

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

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Specialist Counsel for Kadri Veseli
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I. INTRODUCTION

1. Accusations against an accused should be made by *viva voce* witnesses who are available for cross-examination,¹ and who can attest to the reliability, relevance, and probative value of the evidence being presented.² This principle of orality, which forms part of the KSC's statutory framework,³ is meant to ensure the adversarial nature of criminal proceedings, and the right of the accused to a public trial and to confront witnesses against him,⁴ subject only to narrow exceptions.⁵

2. The Defence teams for Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (collectively, "the Defence") have expressed their collective concern about the volume of written evidence the SPO is seeking to introduce in this case, and the risks of creating an unmanageable trial record.⁶ The Trial Panel evidently shares these concerns,⁷ which apply equally to the "Prosecution first motion for admission of evidence pursuant to Rule 155".⁸

¹ ECtHR, *A.M. v. Italy*, 37019/97, Second Section, Judgment, 14 December 1999, para. 25.

² ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, p. 4, citing *Prosecutor v. Prlić et al.*, IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on conduct of Trial Proceedings, 28 April 2006, Guideline II(j).

³ See, Articles 21(2) and 37(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law"), and Rule 141(1) of KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

⁴ KSC Law, Articles 21(4)(e) and (f); ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 16.

⁵ KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023 ("Rule 154 Decision"), para. 18.

⁶ KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, pp. 1926-1934; KSC-BC-2020-06/F01308, Joint Defence Response to 'Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154', 20 February 2023, para. 1.

⁷ Rule 154 Decision, paras 29-31, 81.

⁸ KSC-BC-2020-06/F01329, Prosecution first motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-17, 1 March 2023 ("Application").

3. The admission of evidence of unavailable witnesses has previously been authorised within very narrow parameters, reflecting that this procedure conflicts with the rights of the accused to examine and confront witnesses, and to be tried in his presence.⁹ As such, the importance of preserving the testimony of witnesses who are deceased or unavailable must be weighed against these fundamental rights of the accused.¹⁰ The absence of cross-examination also requires a more stringent test for admission than applies for Rule 154 witnesses.¹¹

4. The SPO never concedes that **any** prejudice could arise from the wholesale admission of the evidence and associated exhibits of these unavailable witnesses. The SPO's justification for each witness concludes with a variation of the submission that "the Defence is aware of the witness' identity, may investigate the witness, [his/her] motives and credibility, and has the opportunity to challenge the Proposed Evidence at trial, and put forward a different version of events".¹²

5. As a means of testing a witness' evidence, however, there is no substitute for the examination of the witness under oath, and in front of the finders of fact, to investigate motives and credibility. Only the live examination of witnesses, under the control of Judges and with professional interpreters, can expose the inaccuracies and omissions that are part of translating and transliterating spoken interviews into written statements, and identify simple mistakes of fact. As such, admission of the testimony of unavailable witnesses is an exception, requiring caution in its application.¹³

⁹ KSC Law, Articles 21(4)(e) and (f).

¹⁰ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgment, 3 April 2008, para. 10; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Judgment, 4 December 2012 ("*Lukić Appeal Judgment*"), para. 570.

¹¹ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Partial Decision on Prosecution's Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses, 27 August 2010, para. 32.

¹² Application, paras. 19 (W00100), 23 (W04416), 27 (W04418), 32 (W04589), 35 (W04835), 40 (W01448), 44 (W04733), 47 (W04848), 50 (W01984), 56 (W01143), 60 (W02618), 64 (W04783), 69 (W04829), 76 (W01456), 83 (W04597), 90 (W04836).

¹³ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 *quater*, 25 September 2009

II. APPLICABLE LAW

6. Article 21(2) of the KSC Law guarantees the right of the accused to “a fair and public hearing”. Article 21(4) provides that each accused is entitled to minimum guarantees, including the rights “to be tried in his presence” and “to examine, or have examined, the witnesses against him”.¹⁴

7. Rule 137(1) of the Rules provides that “the Parties may submit evidence relevant to the case”. Rule 138(1) of the Rules provides that “[...] evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect”.

8. The criteria for admission of the evidence of unavailable persons or persons subjected to interference is contained in Rule 155 of the Rules.

9. Rule 155 is modelled on Rule 92 *quater* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), and Rules 68(2)(c) and (d) of the International Criminal Court (“ICC”) Rules of Procedure and Evidence. Accordingly, the Trial Panel may be assisted by the persuasive authorities of these courts.¹⁵

A. FORMAL REQUIREMENTS

(“*Karadžić Admission Decision*”), para. 8; ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 5 February 2009 (“*Đorđević Admission Decision*”), para. 9.

¹⁴ Articles 21(4)(e) and (f).

¹⁵ KSC-BC-2020-06/IA002/F00005, Decision on Jakup Krasniqi’s Appeal Against Decision on Interim Release, 30 April 2021, para. 17; KSC-BC-2020-06/IA009/F00030, Court of Appeals Panel, Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”, 23 December 2021, para. 54.

10. Rule 155(1) sets threshold requirements to be satisfied before the Trial Panel can exercise its discretion to admit the written evidence: that the witness is unavailable or unable to testify orally, and that the statement, record or transcript is *prima facie* reliable.

11. With regard to the *prima facie* reliability of the written evidence, Rule 155(1)(b) directs the Trial Panel to consider the “circumstances in which [the written evidence] was made, recorded and maintained”. This requirement reflects Rule 92 *ter* of the ICTY Rules, which required the Trial Panel to “find from the circumstances in which the statement was made and recorded that it is reliable” and Rule 68(2)(c)(i) of the ICC Rules, which required “sufficient indicia of reliability”.

12. At the ICTY, factors considered relevant to this assessment included:

the circumstances in which the statement was made and recorded, in particular: (i) whether the statement was given under oath; or (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal.¹⁶

13. ICC Trial Chambers also considered: (i) whether the statement was obtained by the Prosecution in the course of its investigation; (ii) whether, in addition to the witness’ signature, the statement also bears the signature of the investigator; and (iii)

¹⁶ *Lukić Appeal Judgment*, para. 566, fn. 1633; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 (“*Milutinović Decision on Admission of Evidence*”), para. 7; *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater*, 2 November 2006, paras. 10, 15; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 27.

whether the witness was given an explanation as to the procedure and was informed of the significance of providing the statement.¹⁷

B. FACTORS RELEVANT TO ADMISSIBILITY

14. If Rule 155's threshold requirements are satisfied, the Trial Panel then considers whether the general requirements of admissibility contained in Rule 138(1) are met.¹⁸ This is consistent with the ICTY and ICC authorities,¹⁹ and means the statement or transcript can be admitted only if it is relevant, authentic, and has probative value that is not outweighed by its prejudicial effect. If these requirements are satisfied, the Trial Panel "may" admit the written evidence, confirming the Trial Panel's discretion in this regard. Importantly, the Trial Panel can admit only certain portions or extracts of material requested.²⁰

15. In assessing admissibility of the written evidence of unavailable witnesses, other Panels and Chambers have taken following factors into account:

1. Corroboration

¹⁷ ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-596-Red, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b), 18 November 2016, para. 18; *Prosecutor v. Saïd Abdel Kani*, ICC-01/14-01/21-507-Red, Decision on the Prosecution's First, Second, and Fourth Requests pursuant to Rule 68(2)(b), 21 October 2022, para. 26.

¹⁸ *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00235/RED, Public redacted version of Decision on the Prosecution application for the admission of prior statements of witness W04648 and related documents, 15 October 2021, para. 9.

¹⁹ *Lukić Appeal Judgment*, para. 566; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1325, Decision on Prosecution application under Rule 68(2)(c) for admission of testimony of Witness P-0039, 19 May 2016, para. 8; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-1413, Decision on the introduction into evidence of P-0125's prior recorded testimony, 14 April 2021, para. 6.

²⁰ See, e.g., *Karadžić Admission Decision*, para. 8, where the Trial Chamber declined to admit a portion of a deceased witness' testimony going to the acts and conduct of the accused.

16. The fact that written evidence is cumulative of other evidence in the case tends to support its admission.²¹ Chambers have considered that the cumulative nature of evidence, and the fact that it has been corroborated by other evidence which has been tested through cross-examination, renders the evidence more reliable than allegations which are being presented for the first and only time through the written statement of an unavailable witness.

17. The SPO has consistently cited as a factor in favour of admission that the proposed evidence is corroborated by the statements “of other witnesses in the case who will be available for cross-examination”.²² As such, admission of this evidence must be subject to these witnesses appearing for cross-examination. Given the uncertainty as to who will ultimately testify as an SPO witness, and what form their evidence will take, this submission is speculative, and cannot safely be relied upon at present as a factor in support of the admission of the original statement.

2. Importance of the evidence to the case

18. “Whether the evidence is central to the allegations or the case” is a relevant factor.²³ The more important the evidence is, the less likely it is to be fair to introduce

²¹ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008 (“*Popović* Admissibility Decision”), paras. 45, 48, 57 and 64; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Second Prosecution Motion for Admission of Evidence pursuant to Rule 92 *quater*, 5 March 2007, para. 11; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1481-Red-Corr, Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence’, 12 November 2015 (“*Bemba* Rule 68(2)(c) Decision”), para. 21.

²² Application, paras. 19 (W00100), 23 (W04416), 27 (W04418), 32 (W04589), 35 (W04835), 40 (W01448), 44 (W04733), 47 (W04848), 50 (W01984), 56 (W01143), 60 (W02618), 64 (W04783), 69 (W04829), 76 (W01456), 83 (W04597), 90 (W04836).

