosecutor v. Pjetër Shala

Before: **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 17 March 2023

Language: English

Classification: **Public**

Decision on the submission and admissibility of non-oral evidence

Acting Specialist Prosecutor

Alex Whiting

Counsel for the Accused

Jean-Louis Gilissen

Victims' Counsel

Simon Laws

I.	PROCEDURAL BACKGROUND.....	2
II.	SUBMISSIONS	3
III.	APPLICABLE LAW.....	4
IV.	ANALYSIS.....	4
A.	General Principle	4
B.	Rulings on Admissibility	10
1.	Exclusionary Rules.....	10
2.	Evidence Collected Prior to the Establishment of the Specialist Chambers....	11
3.	Expert Reports	12
4.	Written Statements and Transcripts in Lieu of Testimony	12
C.	Procedure for the Submission of Evidence	16
1.	General Directions	17
2.	Material Collected Prior to the Establishment of the Specialist Chambers	19
3.	Material Introduced Under Rules 153-155 of the Rules	20
4.	Other Material	21
5.	Submission of Material through a Witness	22
6.	Consolidated List of Items.....	25
V.	DISPOSITION	26

TRIAL PANEL I (Panel) hereby renders this decision on the submission and admissibility of non-oral evidence.

I. PROCEDURAL BACKGROUND

1. On 30 September 2022, the Panel sought submissions from the Specialist Prosecutor's Office (SPO), the Defence for Pjetër Shala (Defence and Accused, respectively) and Victims' Counsel on whether the Panel should rule on the admissibility of each piece of (non-oral) evidence in the course of the proceedings, or assess the admissibility of evidence when deliberating on the judgment on the guilt or innocence of the Accused.¹
2. On 10 and 18 October 2022, respectively, the Defence², Victims' Counsel³ and the SPO,⁴ made their submissions.
3. On 24 February 2023, the Panel issued the "Decision on victims' procedural rights during trial and related matters" (Decision on Victims' Rights)⁵ and the "Decision on the conduct of the proceedings" (Decision on Conduct of Proceedings).⁶

¹ KSC-BC-2020-04, F00289, Trial Panel I, *Decision setting the date for trial preparation conferences and requesting submissions*, 30 September 2022, public, with Annex 1, strictly confidential and *ex parte*, Section III.C.6(d).

² KSC-BC-2020-04, F00305, Defence, *Defence Submissions Pursuant to Order on Trial Preparation Conferences* (Defence Submissions), 10 October 2022, strictly confidential and *ex parte*, para. 19. A public redacted version was filed the same day, F00305/RED; Transcript of Hearing, 18 October 2022, public, p. 382, lines 13-20.

³ KSC-BC-2020-04, F00301, Victims' Counsel, *Victims' Counsel Submissions for Trial Preparation Conference* (Victims' Counsel Submissions), 10 October 2022, public, para. 24.

⁴ KSC-BC-2020-04, Transcript of Hearing, 18 October 2022, public, p. 380, line 17 to p. 381, line 25.

⁵ KSC-BC-2020-04, F00433, Trial Panel I, *Decision on victims' procedural rights during trial and related matters*, 24 February 2023, public.

⁶ KSC-BC-2020-04, F00434/RED, Trial Panel I, *Public redacted version of Decision on the conduct of the proceedings*, 24 February 2023, public.

II. SUBMISSIONS

4. The SPO advances that the admissibility of non-oral evidence should be decided at the time of its submission and should not be deferred to the judgment on the guilt or innocence of the Accused. Nonetheless, the SPO defers to the Panel's previous practice and the procedure adopted in Case KSC-BC-2020-05 (Case 05).⁷

5. The Defence objects to the Panel deferring its ruling on the admissibility of (non-oral) evidence until the judgment on the guilt or innocence of the Accused. It advances that, in such a case, the Parties will not know the scope of the evidence before the Panel. According to the Defence: (a) the admissibility of non-oral evidence submitted through a witness should be determined at the time of its submission at trial, after the Parties have had an opportunity to make observations; and (b) any "bar-table" motions should be categorised by subject-matter and presented after all witnesses called by a Party and testifying to a particular subject have been heard, in order to allow the context and relevance of the proposed evidence to be properly assessed.⁸

6. Victims' Counsel has no objections to the Panel adopting the same procedure on the submission and the admissibility of evidence as in Case 05.⁹

⁷ KSC-BC-2020-04, Transcript of Hearing, 18 October 2022, public, p. 381, lines 20-25, referring to KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence* (Case 05 Decision on Submission and Admissibility of Evidence), 25 August 2021, public, where the Panel decided that, in general, it would not rule upfront on the admissibility of each piece of evidence during trial – except in certain specific situations – and would consider the standard admissibility criteria of the submitted evidence as part of its deliberations on the guilt or innocence of the accused.

⁸ Defence Submissions, para. 19.

⁹ Victims' Counsel Submissions, para. 24.

III. APPLICABLE LAW

7. The Panel notes Articles 37, 40(2) and 40(6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 99(4), 100, 137-139, 148(2), 149(4) and 153-155 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

8. The present decision concerns the submission and admissibility of non-oral evidence, such as documents, audio-visual material, or any other type of evidence that is not given orally by a witness in court. The Panel hereby provides directions to the Parties and Victims' Counsel, as the case may be, as to the procedure for the submission of non-oral evidence and the Panel's approach to the admissibility of such evidence, setting out when non-oral evidence is considered to be properly before the Panel for the purpose of its judgment on the guilt or innocence of the Accused.

A. GENERAL PRINCIPLE

9. According to Article 40(2) of the Law, the Panel, having heard the Parties,¹⁰ is vested with the discretionary power to organise the fair and expeditious conduct of the proceedings, in the way it sees fit. Notably, Article 40(6)(h) of the Law gives the Panel discretion ("may, as necessary") to rule on the admissibility of evidence. Notwithstanding Article 37(1) of the Law, which contains an exception to the Panel's discretionary power to rule on admissibility,¹¹ these provisions of the Law do not

¹⁰ The reference to "Party" in this decision also includes Victims' Counsel who may present evidence, as ordered by the Panel, unless otherwise stated. *See* Decision on Victims' Rights, paras 37-46.

¹¹ *See further* para. 27 below; *see also* Case 05 Decision on Submission and Admissibility of Evidence, para. 12.

impose a duty on the Panel to render an item-by-item ruling on the admissibility of each piece of evidence submitted at trial, either at the moment of submission or at any other stage of the proceedings.¹²

10. The same reading is deduced from the Rules, which shall be consistent with the Law.¹³ Rule 138(1) of the Rules establishes standard admissibility criteria that the Panel shall apply when assessing the admissibility of the evidence (relevance, authenticity, probative value and prejudicial effect). Importantly, it also stipulates that “unless challenged or *proprio motu* excluded”, the evidence submitted to the Panel shall be admitted if the aforementioned criteria are met, without imposing on the Panel an obligation to issue an item-by-item decision on the admissibility of each piece of evidence. In fact, Rule 138(1) of the Rules goes as far as to establish a presumption that the evidence submitted is considered as admitted, if the standard Rule 138(1) admissibility criteria are met. Accordingly, it is clear from this provision that, as a general rule, the Panel is not duty-bound to rule on the admissibility of each piece of evidence submitted at trial, either at the moment of submission or at any other stage of the proceedings.¹⁴

11. This is however subject to a challenge presented by a Party or the Panel’s general discretion to declare any item of evidence inadmissible *proprio motu*, in accordance with the criteria established in Rule 138(1) of the Rules, and without prejudice to the application of specific exclusionary rules, as will be mentioned below. In this context, it is worth underscoring that, under Rule 138(1) of the Rules, the *proprio motu* powers of the Panel, firmly rooted in Article 40(6)(h) of the Law, are not to be used to confirm the admissibility of a piece of evidence but only to *exclude* a piece of evidence from the evidentiary record, as warranted by the specific circumstances at hand. This

¹² *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, paras 11-12.

¹³ Article 19(3) of the Law. In the event of conflict between the Law and the Rules, the Law shall prevail, pursuant to Rule 4(2) of the Rules.

¹⁴ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 13.

interpretation is further in harmony with the exclusionary rules set forth in Rules 138(2)-(3) and 148(2) of the Rules, which describe specific situations in which evidence is considered as inadmissible, making admissibility rulings in these instances mandatory.¹⁵

12. Rule 139 of the Rules, on the other hand, concerns the Panel's *assessment* of evidence for the purposes of the judgment, *i.e.* after the presentation of evidence is concluded. Rule 139(1) of the Rules dictates that evidence declared inadmissible may not be considered by the Panel for the judgment. *A contrario*, evidence that has not been specifically excluded as inadmissible may be considered by the Panel for the determination of the guilt or innocence of the Accused.¹⁶ No duty to render an item-by-item admissibility ruling can be deduced from Rule 139 of the Rules either.

13. All of the above provisions demonstrate that the legal framework of the Specialist Chambers (SC) does not establish a general duty for the Panel to rule on the admissibility of each piece of evidence submitted at trial, unless the Law and/or the Rules specifically instruct the Panel to do so or the Panel is of the view, in accordance with its *proprio motu* power under Rule 138(1) of the Rules, that it shall issue a ruling, as further developed below. The legal framework also does not establish a general and automatic right of the Parties to receive a ruling on the admissibility of each and every piece of evidence they submit, either at the moment of submission or at any other stage of the proceedings, unless otherwise provided in the legal framework of the SC.¹⁷

14. In the view of the Panel, the standard Rule 138(1) admissibility criteria, in particular the relevance and probative value of a piece of evidence, are assessed more accurately after having received all the evidence presented at trial, in light of the entire

¹⁵ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 13.

¹⁶ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 14.

¹⁷ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 15.

body of evidence before the Panel.¹⁸ This is also in line with the Panel's duty, in accordance with Rule 139(2) of the Rules, to conduct a holistic evaluation and weighing of all the evidence taken as a whole. Moreover, the requirement for a reasoned judgment enables the Parties to verify precisely how the Panel has evaluated the evidence relied upon and has addressed the objections raised, and allows appellate review as appropriate.¹⁹

15. The Panel is not persuaded by the Defence's argument that it should rule on the admissibility of the non-oral evidence during the trial, or else the Parties will not know in advance of closing submissions the scope of the evidence to be considered by the Panel for the judgment.²⁰

16. First, the present decision sets out the Panel's approach to the submission and admissibility of evidence, thereby informing the Parties and Victims' Counsel of the procedure to be followed throughout the proceedings. The Panel will only consider for its deliberations on the guilt or innocence of the Accused evidence that has properly entered the evidentiary record in accordance with this procedure. In other words, the Parties and Victims' Counsel will have absolute clarity, at the closing of the evidentiary proceedings,²¹ which evidentiary items may be considered by the Panel for the purpose of its judgment.