²³ *Bemba* Rule 68(2)(c) Decision, para. 21; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2666-Red, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021 (“*Ntaganda* Appeal Judgment”), para. 630; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution’s Rule 92 *bis* Motion, 4 July 2006, para. 7; *Prosecutor v. Milošević*, IT-98-29/1-T, Decision on Prosecution’s Motion for Admission of Witness Statements Pursuant to Rule 92 *quater*, 19 April 2007, paras. 16-17.

the evidence in writing only. Similarly, if the evidence relates to matters which are not materially in dispute, that will favour its admission.²⁴

19. The case has been charged as a superior responsibility case. The Accused are also alleged to be criminally responsible through a joint criminal enterprise (“JCE”). In this context, prior statements which “go to the existence of a JCE in which the accused allegedly participated, [and] to the relationship of the accused with other members of this alleged joint criminal enterprise” are pivotal to the Prosecution’s case, precluding their admission without cross-examination.²⁵ Similarly, evidence of the acts and conduct of subordinates who have allegedly committed crimes for which an accused is held responsible, was considered “so pivotal to the Prosecution’s case, that these witnesses should be called for cross-examination on the evidence they provided on these units.”²⁶

20. Through the Application, the SPO also seeks to admit written statements that contain identification evidence of the accused, or allegations that they held positions of command. This type of evidence is necessarily central to the allegations in the case, for which caution should be exercised,²⁷ mitigating against its admission in written form.

3. Nature of the evidence

21. The nature of the evidence of an unavailable witness is also relevant. If, for example, the evidence relates solely to the crime-base it is more likely to be admitted,

²⁴ *Bemba* Rule 68(2)(c) Decision, para. 21; ICC, *Prosecutor v. Al Hassan*, Decision on the Introduction into Evidence of P0570’s Prior Recorded Testimony, 11 August 2021, para. 10.

²⁵ ICTY, *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motions for Admission of Written Evidence Pursuant to Rule 92 bis, 16 January 2006, paras. 29, 33.

²⁶ *Ibid.*

²⁷ ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, paras. 34-41; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment, 21 March 2016, para. 241.

than if it relates to the accused.²⁸ The admission of statements of unavailable witnesses has been found to be “particularly apt” for establishing individual criminal acts, when the accused has not been alleged to have carried these out directly.²⁹

22. Consequently, written evidence relating to **the acts and conduct of the accused** should ordinarily lead to the exclusion of all, or at least the relevant portion of, the written evidence; the prejudicial effect of such evidence will, almost invariably, outweigh its probative value. In this context, the ‘acts and conduct’ of the accused means “the personal actions and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged”.³⁰ It plainly includes any evidence relied upon to establish that the accused personally participated in any crime, otherwise aided and abetted those who committed crimes, was a superior to those who committed crimes, knew or had reason to know that crimes were committed by his subordinates, participated in a joint criminal enterprise and shared the intent for those crimes.³¹

23. The fact that Rule 155(5) highlights this type of evidence as a factor against admission is an indicator of the cautious scrutiny required,³² since admission of written evidence deprives the accused of the minimum guarantee to examine or have examined the witnesses against him. Persuasive authorities from other international

²⁸ *Ntaganda* Appeal Judgment, para. 627.

²⁹ *Ibid.*

³⁰ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1667-Red, ‘Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’, [...],’ 27 February 2017, para. 11.

³¹ ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92bis(c), 7 June 2002, paras. 9-10; *Prosecutor v. Stanisić & Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 quater, 16 September 2009, para. 14; ICTY, *Prosecutor v. Orić*, IT-03-68-T, Decision on Defence Motion for the Admission of the Witness Statement of Avdo Husejnovic Pursuant to Rule 92 bis, 15 September 2005.

³² See, for instance, *Popović* Admissibility Decision, para. 32; *Karadžić* Admission Decision, para. 8.

tribunals and the decisions of international human rights courts³³ confirm that convictions may not be based solely (or to a decisive extent) on the evidence of witnesses whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.³⁴ In particular, the ECtHR held that extreme caution is needed whenever untested evidence, even if corroborated by other evidence, would carry “significant weight” in the conviction, or whenever its admission would “handicap the defence”.³⁵ Similarly, the ICTY Appeals Chamber clarified that the prohibition on relying solely or decisively on untested evidence for a conviction applies also where multiple pieces of untested evidence corroborate each other.³⁶ This factor has led other panels to reject the admissibility of written evidence, or at least the parts of such evidence reflecting the acts and conduct of the accused.³⁷

24. Statements or transcripts replete with alleged **hearsay**, particularly where that hearsay is second or third hand, anonymous, or referenced merely as rumours, will also impact admissibility. The second or third hand anonymous hearsay of deceased

³³ International human rights law which sets criminal justice standards (including through the ECHR and ICCPR) is directly applicable and has priority over other legal provisions pursuant to Article 22 of the Constitution of Kosovo and Article 3(2)(e) of the Law.

³⁴ *Ntaganda* Appeal Judgment, paras. 629-630; *Milutinović* Decision on Admission of Evidence, para. 13; *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para. 449; *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015 (“*Popović* Appeal Judgment”), para. 96; *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, para. 807; *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 61. *See also* ECtHR, *Case of Bocos-Cuesta v. The Netherlands*, 54789/00, Third Section, Judgment, 10 November 2005, paras. 67-70; *Solakov v. The Former Yugoslav Republic of Macedonia*, 47023/99, Second Section, Judgment, 31 October 2001, para. 57; *Seton v. United Kingdom*, 55287/10, First Section, Judgment, 31 March 2016 (“*Seton* Judgment”), paras. 57-59; *Al-Khawaja and Tahery v. The United Kingdom*, 26766/05 & 22228/06, Grand Chamber, Judgment, 15 December 2011, paras. 119-147.

³⁵ *Seton* Judgment, para. 59.

³⁶ *Popović* Appeal Judgment, para. 1226.

³⁷ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion for the Admission of the evidence of Milenko Lazic pursuant to Rule 92 *quater* and for leave to add Exhibits to Rule 65 *ter* exhibit list, 9 January 2012, para. 22; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion for the Admission of the evidence of KDZ172 (Milan Babic) pursuant to Rule 92 *quater*, 13 April 2010, para. 41; *Prosecutor v. Šešelj*, IT-03-67-T, ‘Redacted version of the “Decision on the Prosecution’s Consolidated Motion pursuant to Rules 89 (F), 92 *Bis*, 92 *ter* and 92 *Quater* of the Rules Of Procedure And Evidence” [...]’, 21 February 2008, paras. 41-42.

witnesses, which cannot be examined or tested, cannot reasonably be considered to meet the requirements of reliability for admission in these proceedings.

25. Moreover, the SPO also consistently seeks the admission of multiple **overlapping statements** given by the same witness, or the transcripts of a witness' testimony, in addition to multiple and overlapping prior statements. The admission of multiple overlapping statements containing duplicative and substantially similar content risks creating the bloated evidential record that the Trial Panel is openly trying to avoid. Where the admission of multiple statements add nothing of apparent significance, the prerogative of maintaining an uncluttered trial record should take precedence.³⁸

4. Quality of the evidence

26. Factors such as manifest or obvious inconsistencies in a statement, or highly evasive answers on the part of a witness, render the statements of unavailable witnesses unreliable and inadmissible.³⁹

27. An assessment of the quality of the evidence must also include whether, and the extent to which, the evidence has been tested through cross-examination. In this context, simply characterising the questioning by an adverse party as "cross-examination" is insufficient. The "cross-examination" in question may have gone no way towards a meaningful examination or testing of the evidence, whether because it was not in the interest of the adverse party to highlight weaknesses in this evidence, or they were otherwise prevented from doing so.

³⁸ Rule 154 Decision, paras. 29-30, 81.

³⁹ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for the Admission of the Statement of Rajko Koprivica Pursuant to Rule 92 *quater*, 3 October 2012, para. 16; ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment, 20 March 2019, para. 210.

28. In more general terms, any inaccuracies and omissions in witness statements can be most effectively clarified with the benefit of professional interpreters and sworn testimony, under the supervision of Judges who have an understanding of the scope of the charges and an overview of the entire evidential record. These issues cannot be addressed by ascribing less “weight” to the evidence, if they are based on an identification error, a translation or transliteration error, or a mistaken belief. It is for this reason that the KSC Law includes a presumption of orality, and only permits narrowly crafted, specific exceptions that are triggered by well-defined criteria.⁴⁰

29. In addition, through the Application, the SPO seeks the admission of associated exhibits which themselves contain interviews with and statements of third parties.⁴¹ In doing so, the SPO is effectively circumventing the requirements of the admission of prior statements in Rules 153 to 155 of the Rules. Any associated exhibits that include interviews or statements with other people are inadmissible.

III. SUBMISSIONS

30. The Defence does not contest that the witnesses are unavailable to testify, with the exception of W01984, for whom an objection is identified below. However, the Defence submits the following objections to the admission of the evidence and associated exhibits of the 16 witnesses listed in the Application.

A. W00100

31. The SPO seeks admission of a transcript of W00100’s SPO interview from 15 November 2009 (“SPO Interview”); ICTY statement from 17 October 2001 (“ICTY Witness Statement”); statement given to Serbian Police on 21 April 2004 (“Serbian

⁴⁰ Rule 154 Decision, paras. 16-21.

⁴¹ *See, e.g.*, re [REDACTED].

Witness Statement”); record of witness interview in the District Court of Belgrade on 22 February 2007 (“2007 Witness Interview”); witness testimony in a trial hearing in Serbia on 18 December 2007 [REDACTED] (“2007 Testimony”); and SITF Investigator’s Report regarding a meeting on 2 September 2015 (“SITF Report”).⁴²

32. The Defence does not contest that the SPO Interview, the ICTY Witness Statement, the 2007 Witness Interview and the 2007 Testimony contain general indicia of reliability. However, the Serbian Witness Statement does not. There is no indication that W00100 was read her rights. There is no reference to an oath, or confirmation by W00100 that she is aware of the obligation to tell the truth, or the consequences of being untruthful. The original Cyrillic version contains handwritten markings with no indications of authorship, their purpose, or when they were made. There is nothing to indicate the statement is in the form of an official template used by the Serbian Police – the documents contain no attribution to the Serbian Police at all, beyond a case number in the top left corner.⁴³

33. The SITF Report does not contain general indicia of reliability; it is not a statement of W00100 at all, but a report by an investigator as to information received during a meeting with W00100. The report is in summary form, and is not a direct transcription. It is not signed by W00100, and there is no indication the information was repeated for her verification. Nor does it appear that W00100 was advised of standard warnings or notified of her rights. These deficiencies are not sufficiently compensated by the “use of SITF official template; indication of date, time and place of the Investigator’s Report; Investigator’s signature”, when the SPO is not calling or attaching any information or evidence from those present as to the circumstances of the interview.⁴⁴

⁴² See Application, Annex 1, Item Nos. 1-6.