17. Second, in the course of the trial, the Panel will issue decisions following the submission of (each batch of) non-oral evidence, placing the evidence properly on the record. Evidence will be placed on the record when it is either: (a) admitted, where the Panel is compelled to rule on the admissibility of the evidence prior to its

¹⁸ See KSC-BC-2020-05, F00494/RED/COR, Trial Panel I, *Corrected version of Public redacted version of Trial Judgment (Mustafa Judgment)*, 16 December 2022, public, para. 32; Case 05 Decision on Submission and Admissibility of Evidence, para. 19.

¹⁹ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 19.

²⁰ Defence Submissions, para. 19.

²¹ Rule 134 of the Rules.

deliberations on the judgment, or decides to do so *proprio motu*, as will be further explained below; or (b) considered to be available to the Panel for the purpose of its deliberations and judgment on the guilt or innocence of the Accused, where the Panel defers its assessment of the standard Rule 138(1) admissibility criteria to its deliberations on the judgment, in line with the general approach set out above.

18. Following the Panel's decision(s), the Court Management Unit (CMU) will record each piece of evidence in Legal Workflow accordingly, assigning it an exhibit number and reflecting its status. There will be no ambiguity as to which pieces of evidence are part of the evidentiary record and may be considered by the Panel for the judgment.

19. Third, the Panel notes that the Defence itself requests that non-oral evidence, not introduced through witnesses, be categorised and submitted by subject-matter *after* all witnesses called by the submitting Party to testify on a particular subject-matter have been heard, in order to properly assess its relevance and context.²² Thereby, the Defence is acknowledging, in fact, that it may not be possible to properly assess the standard Rule 138(1) admissibility criteria, in particular relevance and probative value, before the submitting Party has concluded the presentation of its evidence. Indeed, this is in line with the position set out by the Panel above. For these reasons, the Panel rejects the Defence's argument.

20. The Defence also contends that the admissibility of non-oral evidence should be decided at the time of its submission at trial when such evidence is submitted through witnesses in court and after the Parties have had an opportunity to make submissions.²³ The Panel confirms that its general approach, as set out in the present decision, allows the Parties to bring forward any challenge(s) and discuss any

²² Defence Submissions, para. 19.

²³ Defence Submissions, para. 19.

objections regarding non-oral evidentiary items, be it (i) during or after the witness's testimony, when such evidence is introduced through a witness, or (ii) at any stage during the evidentiary proceedings, when non-oral evidence is not introduced through a witness. At no point in time are the Parties prevented from challenging, or discussing any objections to, a piece of evidence during trial. In this respect, the Panel clarifies that the Parties' challenges resting on exclusionary rules will be entertained by the Panel upfront during trial; the same applies if the Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item during trial. Conversely, what the Parties cannot expect is that the Panel, without compelling reason, automatically renders a ruling on each piece of evidence during trial, as a matter of course, including on generic challenges concerning the standard Rule 138(1) admissibility criteria; rather, the discussion on such criteria will take place at the end of the trial proceedings, as the relevance and probative value of any given piece of evidence is assessed more accurately in light of the entire body of evidence presented at trial before the Panel.²⁴

21. In light of the foregoing, the Panel will refrain, in general, from rendering discrete item-by-item admissibility rulings of evidence upon submission during trial, unless: (i) the evidence is challenged and the Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item; (ii) the Panel exercises its *proprio motu* power to rule on the admissibility of individual evidentiary items with a view to excluding any of them; or (iii) the Panel is compelled to do so by specific legal provisions, as further discussed below. When deliberating on the judgment, the Panel will consider the standard admissibility criteria in Rule 138(1) of the Rules as part of its assessment of the evidence when determining the guilt or innocence of the Accused and on the basis of a holistic evaluation of all items of evidence that are part of the

²⁴ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 19.

evidentiary record in the present case,²⁵ though it may not necessarily discuss these aspects for every item in the judgment itself.²⁶ That being said, the Panel will now proceed to explain in which circumstances discrete admissibility rulings shall be rendered.²⁷

B. RULINGS ON ADMISSIBILITY

22. Notwithstanding the Panel's general approach to defer consideration of the standard Rule 138(1) admissibility criteria of each evidentiary item to the judgment stage, the Panel is required to render discrete decisions on admissibility separately, prior to the Panel's assessment of evidence for the purposes of judgment when: (i) specific exclusionary rules apply (Section B.1); (ii) the Law or the Rules oblige the Panel to rule on the admissibility of certain evidence (Sections B.2-3); or (iii) provisions establishing certain preconditions or procedural requisites for the introduction of evidence apply (Section B.4). Evidence declared inadmissible shall not be considered by the Panel for the purposes of judgment, pursuant to Rule 139(1) of the Rules.²⁸

1. Exclusionary Rules

23. Rules 138(2)-(3) and 148(2) of the Rules (the so-called exclusionary rules) describe specific situations in which evidence is considered to be inadmissible. Evidence declared inadmissible shall not be considered by the Panel for the purposes of the judgment, as provided in Rule 139(1) of the Rules.²⁹ Accordingly, the Panel must

²⁵ Rules 137(2) and 139(2) of the Rules.

²⁶ KSC-CA-2022-01, F00114, Court of Appeal, *Appeal Judgment*, 2 February 2023, para. 33, with further references to case-law.

²⁷ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 21.