⁴³ Cf. The indicia of reliability identified by the SPO in Application, Annex 1, p. 1.

⁴⁴ See Application, Annex 1, p. 2.

34. Further, W00100's evidence cannot be relied upon regarding the number of KLA soldiers alleged to be present during any of the attacks she witnessed. The witness' evidence on this point is inconsistent and unclear. In her Serbian Witness Statement, W00100 claimed that [REDACTED].⁴⁵ It is not clear which attack W00100 is referencing, but this figure appears to be an exaggeration, not repeated in any of her other statements. While W00100 attempts to later clarify this inconsistency, including confirming this was a reference to the attack on the monastery in Zočište,⁴⁶ her explanation that she meant that one thousand KLA soldiers were merely passing through the area is unconvincing, particularly given that the KLA remained in its infancy in July 1998.⁴⁷ In later statements, W00100 still fails to clearly identify the number of attackers allegedly present for the Zočište Monastery attack, stating variously that she noticed [REDACTED],⁴⁸ or [REDACTED].⁴⁹

35. The quality of the evidence is low. None of the six items resulted from an exercise in which the credibility and veracity of W00100's assertions were properly tested. Despite appearing in person twice, including once in a trial setting, W00100 has not been cross-examined.⁵⁰ The Serbian Witness Statement, which is a summary of the witness' evidence, does not appear to be written in W00100's voice. It contains stronger and more derogatory language than used in her other statements.⁵¹ For example, in the Serbian Witness Statement, W00100 describes those who attacked her family as [REDACTED],⁵² while in all other materials, W00100 avoids any particular description, or otherwise describes them as "UCK" or "UCK soldiers".⁵³

⁴⁵ 026115-026116-ET Revised RED, p. 2.

⁴⁶ 069697-TR-ET Part 1 Revised, p. 7.

⁴⁷ 030947-030949 RED, para. 3.4.

⁴⁸ U002-4871-U002-4878 RED, p. 5.

⁴⁹ 030961-030971-ET RED, p. 8.

⁵⁰ 030972-030978-ET RED, p. 22, where the Presiding Judge asks, [REDACTED].

⁵¹ 026115-026116-ET Revised RED.

⁵² *Ibid.*

⁵³ *See, e.g.*, U002-4871-U002-4878 RED, pp. 2-7.

36. The admission of all six items is unnecessary, and the SPO provides no justification for seeking to admit substantially similar statements. Considering the cumulative nature of the statements, the issues identified above, and that the ICTY Statement likely bears the greatest indicia of reliability – particularly since it is the most contemporaneous in time - the Defence submits only this statement should be admitted as a record of W00100’s evidence. Admission of her other statements adds nothing of apparent significance and would unnecessarily clutter the trial record, particularly given the authenticity, reliability and probative value issues identified. In addition, all later statements are impacted by the passing of time, with W00100’s recollection of the events steadily deteriorating, resulting in less reliable and complete accounts – as W00100 herself acknowledges.⁵⁴

37. Finally, only three of W00100’s six proposed Rule 155 statements are cited in the SPO’s Pre-Trial Brief, and they are only cited in support of two propositions within a single sentence.⁵⁵ This clearly demonstrates the limited relevance of this witness’ evidence to the SPO case, and further justifies not admitting all statements of W00100, particularly those not cited at all in the Pre-Trial Brief.

B. W04416

38. The SPO seeks admission of the UNMIK record of W04416’s hearing of [REDACTED] (“UNMIK Statement”),⁵⁶ and allegedly associated medical records of W04416 from [REDACTED].⁵⁷ The Defence opposes the admission of this evidence in its entirety.

⁵⁴ See, e.g., 069697-TR-ET Part 1 Revised, pp. 7-8.

⁵⁵ KSC-BC-2020-06/F01296/A02, Annex 2 – Lesser Redacted Version of Prosecution Pre-Trial Brief, 15 February 2023 (“SPO Pre-Trial Brief”), para. [REDACTED].

⁵⁶ SPOE00123775-00123786 RED; SPOE00123787-00123800 RED.

⁵⁷ SPOE00209279-00209288; SPOE00209279-SPOE00209282-ET; SPOE00209283-SPOE00209288-ET.

39. First, it appears likely that W04416 was either lying during his testimony, or being so evasive as to be considered wholly unreliable in his account. In his UNMIK Statement, W04416 repeatedly denies [REDACTED].⁵⁸ He denies that [REDACTED].⁵⁹ However, in an earlier interview with UNMIK investigators, W04416 said he [REDACTED].⁶⁰ W04416's evidence is contradicted by [REDACTED]⁶¹ and [REDACTED].⁶² The evidence provided by W03540 concerning the [REDACTED].⁶³ In a further interview with UNMIK investigators, W04416 suggests that he lied during his testimony, because [REDACTED].⁶⁴

40. The same testimony of W04416 was "read into the record" by the District Court of Pristina in *Latif Gashi et al.*⁶⁵ In these proceedings, the Court noted [REDACTED].⁶⁶ Ultimately, W04416 was considered [REDACTED].⁶⁷

41. Inconsistencies in W04416's testimony also diminish his overall reliability and probative value. W04416 fails to clearly identify the length of his detention, stating that it commenced around [REDACTED] August 1998, and lasted either "nineteen or twenty days", or "twenty to twenty two days".⁶⁸ However, W04416 also maintains that he was released on the same day as W03540, which the evidence suggests was [REDACTED]; a date significantly later than W04416's proposed timeframe.

⁵⁸ SPOE00123775-00123786 RED, pp. 6, 7, 8.

⁵⁹ SPOE00123775-00123786 RED, pp. 4, 5, 6, 7.

⁶⁰ SITF00240446-SITF00240446.

⁶¹ See, e.g., 070629-TR-ET Part 2, p. 12; SPOE00123186-00123218 RED, pp. 7-9; SPOE00119959-00119975 RED, pp. 6, 9; SPOE00087525-00087560 RED, p. 16.

⁶² 070629-TR-ET Part 1, p. 26.

⁶³ [REDACTED].

⁶⁴ SPOE00121708-00121711, p. SPOE00121708.

⁶⁵ [REDACTED].

⁶⁶ *Ibid*, p. 35.

⁶⁷ *Ibid.*, p. 37.

⁶⁸ SPOE00123775-00123786 RED, pp. 4, 5.

Documentary evidence supports this later date,⁶⁹ as well as contradicting testimony of W03540.⁷⁰ The District Court considered [REDACTED].⁷¹

42. W04416 gave varying explanations of his initial refusal to testify,⁷² and the medical treatment he received after his period of detention, including what he received the treatment for, where it was received and when.⁷³ When viewed in totality, these inconsistencies and highly evasive responses by W04416 render his evidence unreliable and inadmissible.⁷⁴ W04416's evidence is also untested. Of eight Defence Counsel, only one asked four open-ended and descriptive questions, which failed to meaningfully challenge W04416's account.⁷⁵

43. The medical records presented by the SPO as being an 'integral' part of the UNMIK Statement were neither tendered during the hearing, nor discussed at any length. Rather, they were collected by UNMIK investigators more than a month after the hearing.⁷⁶ A mere reference to the existence of these materials within the UNMIK Statement is not sufficient to render them an inseparable and indispensable part of its record. This is exacerbated by the fact that, [REDACTED].⁷⁷ The relevance of these records is therefore clearly in doubt, particularly considering that they date from [REDACTED], being significantly after his period of detention, and [REDACTED], which is even later and after the conflict.⁷⁸ Consequently, even if the UNMIK

⁶⁹ See, e.g., document presented to W04416 in SPOE00123775-00123786 RED, p. 4, also disclosed in these proceedings: U001-0504-U001-0504 and U001-0504-U001-0504-ET.

⁷⁰ SPOE00123186-00123218 RED, p. 19; SPOE00119959-00119975 RED, p. 12.

⁷¹ [REDACTED].

⁷² Compare testimony given by W04416 in SPOE00123775-00123786 RED at pages 2 and 8-9. [REDACTED].

⁷³ Compare testimony given by W04416 in SPOE00123775-00123786 RED at pages 9-10.

⁷⁴ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for the Admission of the Statement of Rajko Koprivica Pursuant to Rule 92 *quater*, 3 October 2012, para. 16.

⁷⁵ SPOE00123775-00123786 RED, p. 11.

⁷⁶ SPOE00121708-00121711.

⁷⁷ SPOE00123775-00123786 RED, p. 10.

⁷⁸ See SPOE00209279-00209288, SPOE00209279-SPOE00209282-ET, SPOE00209283-SPOE00209288-ET.

Statement is admitted, the purported 'associated exhibits' do not form an integral part of the statement and should not be admitted.

44. Finally, the Defence notes W04416's UNMIK Statement is only cited once in the SPO Pre-Trial Brief, in relation to a general statement about the transfer of detainees.⁷⁹ Again, this demonstrates the limited relevance of this witness to the SPO's case, and further justifies non-admission of W04416's evidence.

C. W04418

45. The SPO seeks admission of W04418's [REDACTED] audio-video recorded interview by [REDACTED] (Item 1), [REDACTED]Statement (Item 2), and [REDACTED] Statement given to the Investigating Judge [REDACTED] (Item 3). The Defence opposes the admission of this evidence in its entirety.