²⁸ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 22.

²⁹ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, paras 21-22.

ensure prior to its deliberations on the guilt or innocence of the Accused that evidence submitted at trial is not inadmissible by virtue of an exclusionary rule.³⁰

24. Rule 138(2) of the Rules provides for the exclusion of evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law. When conducting an assessment under Rule 138(2) of the Rules, the Panel applies a two-prong test. At first, the evidence must have been obtained by means of either a violation of the Law or the Rules, or standards of international human rights law. Only if such a violation is established in the affirmative will the Panel proceed to consider the two alternative conditions: (i) the violation casts substantial doubt on the reliability of the evidence; or (ii) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.³¹

25. Rule 138(3) of the Rules contains a further exclusionary rule according to which evidence obtained under torture or any other inhumane or degrading treatment is inadmissible and shall be excluded.

26. Lastly, Rule 148(2) of the Rules provides that, in cases of alleged sexual violence, evidence of prior or subsequent sexual conduct of the victim shall not be admitted in evidence.

2. Evidence Collected Prior to the Establishment of the Specialist Chambers

27. Article 37(1) of the Law provides that the admissibility of evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the SC prior to its establishment “shall” be decided by the Panel pursuant to international standards on the collection of evidence and Article 22 of the Constitution of the

³⁰ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 13.

³¹ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 25; KSC-BC-2020-04, F00364/COR/RED, Trial Panel I, *Public redacted version of Corrected version of Decision concerning prior statements given by Pjetër Shala* (Decision on Accused Statements), 6 December 2022 (public redacted version issued on 26 January 2023), public, paras 18-19.

Republic of Kosovo. Article 37(1) of the Law provides for an exception to the Panel's discretionary power under Article 40(6)(h) of the Law. It instructs the Panel to render discrete admissibility rulings on evidence collected prior to the establishment of the SC, which includes evidence collected by any national or international law enforcement or criminal investigation authority or agency, including the Kosovo State Prosecutor, any police authority in Kosovo, the International Criminal Tribunal for the former Yugoslavia, the European Union Rule of Law Mission in Kosovo or by the Special Investigative Task Force.³²

28. Article 37(3) of the Law sets out certain types of evidence that *may* be considered by the Panel as admissible if certain conditions are met, subject to judicial determination of admissibility in accordance with Article 37(1) of the Law.

3. Expert Reports

29. Rule 149(4) of the Rules provides that, if certain preconditions are fulfilled, as set forth in Rule 149(2)(b) and (c) of the Rules, the Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert.³³

4. Written Statements and Transcripts in Lieu of Testimony

30. Rule 141(1), first sentence, of the Rules enshrines the principle of orality, according to which the testimony of a witness shall be given in person, unless otherwise provided. This means that witnesses must appear in open court, in person, and provide their evidence orally. The importance of in-court personal testimony is that the witness gives evidence under oath and under the observation and general

³² *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, paras 12, 23. *See also* Decision on Accused Statements, para. 18.

³³ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 24. *See also* Decision on Conduct of Proceedings, paras 59, 62.

oversight of the Panel.³⁴ It allows the witness's evidence to be fully tested by questioning, with the Panel being able to assess its accuracy and reliability. Nevertheless, in-court testimony is not the exclusive mode by which the Panel may receive witness testimony.

31. Rule 100(1) of the Rules allows for the taking of depositions upon decision of the Pre-Trial Judge which may be used at trial without the person testifying orally before the Panel. Such evidence is preserved under the supervision of the Pre-Trial Judge with full respect for the rights of the opposing Party.³⁵ Upon transmission of the case file to the Trial Panel, the admissibility of Rule 100 material is governed by Rule 138 of the Rules, as clarified in Rule 99(4) of the Rules.³⁶

32. Rules 153-155 of the Rules are tools to expedite and streamline the proceedings.³⁷ They allow the introduction of written statements or transcripts replacing or complementing the oral testimony of a witness, provided that certain preconditions or procedural requisites are met.³⁸ Rules 153 and 155 of the Rules allow the introduction of statements/transcripts of witnesses who are not present before the Panel. Rule 154 of the Rules allows the introduction of statements/transcripts of

³⁴ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 27. See also, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Appeals Chamber, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), 3 May 2011, public, para. 76.

³⁵ See, in particular, Rule 100(3)-(5) of the Rules.

³⁶ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 28.

³⁷ Similarly, ICC, *Prosecutor v. Yekatom and Ngaiisona*, ICC-01/14-01/18-685, [Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules](#) (*Yekatom* Initial Rule 68 Guidance), 16 October 2020, public, para. 26.

³⁸ The Panel understands that the term "written statement" and "transcript" also includes annexes or other documents associated with the written statement/transcript, which are used or explained by the witness and which, as such, are an integral part of the testimony itself; see Case 05 Decision on Submission and Admissibility of Evidence, fn. 27. See similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-596-Red, Trial Chamber IX, [Decision on the Prosecution's Applications for Introduction of Prior Recorded testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, public, para. 10. This is without prejudice to the Panel's discretion to determine that certain annexes or other documents associated with the written statement/transcript are inadmissible.

witnesses who are present before the Panel. Thus, Rules 153 and 155 of the Rules are full exceptions to the principle of orality, while Rule 154 of the Rules only limits this principle. Evidence that is testimonial in nature is inadmissible when not elicited orally or when the preconditions for the introduction of written statements/transcripts under Rules 153-155 of the Rules are not met.³⁹