46. W04418's account of his alleged detention in Llapashticë/Lapaštica has changed considerably over time. In both his [REDACTED] statement on [REDACTED],⁸⁰ and statement to the Investigative Judge on [REDACTED],⁸¹ W04418 claimed to have [REDACTED] in Llapashticë.

47. However, on [REDACTED], W04418 testified before [REDACTED], and recanted his testimony in multiple key aspects including, crucially, by denying [REDACTED] in Llapashticë,⁸² stating: [REDACTED].⁸³ W04418 maintained this recantation for [REDACTED] years, under penalty of perjury, when he testified in

⁷⁹ [REDACTED].

⁸⁰ SITF00068687-00068691 RED2.

⁸¹ See SPOE00122306-SPOE00122330 RED2.

⁸² See SPOE00038211-00038215 RED[REDACTED].

⁸³ See SPOE00038211-00038215 RED, p. 4; and SPOE00038200-00038202 RED.

[REDACTED]⁸⁴ [REDACTED]⁸⁵ [REDACTED], only reverting back to his original testimony in [REDACTED], when interviewed by [REDACTED].

48. The [REDACTED] interview was conducted in [REDACTED],⁸⁶ which is not W04418's language, which he complains about in subsequent testimonies.⁸⁷ In the [REDACTED] statement, W04418 claimed to have [REDACTED]. In his [REDACTED] interview, W04418 says that it was [REDACTED].⁸⁸ W04418 also gave contradictory accounts about whether he was allegedly arrested in [REDACTED] and then brought to Llapashticë, or whether he was in [REDACTED] and then in Llapashticë.⁸⁹

49. Items 2 and 3 are also inconsistent despite having been given [REDACTED]. W04418 gave different answers regarding how many people allegedly took him, what they were wearing, and at what point W04418 learned [REDACTED].⁹⁰

50. When shown his [REDACTED] statement, W04418 stated that he was [REDACTED] that it was his signature;⁹¹ and that he may have spoken [REDACTED]⁹² (which he repeats in reference to his [REDACTED]).⁹³ W04418 then claimed he had [REDACTED], but added that he did not know what was written in the statement because he did not speak the language of the interviewer and the statement was not

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ See Annex 3, Item no. 2, SITF00068687-SITF00068691 RED2, p. SITF00068691.

⁸⁷ See SPOE00087525-00087560 RED, p. SPOE00087556; SPOE00087006-00087076 RED, p. SPOE00087006; 066543-TR-ET Part 1 RED2, pp. 14-15.

⁸⁸ 066543-TR-ET Part 1 RED2, p. 30.

⁸⁹ Compare SPOE00087525-00087560 RED, p. SPOE00087555, SPOE00038211-00038215 RED, p. 3, SPOE00087006-00087076 RED, p. SPOE00087032 and SPOE00087525-00087560 RED, p. SPOE0008755 with SITF00068687-SITF00068691 RED2, p. SITF00068687.

⁹⁰ Compare SITF00068687-SITF00068691 RED2, p. SITF00068688 and SPOE00122306-00122330 RED2, p. SPOE00122309.

⁹¹ 066543-TR-ET Part 1 RED2, pp. 11-12.

⁹² *Ibid.*, p. 14.

⁹³ 066543-TR-ET Part 2 RED2, p. 17.

read back to him, and that he had [REDACTED].⁹⁴ He further complained that with regard to [REDACTED],⁹⁵ and that he signed the statement because [REDACTED].⁹⁶ W04418 did not recognize the signature (initials) that appears on [REDACTED] statement,⁹⁷ and complained that [REDACTED].⁹⁸

51. When [REDACTED] questioned W04418 about these divergent accounts, he said that his [REDACTED] were the truth, and that he had lied [REDACTED].⁹⁹ In this regard, when giving his [REDACTED] statement in which he testified about [REDACTED], W04418 had stated that [REDACTED],¹⁰⁰ circumstances that he later denied.¹⁰¹

52. W04418's account of the circumstances of his recantation is confused.¹⁰² W04418 stated that he only changed his account in [REDACTED],¹⁰³ while in fact he had recanted his previous testimony in [REDACTED], maintaining the recantation in [REDACTED]. When confronted with that fact, he first denied that he did so in [REDACTED], then he stated it was either [REDACTED], eventually conceding that he was unsure when or why he did so.¹⁰⁴ In these circumstances, [REDACTED] questioning is no substitute for Defence exploration and cross-examination on this issue, and does not cure the serious reliability issues affecting W04418's evidence.

⁹⁴ 066543-TR-ET Part 1 RED2, p. 14.

⁹⁵ *Ibid.*, p. 15.

⁹⁶ *Ibid.*, p. 15.

⁹⁷ 066543-TR-ET Part 2 RED2, p. 10.

⁹⁸ *Ibid.*, p. 9.

⁹⁹ *Ibid.*, p. 6, 17.

¹⁰⁰ SITF00068687-00068691 RED2, p. SITF00068689; SPOE00122306-00122330 RED2, p. SPOE00122329.

¹⁰¹ SPOE00087006-00087076 RED, p. SPOE00087029.

¹⁰² 066543-TR-ET Part 2 RED2, pp. 25-26.

¹⁰³ *Ibid.*, pp. 18, 27.

¹⁰⁴ *Ibid.*, pp. 27-29.

53. Both the [REDACTED] found that W04418 has provided false testimony on [REDACTED].¹⁰⁵ Whatever view is taken regarding the truth of his original statement, W04418 either lied [REDACTED] to various judicial authorities in [REDACTED] and to [REDACTED], or he lied [REDACTED]. In light of these repeated, serious, adverse credibility findings, W04418's reliability as a witness is so tarnished that his evidence cannot be admitted, particularly without the opportunity for the Defence to challenge it.

D. W04589

54. The SPO seeks to admit the [REDACTED] statement of W04589, who is the deceased [REDACTED], an individual alleged to have been detained at Jabllanicë in [REDACTED] 1998, [REDACTED].¹⁰⁶ W04589's statement was admitted in [REDACTED] trial, and [REDACTED].

55. W04589's evidence adds very little to the SPO's case. His evidence is cited just twice in the SPO's Pre-Trial Brief: [REDACTED],¹⁰⁷ about which there are multiple other sources, and a second time for the allegation that detainees at Jabllanicë were [REDACTED] – an allegation to which his evidence does not speak.¹⁰⁸

56. The statement cannot be relied upon for the identification of the person referred to throughout the statement as [REDACTED]. In his statement, W04589 states that he subsequently learned [REDACTED]. However, despite W04589 allegedly meeting with [REDACTED] on multiple occasions and therefore being in a position to identify him from a photo board, W04589 was never asked to do so, nor does he provide a

¹⁰⁵ See 042325-042390 RED, pp. 28 ff.; 042411-042469 RED, p. 15; 042472-042530, pp. 15-16.

¹⁰⁶ [REDACTED].

¹⁰⁷ See SPO Pre-Trial Brief, para. [REDACTED].

¹⁰⁸ See SPO Pre-Trial Brief, para. [REDACTED]. This reference cites to [REDACTED]

physical description of [REDACTED]. There is therefore no indication in the record of whether the person referred to as [REDACTED]. As noted by [REDACTED].¹⁰⁹

57. Given the very low probative value of his evidence, the Defence submits that the Trial Panel should exercise its discretion to exclude W04589's evidence.

E. W04835

58. The SPO seeks to tender W04835's UNMIK statement dated 7 August 2002; an ICTY statement dated 13 August 2006; and his testimony in the first *Haradinaj* trial which was given via video link on 31 October 2007 and admitted in lieu of oral testimony in the *Haradinaj* retrial in 2011.¹¹⁰ W04835 is the cousin of a named victim on the indictment, Skender Kuqi, who is alleged to have died in KLA custody in Jabllanicë, in mid-July 1998.¹¹¹

59. The admission of all three statements is unnecessary. The SPO provides no justification for seeking to admit three substantially similar statements. Considering the cumulative nature of the statements, and that the transcript of W04835's testimony before the ICTY bears the greatest indicia of reliability – being the only statement reflecting the witness's own words and provided in-court - the Defence submits that only this statement should be admitted as a record of W04835's evidence. Admission of his other statements adds nothing of apparent significance, and would unnecessarily clutter the trial record.

F. W01448

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ KSC-BC-2020-06/F00999/A01, Annex 1 - Amended Indictment, 30 September 2022 ("Indictment"), para. 142.

60. The Defence objects to the admission of any identification evidence provided by W01448; the parts of his testimony relating to the acts and conduct of the Accused; and to the discrete uncorroborated allegations identified below.

61. *Acts and conduct of the accused:* W01448 provides limited and unreliable information about Messrs. Veseli and Krasniqi's presence in Kukës between May and June 1999. This evidence relates to personal actions of the accused on which the SPO relies to attempt to establish criminal responsibility.¹¹² W01448 is the only source cited in the SPO Pre-Trial Brief to support the allegation that Mr. Veseli was present at Kukës,¹¹³ and one of the sources for the allegation that Mr. Krasniqi was present at Kukës.¹¹⁴ Presence at detention sites is relied on by the SPO in an attempt to establish intent and knowledge of crimes.¹¹⁵

62. The prejudicial effect of admitting this evidence without cross-examination outweighs any probative value. This is particularly true where, as here, the evidence relates to contentious identification of the Accused. There is a need to be extremely cautious in assessing identification evidence due to the vagaries of human perception and recollection, particularly in turbulent and traumatising circumstances.¹¹⁶ Identification is particularly unreliable where the witness has only ever seen the accused on television.¹¹⁷

63. The particular features of this identification evidence magnify the prejudicial effect. In two statements, W01448 purportedly identifies a "Kadri Veseli from Likovc,

¹¹² See paras. 22-23 above.

¹¹³ SPO Pre-Trial Brief, para. [REDACTED]

¹¹⁴ *Ibid.*, [REDACTED].

¹¹⁵ *Ibid.*, paras. 11-16.

¹¹⁶ See sources cited in fn. 27.

¹¹⁷ ICTY, *Prosecutor v. Limaj*, IT-03-66-T, Judgment, 30 November 2005, paras. 540, 550, 555, 563.

Skenderaj”¹¹⁸ as the highest ranked of the senior commanders at the KLA compound in Kukës.¹¹⁹ However, this clearly is not the same Mr Kadri Veseli who is an Accused in this case. As the SPO notes, “W01448 confused the Accused’s name with another Veseli family he knew”.¹²⁰ Although the SPO has rightly abandoned this identification,¹²¹ the Defence request the redaction of these portions in order to properly protect Mr. Veseli’s rights.

64. Similarly, W01448 misstates Mr. Krasniqi’s presence in Kukës. In his ICTY testimony, the witness included “Jakup Krasniqi from Negrovc” among the senior commanders he “saw” in Kukës.¹²² This statement was then retracted three times. In his EULEX statement, W01448 said that he did not see this himself, but was told by an unidentified individual that[REDACTED].¹²³ During a separate EULEX identification exercise, W01448 stated that he never saw Jakup Krasniqi in Kukës.¹²⁴ He confirmed this during his in-court testimony in *Sabit Geci et al.*¹²⁵ As such, the initial allegation that W01448 saw Mr. Krasniqi at Kukës has no probative value. W01448’s suggestion that Mr. Krasniqi attended Kukës [REDACTED] is second-hand hearsay from an unidentified individual, uncorroborated and inherently implausible given the resources and equipment of the KLA during the conflict. The probative value of W01448’s statements about Mr. Krasniqi’s presence in Kukës is thus extremely low, and outweighed by the prejudice their admission would cause to Mr. Krasniqi, who cannot explore these inconsistencies in cross-examination.

¹¹⁸ SITF00013852-00013885, pp. 9-10.

¹¹⁹ *Ibid.*; SITF00013736-SITF00013800 RED2, p.28.

¹²⁰ Application, para. 39.

¹²¹ *Ibid.*

¹²² SITF00013852-00013885, p. 9.

¹²³ SITF00013736-SITF00013800 RED2, p. 27.

¹²⁴ SITF00013886-00013908 RED, p. SITF00013887.

¹²⁵ [REDACTED]: SITF00016140-00016220 RED, p. SITF00016150.

65. *Other identification evidence:* Misidentification of other KLA members renders W01448's evidence about who he saw in Kukës wholly unreliable. W01448 spoke at length about the role and conduct of Xhemshit Krasniqi,¹²⁶ alleged to have mistreated the witness [REDACTED].¹²⁷ Yet, when shown a picture of Xhemshit Krasniqi, W01448 did not recognise him.¹²⁸ Again, despite testifying that he was beaten by [REDACTED],¹²⁹ W01448 did not recognise him.¹³⁰ Although he stated that he saw [REDACTED] on many occasions,¹³¹ during the first identification exercise, W01448 did not recognise his face.¹³²

66. W01448's identification of [REDACTED] should also be excluded. The witness said he [REDACTED]¹³³ and explained that the first time he saw him, he thought it was [REDACTED].¹³⁴ Later, he stated that he *believes* that the person was [REDACTED], or at least "[he] was told so".¹³⁵ Similarly, W01448 initially included [REDACTED] among the people he "saw" in Kukës.¹³⁶ In his in-court testimony, however, he stated that [REDACTED].¹³⁷

67. The admission of this identification evidence without cross-examination is prejudicial, given that some of these individuals are alleged to be JCE members and

¹²⁶ *E.g.*, SITF00013852-00013885, pp. 8-9; SITF00013736-SITF00013800 RED2, pp. 11-12, 21, 26; SITF00016221-00016285 RED2, pp. 11-12, 15; SITF00016140-00016220 RED2, pp. 2, 7, 9, 16, 21.

¹²⁷ SITF00013736-SITF00013800 RED2, p. 15. *See also* SITF00013852-00013885, p. 6; SITF00013736-SITF00013800 RED2, pp. 8, 10, 17, 19, 21; SITF00016140-00016220 RED2, p. 9.

¹²⁸ SITF00013886-00013908 RED, pp. SITF00013895 (no. 45), SITF00013888.

¹²⁹ SITF00013736-SITF00013800 RED2, pp. 21, 25.

¹³⁰ SITF00013886-00013908 RED, pp. SITF00013895 (nos. 55, 58), SITF00013888.

¹³¹ SITF00013736-SITF00013800 RED2, pp. 19-20; SITF00013833-00013847 RED2, pp. 4, 6/7, SITF00013852-00013885 RED2, p. 8.

¹³² SITF00013886-00013908 RED, pp. SITF00013895 (no. 93), SITF00013888. [REDACTED]. *See* SITF00013909-00013914 RED, p. SITF00013910; SITF00013736-SITF00013800 RED2, p. 31.

¹³³ SITF00013852-00013885 RED2, p. 4;

¹³⁴ SITF00013736-SITF00013800 RED2, p. 5.

¹³⁵ SITF00016221-00016285 RED2, p. SITF00016228.

¹³⁶ SITF00013852-00013885, p. 9.

¹³⁷ SITF00016140-00016220 RED2, p. SITF00016150.

tools with high-ranking positions in the KLA.¹³⁸ The number of erroneous or unreliable identifications in W01448's evidence casts doubt on the reliability of *any* of his assertions that an individual was present at or participated in the events in Kukës in May and June 1999. These segments of the W01448's evidence do not meet the minimum standard of reliability for admission. In light of W01448's unavailability, the admission of these segments would also be unduly prejudicial to the Accused, who are denied the chance to explore these issues.

68. *Uncorroborated allegations:* The Defence opposes the admission of segments of W01448's evidence which are not corroborated. W01448 is the only witness to allege that [REDACTED].¹³⁹ W04733 denied this ever happened.¹⁴⁰ W01448 alleges that an individual named [REDACTED] was present in Kukës and had various roles; conducting interrogations,¹⁴¹ [REDACTED],¹⁴² and [REDACTED].¹⁴³ The name [REDACTED] is not mentioned by other witnesses who were allegedly detained in Kukës, let alone linked these activities.

69. The lack of any corroboration renders the admission of these segments prejudicial. The Defence is prevented from exploring with W01448 the evident discrepancies with the account provided by other witnesses who were allegedly detained at the same time.

G. W04733

¹³⁸ SPO Pre-Trial Brief, paras. [REDACTED].

¹³⁹ SITF00013736-SITF00013800 RED2, p. 15; SITF00013848-00013851 RED2, p. SITF00013849; SITF00013852-00013885 RED2, p. 7.

¹⁴⁰ SITF00018740-00018767 RED, p. 7.

¹⁴¹ SITF00013736-SITF00013800 RED2, pp. 27-29. *See also* SITF00013852-00013885 RED2, pp. 5, 9; SITF00016140-00016220 RED2, p. SITF00016161.

¹⁴² SITF00013833-00013847 RED2, p. 6.

¹⁴³ SITF00013736-SITF00013800 RED2, p. 24; SITF00013833-00013847 RED2, p. 5.

70. The Defence notes that the SPO intends to rely on the statements of W04733 to substantiate the existence of a detention site in Kukës, as well as control by the Accused therein. .

71. *Allegation that Jakup Krasniqi [REDACTED]*. No other witness corroborates the allegation that when W04733 asked to [REDACTED], he was taken to Mr. Krasniqi. No other witness even alleges that Mr. Krasniqi saw any person detained at Kukes. Indeed, no other witness alleges that Mr. Krasniqi [REDACTED] at any location. The absence of corroboration diminishes the probative value of this allegation and magnifies its prejudicial effect because Mr. Krasniqi would be denied any means to confront this evidence.

72. The probative value of this allegation is extremely low. First, W04733 did not mention this allegation *at all* in his [REDACTED] account to [REDACTED],¹⁴⁴ his [REDACTED] accounts to the [REDACTED]¹⁴⁵ or his [REDACTED] testimony¹⁴⁶. Instead, the allegation appeared for the first time in [REDACTED] years after the relevant events.¹⁴⁷ Second, W04733 provides no details to substantiate his identification. He does not describe Mr. Krasniqi, saying only that he had seen him several times on television and that he was wearing KLA uniform.¹⁴⁸ Third, there are inconsistencies between W04733's testimony and that of his family members,¹⁴⁹ [REDACTED]. Whilst W04733 asserts that [REDACTED],¹⁵⁰ [REDACTED]¹⁵¹ and

¹⁴⁴ SITF00390625-00390626.

¹⁴⁵ SITF00013181-SITF00013189 RED2; U003-2283-U003-2289.

¹⁴⁶ SITF00018740-SITF00018767; SITF00019685-SITF00019792; SITF00019824-SITF00019876.

¹⁴⁷ SITF00013793-SITF00013900.

¹⁴⁸ 082892-TR-ET Part 3 RED3, pp. 6-7.

¹⁴⁹ The SPO is not proposing to call these witnesses, in contrast to its approach to W00498, further limiting the opportunity for the Defence to confront the evidence.

¹⁵⁰ 082892-TR-ET Part 3 RED3, p. 2, line 5 – p. 5, line 8; Part 6 RED, p. 9.

¹⁵¹ 105370-TR-ET Part 2 RED3, p. 7, lines 10-15.

[REDACTED].¹⁵² Fourth, whilst W04733 now claims that he was taken to see [REDACTED],¹⁵³ in his [REDACTED] statement, W04733 claimed that he was taken to see [REDACTED].¹⁵⁴ In his testimony [REDACTED], W04733 said that [REDACTED].¹⁵⁵ It is inherently implausible that Mr. Krasniqi would have [REDACTED]. For these reasons, the identification of Mr. Krasniqi lacks probative value and it is prejudicial to admit it without possibility of cross-examination.