33. More specifically, Rule 153 of the Rules provides the Panel with discretionary powers to admit, *in lieu* of oral testimony, the written statement of a witness, or transcript of evidence provided by a witness in proceedings before the SC, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment. A set of non-exhaustive factors spelled out in Rule 153(2) and (3) of the Rules, which militate in favour or against admission, guide the Panel when deciding on the admissibility of such evidence. Moreover, Rule 153(2) of the Rules contains procedural requisites that aim at strengthening the probative value of the material introduced under Rule 153 of the Rules.⁴⁰

34. Rule 154 of the Rules provides the Panel with discretionary powers to admit the written statement of a witness or transcript of evidence given by a witness in proceedings before the SC that goes to proof of the acts and conduct of the Accused as charged in the indictment, if the following procedural requisites are met: (i) the witness is present in court; (ii) the witness is available for cross-examination by the other Party and questioning by the Panel; and (iii) the witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she

³⁹ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 29. *See also*, ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-2275-Red, Appeals Chamber, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, public, para. 581; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-631, Trial Chamber V, [Initial Directions on the Conduct of Proceedings](#) (*Yekatom Initial Directions*), 26 August 2020, public, para. 56.

⁴⁰ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 30.

would say if examined. The admitted written statement/transcript complements the oral testimony of the witness. The non-calling Party has the opportunity to test the entirety of the witness's testimony, both in relation to the in-court testimony and the written statement/transcript.⁴¹ Upon application of the calling Party, the Panel will issue rulings ahead of the relevant in-court testimony. However, in principle, the Panel will make its final determination only when the witness appears before the Panel and attests to the accuracy of his or her prior declaration sought to be introduced.⁴²

35. Lastly, Rule 155(1) of the Rules provides the Panel with discretionary powers to admit evidence in the form of a written statement, any other record written or otherwise expressed of what a person has said or transcript of a statement by 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, if the Panel is satisfied: (i) of the person's unavailability or inability to testify orally; and (ii) that the statement, the record or the transcript is *prima facie* reliable, having regard to the circumstances in which it was made, recorded, and maintained. Rule 155(2) of the Rules allows the admission of evidence in the form of a written statement, any other *prima facie* reliable record or transcript of a statement by a person, if the Panel is satisfied that: (i) the witness has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect; (ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion, as further described in Rule 155(3)(a) of the Rules; (iii) where appropriate, reasonable efforts have been made to secure the attendance of the witness as a witness under Rules 100

⁴¹ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 31. See also, [Yekatom Initial Rule 68 Guidance](#), para. 30.

⁴² Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 31. See also, ICC, [Yekatom Initial Directions](#), para. 58.

or 121 of the Rules or, if in attendance, to receive from the witness all material facts known to that witness; (iv) the proposed evidence or evidence to the same effect cannot be otherwise obtained; and (v) it is in the interests of justice, as further described in Rule 155(3)(b) of the Rules.⁴³

36. It is, in principle, up to the calling Party whether it uses the above modalities. However, this choice is subject to judicial oversight. In particular, the Panel shall interfere with the calling Party's choice regarding its presentation of evidence where potential prejudice arises to the rights of the Accused⁴⁴ – in particular, the right to confront and examine in court a person making allegations against him – and to ensure that the proceedings are conducted in a fair and expeditious way,⁴⁵ in full respect of the principles of orality and publicity.⁴⁶ Lastly, a decision under Rules 153-155 of the Rules is made on a case-by-case basis, bearing the case-specific circumstances in mind.⁴⁷

C. PROCEDURE FOR THE SUBMISSION OF EVIDENCE

37. The Panel adopts the following procedure for the submission of evidence, which applies to the SPO and the Defence equally. The same procedure applies, *mutatis mutandis*, to Victims' Counsel who may submit evidence in accordance with the Decision on Victims' Rights.⁴⁸ Noting the inability of the Defence and Victims' Counsel, at this stage, to provide precise information as to the evidence they will eventually present,⁴⁹ further specific deadlines may be set later in the proceedings.

⁴³ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 32.

⁴⁴ Article 21(4)(c), (d), and (f) of the Law; Rule 138(1) of the Rules.

⁴⁵ Article 40(2) of the Law.

⁴⁶ Article 21(2) of the Law.

⁴⁷ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, para. 33.

⁴⁸ Decision on Victims' Rights, paras 37-46.

⁴⁹ Defence Submissions, paras 15-17; Victims' Counsel Submission, paras 17-19.

1. General Directions

38. At the outset, the Panel underscores that the Parties bear full responsibility for the selection and presentation of evidence in support of their arguments. Crucially, it is their duty to ensure that each and every piece of evidence they submit meets the standard Rule 138(1) admissibility criteria. The Parties are also responsible for furnishing further support for the admissibility of the evidence should questions or concerns arise during trial. The Panel's interference is foreseen only if disputes must be resolved or if specific legal provisions require the Panel to issue a ruling on the admissibility of the evidence, as set out above. Other than that, it is not the responsibility of the Panel to guide and advise the Parties upfront and to make preliminary rulings on the admissibility of individual pieces of evidence before the entirety of the evidence has been heard.⁵⁰

39. Further, the Parties are reminded to be selective in their requests for admission of evidence, allowing the trial to be completed within a reasonable time.⁵¹ They shall further ensure that they do not seek to submit items that have already been submitted in previous requests and/or have been admitted or are considered to be available to the Panel for its deliberations and judgement.

40. Importantly, the Panel reminds the Parties that the material concerned must have been disclosed to the opposing Party, Victims' Counsel and the Panel.⁵² In the following, the Panel provides general guidance that concerns all types of non-oral evidence, be it introduced through a witness or not.

41. *Lengthy material.* As a general rule, material, even if lengthy, shall be submitted for admission in its entirety, in order to allow the Panel to assess the correct meaning

⁵⁰ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 18.

⁵¹ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 34.

⁵² *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 34.

and broader context of the portion(s) relied upon by the Parties. If the Panel intends to rely on portions of the material, other than those proposed by the Parties, it will give notice accordingly.⁵³ However, the Panel retains its discretion to admit/consider as available for its deliberations and judgment only parts of the material if the volume or specific nature of the evidence warrant such approach. The submitting Party is instructed to indicate if the material in question is requested to be admitted only in part.⁵⁴

42. *Translations and/or Transcripts.* When making a request for the admission of material in a language other than English,⁵⁵ including audio-visual material, the Parties shall include the original material together with any associated translation(s) and/or transcript(s). If translation(s)/transcript(s) do not exist, the Parties shall indicate this in their requests. A decision to admit such material, including audio-visual material, or to consider it to be available to the Panel for its deliberations and judgment automatically extends to any associated translation(s)/transcript(s) which were duly disclosed and *vice versa*. CMU shall ensure that the status of the material is reflected accurately in Legal Workflow for all versions concerned, *i.e.* original, translation(s) and transcript(s).⁵⁶

43. *Unredacted/Lesser Redacted Versions.* A decision to admit an item or consider it to be available to the Panel for its deliberations and judgment automatically extends to

⁵³ Similarly, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-498-AnxA, Trial Chamber I, [Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings](#), 4 May 2016, public, para. 47.

⁵⁴ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, paras 38, 47; KSC-BC-2020-05, F00285/RED, Trial Panel I, *Public redacted version of Decision on items used with witnesses W03593, W04600, W01679, and W03594 during their in-court testimony* (Case 05 17 December 2021 Decision), 17 December 2021, public, para. 15.

⁵⁵ KSC-BC-2020-04, F00025, Pre-Trial Judge, *Decision on Working Language*, 21 April 2021, public; F000289, Trial Panel I, *Decision setting the dates for trial preparation conferences and requesting submissions*, 30 September 2022, public, para. 7.

⁵⁶ This is irrespective of whether the Parties have included the translation(s)/transcript(s) in their requests, as long as the translation(s)/transcript(s) have been duly disclosed. Similarly, Case 05 Decision on Submission and Admissibility of Evidence, paras 37, 47.

any subsequent unredacted or lesser redacted versions, subject to any objections of the Parties. For the purpose of maintaining an accurate record of the proceedings, should any unredacted or lesser redacted versions be subsequently disclosed, the disclosing Party shall immediately inform the other Party, Victims' Counsel, the Panel and the Registry (CMU). This will allow CMU to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the version admitted or considered as part of the evidence for the purpose of the Panel's deliberations and judgment. Should the other Party or Victims' Counsel have any objections in relation to any such subsequent unredacted or lesser redacted versions, they shall inform the Panel thereof within five days of the notification of their disclosure.⁵⁷

2. Material Collected Prior to the Establishment of the Specialist Chambers

44. The Panel has taken note of the SPO's motion for admission of documentary evidence, including so-called Article 37 material.⁵⁸ The Panel directs the SPO to submit any further applications for the admission of material falling under Article 37 of the Law, if it so wishes, no later than **Friday, 14 April 2023**. Corresponding deadlines for the Defence and Victims' Counsel will be set later in the proceedings.

45. When making an application for the admission of material falling under Article 37 of the Law, the Parties shall: (i) describe shortly the asserted relevance of each piece of material in relation to the factual allegation in question; (ii) suggest the

⁵⁷ Similarly, Case 05 Decision on Submission and Admissibility of Evidence, paras 37, 47; KSC-BC-2020-05, F00281/RED, Trial Panel I, *Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material*, 13 December 2021, public, para. 25.

⁵⁸ KSC-BC-2020-04, F00431, Specialist Prosecutor, *Prosecution motion for admission of documentary evidence*, 22 February 2023, confidential, with Annex 1, confidential. A public redacted version was filed on 2 March 2023, F00431/RED; F00447, Defence, *Defence Response to the Prosecution Motion for Admission of Documentary Evidence*, 6 March 2023, confidential. A public redacted version was submitted on 9 March 2023, F00447/RED; F00453, Specialist Prosecutor, *Prosecution reply to 'Defence Response to the Prosecution Motion for Admission of Documentary Evidence'*, 10 March 2023, confidential.

asserted probative value of each piece of material; and (iii) provide information as to the authenticity of each piece of material, if available.⁵⁹

46. Upon receipt of the application, the opposing Party may respond and present objections and/or challenges to individual evidentiary items, if any.⁶⁰ Victims' Counsel may submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.⁶¹ Subsequently, the Panel will proceed to decide on the admission of the material concerned, as foreseen in Article 37 of the Law and Rule 138 of the Rules.⁶²

47. Mindful of the principle of orality, Article 37 of the Law does not apply to statements or material related to witnesses who are called to testify before the Panel.⁶³

3. Material Introduced Under Rules 153-155 of the Rules

48. The Panel recalls the time limits set for the SPO, the Defence and Victims' Counsel, in its Conduct of Proceedings Decision, for the submission of applications under Rules 153, 154 and 155(1) of the Rules.⁶⁴ In general, upon receipt of such applications, the opposing Party may respond and present its objections, if any. Victims' Counsel may respond and submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.⁶⁵ Unless otherwise ordered, the time limits for responses and, if necessary, replies follow Rule 76 of the Rules.