73. *Identification of Mr. Krasniqi and Mr. Thaci.* Whilst W04733 further asserts that he saw Mr. Krasniqi and Hashim Thaçi in Kukës,¹⁵⁶ he later notes that he was concentrating on [REDACTED] and did not remember or did not see Mr. Krasniqi in the courtyard in Kukës.¹⁵⁷ W04733 is inconsistent on who ordered his release, as between [REDACTED], and who sought to prevent it, at one point conflating [REDACTED] and Mr. Thaçi's alleged actions. Notably, W04733's assertion that this even happened is a product of his "personal conviction" and not knowledge.¹⁵⁸

74. The alleged sighting of Mr. Krasniqi, Mr. Thaçi, and other members of the General Staff in the courtyard near the detention site, is also affected by W04733's purported condition at that time. Pursuant to his own testimony, W04733 would have suffered [REDACTED],¹⁵⁹ and was [REDACTED].¹⁶⁰ Up until the date of [REDACTED], W04733 claimed to have [REDACTED].¹⁶¹ Even if W04733 was consistent on the sighting itself (which he was not), this casts further doubt on the veracity of what he claims to have seen. Further, this purported sighting of Jakup

¹⁵² 105285-TR-ET Part 2 RED3, p. 7, lines 1-4.

¹⁵³ 082892-TR-ET Part 3 RED3, p. 5, lines 5-8.

¹⁵⁴ 082892-TR-ET Part 2 RED3, p. 19, line 25 – p. 20, line 7; SPOE00185335-00185363, p. SPOE00185343.

¹⁵⁵ 107258-107300, p. 107259.

¹⁵⁶ 082892-TR-ET Part 2 RED3, p. 75, line 25 – p. 76, line 15.

¹⁵⁷ 082892-TR-ET Part 3 RED3, pp. 7-8.

¹⁵⁸ 082892-TR-ET Part 2 RED3, p. 69, line 12.

¹⁵⁹ U003-2283-U003-2289 RED2, p. U0032287; 107258-107300, p. 107260.

¹⁶⁰ 082892-TR-ET Part 2 RED3, p. 27, lines 4-6.

¹⁶¹ 082892-TR-AT-ET Part 9, p. 20, lines 9-16.

Krasniqi and Hashim Thaçi does not form any part of W04733's [REDACTED] statement to [REDACTED], nor his [REDACTED] statements to [REDACTED]. The limited probative value of this evidence is outweighed by its prejudicial effect.

75. *Other credibility issues.* W04733's testimony is also inconsistent or incredible on other significant issues. W04733 alleges that he suffered [REDACTED] as a result of alleged abuse by KLA members, but also states that [REDACTED].¹⁶² This was despite the fact that the witness was able to [REDACTED].¹⁶³ [REDACTED].

76. Further, whilst W04733 noted that [REDACTED] was present during his mistreatment at the detention site in a [REDACTED] statement,¹⁶⁴ the witness elsewhere notes being mistreated by [REDACTED].¹⁶⁵ Whilst W04733 alleges that he saw [REDACTED] in Kukes,¹⁶⁶ [REDACTED] is clear that he did not visit a detention centre in Albania.¹⁶⁷ These misidentifications call the veracity of W04733's information into doubt. Yet further, much of W04733's evidence appears to be hearsay and he refused to reveal the source of his information, thus preventing the Defence from confronting it.¹⁶⁸

77. The unreliability of W04733's testimony is exacerbated by the SPO's regular use of leading questions, in particular regarding the alleged role of the Accused in his detention and subsequent release.¹⁶⁹ [REDACTED].¹⁷⁰ The SPO also led the witness to correct aspects of his testimony which were initially wrong – for instance,

¹⁶² 082892-TR-ET Part 1 RED, p. 12, lines 3-12.

¹⁶³ SPOE00185335-00185363, p. SPOE00185337.

¹⁶⁴ 082892-TR-AT-ET Part 8 RED, p. 10, line 18 – p. 15, line 7.

¹⁶⁵ 107258-107300, p. 107296; SITF00013181-SITF00013189, p. SITF00013185.

¹⁶⁶ *See, e.g.*, 082892-TR-ET Part 2 RED3, pp. 48, 52-53.

¹⁶⁷ 054739-TR-ET Part 6, p. 7.

¹⁶⁸ 082892-TR-ET Part 2 RED3, p.90.

¹⁶⁹ 082892-TR-ET Part 2 RED3, pp. 64-65, p. 65, lines 17-18, p. 78, lines 8-9.

¹⁷⁰ 082892-TR-ET Part 2 RED3, pp. 63-66.

[REDACTED].¹⁷¹ The extent of the SPO's leading the witness in the pursuit of information that specifically incriminates the Accused removes the probative value of the evidence and warrants the exclusion of any portion of his evidence which relates to their acts and conduct.

H. W04848

78. The SPO seeks to admit an SPRK record dated [REDACTED],¹⁷² and a [REDACTED] transcript from W04848's testimony in *Sabit Geci et. al.*¹⁷³

79. Without the ability to cross-examine the witness on the details of his statement, the probative value of W04848's evidence is outweighed by its prejudice. W04848 provides details as to the structure and activities of the Headquarters in Kukës, including the role and influence of the Military Police.¹⁷⁴ The witness also identifies the Accused and places them within the overarching KLA structure.¹⁷⁵ The centrality of these allegations concerning the accused mitigates against admission of these written statements.

80. W04848's testimony also contains an allegation that cannot be corroborated: that [REDACTED].¹⁷⁶ Though W04848 alleges that he was given the SPO has not submitted [REDACTED], nor is this incident corroborated by other witnesses. As the Defence will be unable to question W04848 further about this incident, this portion of W04848's testimony should not be admitted.

¹⁷¹ 082892-TR-AT-ET Part 10 RED, p. 10, lines 10-22.

¹⁷² SITF00014088-00014120 RED.

¹⁷³ SITF00016908-SITF00016926 RED2.

¹⁷⁴ SITF00014088-00014120 RED, p. SITF00014093.

¹⁷⁵ *Ibid.*, p. SITF00014094.

¹⁷⁶ SITF00016908-SITF00016926 RED2, p. SITF00016913.

I. W01984

81. The SPO seeks to admit an [REDACTED] report of interrogation of W01984 dated [REDACTED], and a statement of W01984 to the [REDACTED].

82. The Defence contests that W01984 is unavailable. Rule 155(1) applies to a witness “who is by reason of physical or mental impairment or other compelling reason unable to testify orally”. It requires proof of a physical or mental impairment, and that this impairment renders the witness unable to testify. This is an objective test.¹⁷⁷ It requires medical evidence that the witness is incapable of attending court and answering questions coherently. It is insufficient to allege that attending court could have harmful after-effects or cause the witness emotional distress.¹⁷⁸

83. The SPO has not established that W01984 is unable to testify. It has produced a [REDACTED];¹⁷⁹ [REDACTED];¹⁸⁰ and [REDACTED].¹⁸¹ The burden rests with the SPO to substantiate its reliance on Rule 155, and to disclose information in its possession which may affect the credibility or reliability of its evidence.

84. These snapshots do not establish that W01984 is objectively unable to testify. [REDACTED]. Nor do the [REDACTED] establish that W01984 is objectively unable to testify. The closest the evidence comes [REDACTED].¹⁸² This a conclusion [REDACTED], and does not address the question of his ability of testify.

¹⁷⁷ ICTY, *Prosecutor v. Prlić*, IT-04-74-AR73.6, Decision on Appeals against Decision admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48.

¹⁷⁸ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion to Admit the Evidence of Witness No. 39 pursuant to Rule 92 *quater*, 7 September 2011, paras. 29-30.

¹⁷⁹ 106514-106519-ET, p. 106514.

¹⁸⁰ *Ibid.*, p. 106515.

¹⁸¹ *Ibid.*, pp. 106516-106519.

¹⁸² [REDACTED].

85. The SPO then cites to [REDACTED] finding W01984 unable to testify.¹⁸³ The [REDACTED] not indicative of the current position. [REDACTED],¹⁸⁴ the results of which do not appear to have been disclosed or relied upon by the SPO.

86. In any event, the two statements are not sufficiently reliable to be admitted, given the prejudicial effect of admitting the evidence without cross-examination. First, [REDACTED] relied on by the SPO to justify W01984's unavailability is also [REDACTED]. [REDACTED].¹⁸⁵ The SPO has produced no evidence of [REDACTED].

87. W01984's evidence is also inconsistent with other witnesses. W01984 [REDACTED]. W01984 says that [REDACTED].¹⁸⁶ [REDACTED], however, told the SPO that [REDACTED].¹⁸⁷ W01448 told [REDACTED].¹⁸⁸ W01984 was asked about this allegation and responded [REDACTED].¹⁸⁹ Indeed, in one statement, W01984 denied that he [REDACTED],¹⁹⁰ although in his other statement, W01984 said that he [REDACTED].¹⁹¹ His account of transfer to [REDACTED] and release is also wholly inconsistent with other witnesses.¹⁹² W01984's statements should not be admitted through Rule 155.

J. W01143

88. The Defence oppose the admission of W01143's evidence in its entirety.

¹⁸³ SITF00432046-00432059, pp. 5-7.

¹⁸⁴ *Ibid.*, p. 6.

¹⁸⁵ *Ibid.*

¹⁸⁶ SITF00013123-00013153 RED, p. SITF00013135.

¹⁸⁷ 106774-106774 RED.

¹⁸⁸ SITF00452778-00452793, p. SITF00452785.

¹⁸⁹ SITF00372498-00372510 RED2, p. SITF00372501 at 19.

¹⁹⁰ *Ibid.*, p. SITF00372501 at 12-14.

¹⁹¹ SITF00013123-00013153, p. SITF00013134.