⁵⁹ Where appropriate, the information under points (i)-(iii) may be summarized for groups of documents. *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 35.

⁶⁰ *See* Rules 76 and 138(1) of the Rules, second sentence. *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 36.

⁶¹ *See* Rule 76 of the Rules; Decision on Victims' Rights, para. 50.

⁶² *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 36.

⁶³ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 39.

⁶⁴ Conduct of Proceedings Decision, paras 67-69. The Panel recalls the deadline set for the Defence and Victims' Counsel to respond and raise any objections to the SPO's application, as well as the deadline for the SPO to reply, *see* Conduct of Proceedings Decision, para. 67.

⁶⁵ Decision on Victims' Rights, para. 50.

49. Upon receipt of all required submissions, the Panel will: (i) as regards applications under Rules 153 and 155(1) of the Rules, proceed to decide on the admission of the written statement(s)/transcript(s); and (ii) as regards applications under Rule 154 of the Rules, proceed to decide preliminarily on the admission of the written statement(s)/transcript(s), pending the witness's in-court attestation.⁶⁶

50. As regards applications under Rule 155(2) of the Rules, the Panel instructs the Parties to make such applications as soon as practicable. Upon receipt of all required submissions, the Panel will subsequently proceed to decide on the admission of the written statement(s)/transcript(s) concerned.⁶⁷

4. Other Material

51. The Panel has taken note of the SPO's motion for admission of non-oral, documentary evidence,⁶⁸ and orders the SPO to submit any other applications for the admission of material that does not fall under the aforementioned categories, if it so wishes, no later than **Friday, 14 April 2023**. Corresponding deadlines for the Defence and Victims' Counsel will be set later in the proceedings.

52. In the application, the Parties and Victims' Counsel are ordered to: (i) describe shortly the asserted relevance of each piece of material in relation to the factual allegation in question; (ii) suggest the asserted probative value of each piece of material; and (iii) provide information as to the authenticity of each piece of material, if available.⁶⁹

⁶⁶ See para. 34 above. *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, paras 40-41.

⁶⁷ *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 42.

⁶⁸ See fn. 58.

⁶⁹ Where appropriate, the information under points (i)-(iii) may be summarized for groups of documents. *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 43.

53. Upon receipt of the application, the opposing Party may respond and present objections and/or challenges to individual evidentiary items, if any.⁷⁰ Victims' Counsel may respond and submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.⁷¹ Unless otherwise ordered, the time limits for responses and, if necessary, replies follow Rule 76 of the Rules.

54. Subsequently, the Panel will proceed as summarised in paragraph 21 above, subject to any exclusionary rules as discussed in paragraphs 23-26 above, or other compelling reasons to exclude the evidence. As a result, the Panel will, unless it excludes said material, consider all material included in the application as available for its deliberations and judgment on the guilt or innocence of the Accused, without rendering a discrete item-by-item ruling under Rule 138(1) of the Rules.⁷²

5. Submission of Material through a Witness

55. Before all else, the Panel informs the Parties and Victims' Counsel that the following directions complement the Panel's relevant directions for the use of material during the questioning of witnesses, as set out in the Decision on Conduct of Proceedings.⁷³ The directions in the present decision concern the procedure for the submission of the (selected) material into evidence used during the questioning of a witness, whose testimony was completed within the evidentiary block concerned, and which has not already been submitted to the Panel.⁷⁴

⁷⁰ See Rules 76 and 138(1), second sentence, of the Rules.

⁷¹ See Rule 76 of the Rules; Decision on Victims' Rights, para. 50. *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 44.

⁷² *Similarly*, Case 05 Decision on Submission and Admissibility of Evidence, para. 45.

⁷³ Decision on Conduct of Proceedings, paras 44-51.

⁷⁴ *Similarly*, KSC-BC-2020-05, F00170, Trial Panel I, *Decision on the conduct of proceedings* (Case 05 Decision on Conduct of Proceedings), 26 August 2021, public, para. 37.

56. No later than one week after the completion of an evidentiary block,⁷⁵ the SPO, the Defence and Victims' Counsel shall submit an application for the admission of any material used during their respective questioning of the witnesses whose testimony was completed within that block. Within five days of receipt of the application: (i) the opposing Party/Parties may respond and present their objections, if any;⁷⁶ and (ii) Victims' Counsel may submit his observations, if any, in accordance with the Decision on Victims' Rights.⁷⁷ Unless otherwise ordered, the time limits for responses and, if necessary, replies follow Rule 76 of the Rules.

57. Subsequently, the Panel will proceed as set out in paragraph 21 above, subject to any exclusionary rules⁷⁸ or other compelling reasons to exclude the evidence. As a result, unless it excludes said material, the Panel will consider it to be available for its deliberations and judgment, without rendering a discrete item-by-item ruling under Rule 138(1) of the Rules.⁷⁹

58. The SPO, the Defence and Victims' Counsel may submit through a witness only material which has been disclosed and *actually* used during their questioning of the witness.⁸⁰

59. Any portions of the witnesses' prior statements that are *read out* and discussed with the witnesses in court become an integral part of their testimony.⁸¹ The Panel

⁷⁵ See KSC-BC-2020-04, F00405, Trial Panel I, *Decision on the date for the commencement of the trial, evidence presentation and related matters*, 26 January 2023, public, paras 15, 18(e), setting the dates for the first four evidentiary blocks; see also *Decision on Conduct of Proceedings*, paras 24-26.

⁷⁶ See Rules 9(5), 76, and 138(1), second sentence, of the Rules.

⁷⁷ See Rule 76 of the Rules; *Decision on Victims' Rights*, para. 50. *Similarly*, Case 05 *Decision on Conduct of Proceedings*, para. 37.

⁷⁸ See paras 23-26 above.

⁷⁹ *Similarly*, Case 05 *Decision on Conduct of Proceedings*, para. 37.

⁸⁰ See KSC-BC-2020-05, F00422, Trial Panel I, *Decision on items used with Defence witnesses 200, 300, 400 and 500 during their in-court testimonies*, 26 May 2022, public, para. 8.

⁸¹ *Mustafa* Judgment, para. 30.

notes that it does not suffice to refer only to the page(s), paragraph(s) or line number(s) in written statements or transcripts.

60. Accordingly, such portions of prior statements do not need to be submitted separately into evidence; rather, they will be part of the official transcript of the witness's in-court testimony, on equal footing as any other statement of the witness reflected in the official transcript. They are automatically available to the Panel for its deliberations and judgment as part of the witnesses' in-court testimony. The same applies to any corresponding translations and/or audio-visual recordings of such portions of prior statements.⁸² The Panel stresses that, in accordance with the principle of orality, only the portions discussed with the witnesses during their in-court testimony are part of the evidentiary record.⁸³ This is because evidence that is testimonial in nature is inadmissible when not elicited orally or introduced through Rules 153-155 of the Rules.⁸⁴

61. Accordingly, the SPO, the Defence and Victims' Counsel shall refer in their final trial briefs, impact statement, or Rule 130 motion, as the case may be, to the witness's testimony in court where the prior statement was discussed, and not directly to the prior statement as such. The Panel will not consider any references made directly to prior statements, unless such statements were introduced under Rules 153-155 of the Rules.

62. Further, when questioning the witness, the SPO, the Defence and Victims' Counsel shall always, before confronting the witness with a particular statement, identify clearly the portions of prior statement(s) that they wish to put to the witness, by reference to the ERN number/range, relevant page, and relevant paragraph or line

⁸² This is in line with the principle set out in para. 42 above. *Similarly*, Case 05 17 December 2021 Decision, para. 14.

⁸³ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, public, p. 852, line 14 to p. 854, line 21.

⁸⁴ See paras 32, 47 above.

numbers.⁸⁵ They shall ensure that such references are correct and complete. They shall further avoid paraphrasing what the witness has said and instead read out the relevant portion(s) of the prior statement.

63. With regard to items marked by witnesses in court, both the original version and the version marked by the witness shall be submitted.

64. As indicated above,⁸⁶ the Parties and Victims' Counsel shall ensure that they do not submit items that have already been submitted in previous requests and/or have been admitted or are considered to be available to the Panel for its deliberations and judgement. Before using an item during their questioning of a witness, the Parties and Victims' Counsel shall indicate whether said item has already been admitted or is considered to be available to the Panel for its deliberations and judgment, or is otherwise subject to a previous request.

65. Following the completion of each witness's testimony in court, CMU shall circulate to the SPO, the Defence, Victims' Counsel and the Panel, via email, a list of all items used during their respective questioning of the witness. CMU shall indicate therein which items have already been admitted, or are considered by the Panel to be available for its deliberations and judgment, or are otherwise subject to a previous request. The Parties and Victims' Counsel may object to CMU's record keeping, if they so wish, within one day.

6. Consolidated List of Items

66. For the purpose of maintaining an accurate record of the proceedings, in accordance with Article 40(5) of the Law and Rule 24(1) of the Rules, within two weeks of the closing of the evidentiary proceedings in accordance with Rule 134 of the Rules,

⁸⁵ See also Decision on Conduct of Proceedings, para. 50.

⁸⁶ See para. 39 above.

the Registry shall file in the case record a consolidated list of all items admitted or considered to be available to the Panel for the purpose of its deliberations and judgment. The Registry shall indicate, as applicable, the portions of each respective item used with the witnesses who testified in the present case.⁸⁷

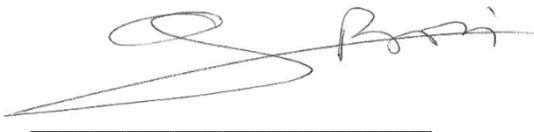
V. DISPOSITION

67. For the above-mentioned reasons, the Panel hereby:

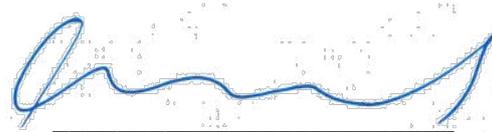
- a. **ADOPTS** the procedure on submission and admissibility of evidence, as set out in this decision; and
- b. **INSTRUCTS** the Parties, Victims' Counsel and the Registry to comply with the directions and deadlines set out above.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 17 March 2023

At The Hague, the Netherlands.

⁸⁷ Consistent with the Panel's direction at para. 59 above, the list will not include portions of prior statements discussed with the witnesses in court, as such portions are an integral part of the witnesses' testimonies.