¹⁹² *Ibid.*, p. SITF00013135; contrast SITF00452778-00452793, p. SITF00452788.

89. *Authenticity and reliability.* The statement taken by the Serbian Ministry of the Interior¹⁹³ is of highly questionable authenticity and should not be admitted. The statement is not written in W01143's voice, but is the recording officer's interpretation of the witness' words. The legibility of the original document, in particular pages two to four, is of extremely poor quality and appears to have been photocopied and/or scanned repeatedly. The SPO translator at several points on each page is left to guess as to the content of the original. There is no identifying rank of the recording officer, whose signature is illegible (as accurately recorded in the English translation), and the document is not signed by the witness. With no official stamp, the "official Ministry of Interior template" and the "handwritten number of Official Note" are insufficient to authenticate the document, as it is plain from reading the document that the former is replicable by any person with access to word processing software and a printer, and the latter to anybody with a pen.

90. In relation to the UNMIK statements of [REDACTED],¹⁹⁴ neither document includes a version in W01143's native language. This poses a particular issue for the UNMIK statement of [REDACTED]. While it certainly is not reasonable to expect that every record taken by an international peacekeeping force is in perfect English, this particular statement is rife with spelling, grammatical and syntax errors to a degree that the accuracy of the particulars of the statement are called into question. As addressed below, this statement adds, leaves out, embellishes and contradicts details found in the other statements.¹⁹⁵ There is no indication whether the statement was translated, or in which language the interview was conducted.

¹⁹³ 101690-101693-ET RED2.

¹⁹⁴ SITF00289702-00289702; SITF00034178-SITF00034183 RED3.

¹⁹⁵ See below, paras. 93-94.

91. The UNMIK statement of [REDACTED]¹⁹⁶ is not a statement of W01143, but of the recording officer as to information he purportedly received in a meeting with [REDACTED] and W01143, without specifying who gave the information. W01143 did not sign the statement, and there is no indication that the information was properly repeated back to him for verification.

92. With regard to the remaining two UNMIK statements, the hand-drawn map annexed to item 2 is not mentioned in the statement to which it is annexed, and is not signed by W01143. Although the map is signed by the recording officer as having been drawn by W01143 during the interview, the handwriting on the map is in English, not W01143's native language, indicating, at the very least, that it was co-authored by that same recording officer.

93. *Substantive objections.* Regarding the substance of the documents, the UNMIK statement of [REDACTED]¹⁹⁷ is mostly probative of nothing relevant to the SPO's case, focusing on persons not named in the SPO Pre-Trial Brief as either victims or perpetrators, one of whom is only identified by a first name. Irrespective, the statement is, for the most part, W01143 confirming that he knew or didn't know some people, one of whom is identified solely by first name.

94. The statements are inconsistent and contradictory on significant details:

- (i) W01143 mentions the presence of Commander "Drini" during his detention in the UNMIK statements of [REDACTED]¹⁹⁸ and [REDACTED],¹⁹⁹ with the interaction being omitted from every other statement. This could not be the result of a shift of clarity in memory; an

¹⁹⁶ SITF00034178-SITF00034183 RED3.

¹⁹⁷ SITF00289702-00289702.

¹⁹⁸ SITF00311849-00311857 RED2..

¹⁹⁹ SITF00034178-SITF00034183 RED3.

interaction with the commander alleged to be responsible for one's detention would be a significant detail that would not fade from memory. The fact that reference to this supposed interaction disappears upon subsequent retelling of the story, coupled with the differences outlined below, raises considerable questions not only about the reliability of the statement, but also the credibility of W01143.

- (ii) The description of this supposed interaction with Commander "Drini" is vastly different between the only two statements in which it appears. The UNMIK statement of [REDACTED] describes it as "UCK-Commander "Drini" came and checked my documents [...] their (sic) behaviour was nice to me (sic)",²⁰⁰ whereas the statement of [REDACTED] describes Commander Drini threatening W01143 after he had been beaten, allegedly saying [REDACTED].²⁰¹ Again, this could not reasonably result from a mere shift in memory, as the two statements are taken roughly six months apart and the detail is completely different.
- (iii) The UNMIK [REDACTED] statement is the only place where W01143 and his fellow detainees [REDACTED].²⁰² This particular detail is highlighted by the SPO in the Rule 95 Summary for this witness, yet it is not recalled in any other statement W01143 provides to the various authorities. In fact, the only mention of sounds from other rooms is in the Serbian Ministry of the Interior statement of [REDACTED], which simply recalls that [REDACTED] and nothing about shouting, or being forced to repeat slogans.²⁰³ This is not an isolated example of the [REDACTED] UNMIK statement including specific details not found in any other statement. For

²⁰⁰ SITF00034178-SITF00034183 RED3, p. SITF00034178..

²⁰¹ SITF00311849-00311857 RED2, p. SITF00311851.

²⁰² SITF00034178-SITF00034183 RED3, p. SITF00034179.

²⁰³ 101690-101693-ET RED2, p. 101692.

example, W01143 recounts purportedly having been [REDACTED].²⁰⁴ He also recalls, only in this statement, one odd alleged incident where the men who captured him [REDACTED].²⁰⁵ This statement also contradicts other statements, in that he recalls having [REDACTED],²⁰⁶ whereas the Serbian Ministry of the Interior statement of [REDACTED].²⁰⁷ [REDACTED] is absent from all other statements.

95. *Corroboration Issues.* The SPO lists five witnesses it regards as providing evidence which is consistent with or corroborates W01143's evidence.²⁰⁸

96. W02087 is the only purportedly corroborating witness for W01143 listed by the SPO who knows W01143. His statement provides multiple details not found in W01143's.²⁰⁹ W02087 is a deceased witness whose evidence will similarly be tendered through Rule 155, and thus is incapable of being examined. W02087's evidence, particularly as it relates to W01143, is wholly unreliable, as evidenced by his clear belief that W01143 [REDACTED].²¹⁰ This is not a misidentification, as W02087 notes specific identifying details of W01143, and also states that the two knew each other as schoolmates. As this detail is so glaring in its specificity and incorrectness, W02087 should not be regarded as a reliable source of corroborating evidence for W01143, particularly since he will not be available for cross-examination.

97. The remaining witnesses who purportedly "corroborate" W01143's evidence do not provide any account of events allying with that of W01143, the only common

²⁰⁴ SITF00034178-SITF00034183 RED3, p. SITF000034179.

²⁰⁵ SITF00034178-SITF00034183 RED3, p. SITF000034178.

²⁰⁶ SITF00034178-SITF00034183 RED3, p. SITF000034179.

²⁰⁷ 101690-101693-ET RED2, p. 101692.

²⁰⁸ Application, para. 56, fn. 220.

²⁰⁹ 025792-TR-ET RED2.

²¹⁰ 025792-TR-ET RED2, pp. 7, 8.

point seemingly being a garage. [REDACTED],²¹¹ and later [REDACTED].²¹² These stories do not appear at any point in W01143's statement, nor is [REDACTED] mentioned as having been present during the detention by this witness. Similarly, [REDACTED] cannot identify the people he claims to have seen.

98. [REDACTED] describes being in a garage near Prizren, and among other points of evidence that have no connection or do not correspond with W01143's evidence, [REDACTED].²¹³ [REDACTED] is also not mentioned by W01143.

99. [REDACTED] does not mention W01143 in his statements, does not describe the same events and is likewise not mentioned by W01143. Neither are the events described by W01143 described by [REDACTED].²¹⁴ The same is true of [REDACTED].²¹⁵

K. W02618

100. The Defence opposes the admission of: witness interviews of individuals other than W02618, and evidence of W02618 which appears to be based on these inadmissible interviews; and evidence outside the temporal scope of the Indictment or which does not relate to crimes alleged therein.

101. *Authenticity and reliability.* W02618's obligations as a witness were those set out specifically under [REDACTED] law,²¹⁶ rather than the KSC Law or Rules, or the

²¹¹ SITF00013352-00013368 RED2, p. SITF00013356.

²¹² 083218-TR-ET Part 8 RED, pp. 8-12.

²¹³ 060650-TR-ET Part 4 RED2, pp. 8-21.

²¹⁴ See, e.g., 069662-TR-ET Parts 1-4; 025046-025056 RED; 0188-4043-0188-4045-ET; SITF00254542-SITF00254545-ET RED.

²¹⁵ See, e.g., 030943-030946 RED; 028796-028813-ET RED; 070990-TR-ET RED Parts 1-4; 072709-TR-ET RED Parts 1-2.

²¹⁶ [REDACTED].

Kosovo Code of Criminal Procedure. The SPO makes no attempt to explain the content and impact of the provisions of [REDACTED] law relied upon, and how they are equivalent to the same warnings provided by the SPO under the Rules. Further, the version of the interview of W02618 contains various redactions to the information relied upon by the SPO.²¹⁷

102. W02618 discussed and authenticated [REDACTED] reports about events in which he was personally involved. Where these Reports or Internal Documents have been authenticated by W02618, the Defence does not object to their admissibility. However, it appears that the SPO is attempting to tender, through these Reports, statements or records of interview of other individuals who are not deceased or otherwise fall under Rule 155.

103. For example, [REDACTED]²¹⁸ seeks to tender an extensive interview by W02618 with Nexhmedin Krasniqi. It is described in the Application as “his questioning of KRASNIQI concerning crimes committed by KRASNIQI’s subordinates and KRASNIQI’s admission of knowledge and responsibility for the same”²¹⁹ and in the SPO Annex as “[REDACTED].”²²⁰ Mr. Krasniqi is not deceased and his evidence is not admissible under Rule 155. As such, this document is only admissible with the interview of Mr. Krasniqi removed. Other associated exhibits which seek to tender witness interviews by circumventing Rule 155 should similarly be removed.²²¹

²¹⁷ 086914-TR-ET Part 1 RED, p. 1.

²¹⁸ SITF00189153-SITF00189178-ET.

²¹⁹ Application, para. 57.

²²⁰ See also 086914-TR-ET Part 2 RED, p. 1, where this is referred to as [REDACTED].

²²¹ SITF00189674-SITF00189712, p. 8; SITF00189179-SITF00189235, pp. 3-10.

104. *Relevance and fairness.* Some parts of W02618's interview and associated exhibits appear to refer to the investigation of incidents that have no connection to the Indictment. The death of [REDACTED]²²² appears in neither the Indictment nor the SPO Pre-Trial Brief. It is not sufficient that such events occurred during the timeframe of the Indictment Period if the SPO cannot demonstrate their relevance to this case.

105. Further, the allegation that the KLA Military Police continued to act after June 1999 under the alleged authority of Mr. Selimi, while he was Minister of Public Order, is a central aspect of the allegations against him,²²³ both based on JCE and superior responsibility. The role of Nexhme Krasniqi at this time is of particular importance to this allegation. Extreme caution must be displayed by the Trial Panel when assessing the admission of this evidence. Given that W02618's evidence on this point appears to be based largely upon the interviews of Mr. Krasniqi, which are not themselves admissible as explained above, it would be unfairly prejudicial to allow his evidence on this point to be admitted through Rule 155.

L. W04783

106. The unreliability of W04783's account, evidenced through the various inconsistencies in his statements and testimony, renders his evidence inadmissible.

107. *Authenticity and reliability.* W04783 was not asked to swear an oath until almost the end of his direct examination in one of those proceedings, which affects reliability.²²⁴ Regarding the UNMIK statement dated [REDACTED],²²⁵ only one page appears in the originally recorded French, preventing any evaluation of the content or

²²² SITF00189674-SITF00189712, p. 3.

²²³ SPO Pre-Trial Brief, paras. 151-155.

²²⁴ SPOE00208970-SPOE00208982 RED, p. SPOE0028978. .

²²⁵ SITF00306147-SITF00306153 RED, this date is erroneously marked as 23 November 2000 in Annex 12.

translation of the document in either English or Albanian.²²⁶ As such, approximately half of the substantive content is unavailable for review in its original form.

108. *Substantive objections.* The witness is inconsistent on several key issues, rendering his evidence unreliable and with low probative value:

- (i) W04783 gives inconsistent evidence on his visits to the Drenovc compound. In his UNMIK statements of [REDACTED],²²⁷ he says that he saw [REDACTED] on the two occasions he visited the Drenovc compound.²²⁸ In his testimony [REDACTED], W04783 states that [REDACTED] on a third visit to the compound, which he had not previously mentioned.²²⁹ In his testimony [REDACTED], the witness again recalls only two visits to the Drenovc compound, stating that [REDACTED].²³⁰
- (ii) Then, W04783 states in his testimony [REDACTED] that he went there once, complaining that his memory is unreliable due to [REDACTED] and the amount of time since the incident.²³¹ This admission is significant, given that this [REDACTED] testimony was provided [REDACTED]²³² and [REDACTED].²³³ This calls into question the overall reliability of W04783's evidence in any of these proceedings, [REDACTED].²³⁴

²²⁶ SITF00306147-SITF00306153 RED, *see* SITF00306147-SITF00306149.

²²⁷ Note, this is a second UNMIK statement attached to the first UNMIK statement, but not listed as a separate item in Annex 12, p. SITF00306151.

²²⁸ SITF00306147-SITF00306153 RED, p. SITF00306147.

²²⁹ SPOE00208970-SPOE00208982 RED, pp. SPOE00208976, SPOE00208977.

²³⁰ SITF00180542-00180576 RED, pp. SITF00180549, SITF00180550.

²³¹ SITF00181515-00181524 RED, p. SITF00181518.

²³² SPOE00208970-SPOE00208982 RED.

²³³ SITF00180542-00180576 RED, dated 10 November 2005.

²³⁴ SPOE00208970-SPOE00208982RED.

- (iii) During his testimony on [REDACTED], W04783 is asked [REDACTED]. W04783 again complains that he is confused and does not recall having given this information during his previous testimony.²³⁵
- (iv) W04783's interactions with those in the compound in Drenovc vary significantly, from being told that [REDACTED];²³⁶ to being told that [REDACTED];²³⁷ to being asked [REDACTED], to which W04783 responded [REDACTED].²³⁸ On his [REDACTED] re-telling, W04783 recalls the interaction as being that he was told [REDACTED].²³⁹

M. W04829

109. W04829 worked for the Yugoslav Secret Service REDACTED²⁴⁰ [REDACTED],²⁴¹ effectively the forerunner to the Serbian opposition to the KLA during the conflict over the Indictment Period. For the reasons set out below, W04829's evidence should be excluded in its entirety.

110. *Preliminary issues.* The SPO submissions relating to the manner in which W04829 purportedly died in 2005²⁴² are wholly unrelated to the question of whether the evidence provided by this witness is sufficiently relevant for admission pursuant to Rule 155.

²³⁵ SITF00180542-00180576 RED, p. SITF00180557.

²³⁶ SITF00306147-SITF00306153 RED, p. SITF00306147.

²³⁷ SITF00306147-SITF00306153 RED, p. SITF00306151.

²³⁸ SPOE00208970-SPOE00208982 RED, p. SPOE00208975.

²³⁹ SITF00180542-00180576 RED, p. SITF00180547.

²⁴⁰ Application, para. 65.

²⁴¹ SITF00305106, p. 1.

²⁴² Application, para. 65.

111. *Relevance of the Statement and Fairness of Admission.* The “statement” of W04829 is a collection of five different interviews conducted over the course of 2004 and 2005 with different UNMIK personnel (“Five Statements”).²⁴³

112. The SPO’s description of the relevance of the Five Statements is inaccurate. The SPO mischaracterises W04829’s evidence in stating that Bedri ZYBERAJ, Xhemajl GASHI, Isuf GASHI, Mahir GASHI/HASANI, Gani PAQARIZI, and Selim KRASNIQI were the “leaders” in Drenoc²⁴⁴ when he did not use the word “leaders”, merely stating that there was a [REDACTED].²⁴⁵ The only reference to leaders in his statement was to those heading groups of around 10 soldiers.

113. Even as described by the SPO however, the evidence of W04829 directly relates to the acts and conduct of JCE members and, indirectly, the Accused themselves. Any evidence related to alleged personal participation of the accused relating to specific named victims, implicitly affects the acts and conduct of the accused. For example, [REDACTED].²⁴⁶ Therefore, at the very least, the evidence provided by W04829 in relation to this named victim, and the purpose and location of his detention falls within this category²⁴⁷ and should be excluded.

114. Further, the SPO’s refusal to delineate between JCE Members and Tools in the Indictment,²⁴⁸ means that the many individuals named by W04829 are, in all likelihood, alleged JCE members with whom the accused are alleged to have formed

²⁴³ The five statements are as follows: (1) First Statement: SITF00305107-SITF00305129; (2) Second Statement: SITF00305096-SITF00305098 & SITF00305103-SITF00305106; (3) Third Statement: SITF00305099-SITF00305102 & SITF00305092-SITF00305095; (4) Fourth Statement: SITF00305089-SITF00305094 & SITF00299963-SITF00299964-AT / SITF00299963-SITF00299964; (5) Fifth Statement: SITF00305080-SITF00305088.

²⁴⁴ Application, para. 66.

²⁴⁵ First Statement, p. SITF00305109.

²⁴⁶ Indictment, para. 41.

²⁴⁷ First Statement, p. SITF00305114.

²⁴⁸ Indictment, para. 35.

a common plan or over whom the accused allegedly exercised command responsibility.

115. The witness provides no source for his purported extensive knowledge of the structure of the KLA forces in Drenoc, and his evidence is based on anonymous hearsay, and of little probative value. While he describes this structure with certainty, no basis for his knowledge is given or sought by the various UN investigators. Given his propensity for adopting the evidence of others, as detailed below, and his previous occupation working for the FRY secret service, this absence is telling and calls into question the reliability of the evidence. The prejudicial effect of admitting his evidence relating to the acts and conduct of the accused outweighs any probative value.

116. *Authenticity and Reliability.* The Five Statements have insufficient indicia of *prima facie* reliability.²⁴⁹ As noted above, W04829 worked for the Yugoslav Secret Service [REDACTED]. His motivation to implicate particular KLA members in alleged crimes cannot be overlooked. While this factor is relied upon by the SPO in support of the relevance of this statement, it undermines its reliability and W04829's impartiality, given that the Defence cannot cross-examine him on this point.

117. The Five Statements were taken in a variety of different formats by different UNMIK personnel²⁵⁰ without a clear legal framework. The first statement, taken on [REDACTED] 2004,²⁵¹ asserts that Regulation 07/2002 was provided to the witness. However, no information is provided as to what that regulation specifies and how it impacts reliability. There is also no audio recording of the interviews and no verification of the witness' identity in each interview, at least according to the information on the face of the interview as no identity document has been provided.

²⁴⁹ Application, para. 68.

²⁵⁰ [REDACTED].

²⁵¹ SITF00305118.

While there are signatures present on the statement, there is no corroborating evidence that these are the statements of W04829.

118. In the Five Statements, there is neither an oath, nor confirmation by the witness that he is aware of the obligation to tell the truth in providing the information in his statement and, concomitantly, of the consequences for being untruthful. While certain statements are prefaced by the statement that it was “made under no pressure, force or threats, that the witness is “free to say nothing” but that anything he did say “may be used as evidence”, this is markedly different from a clarification of the truthfulness of the statement.

119. That W04829’s statement comprises five interviews taken over the course of a year does not reinforce its reliability. The witness does not appear to have been told about his right to correct his previous statements, or been provided with a copy to be able to review what was previously recorded. Although in his Third Statement, W04829 did provide “additional information as a follow up to the two statements [he] gave to the CCIU investigators previously”,²⁵² this was not replicated in other statements. In these circumstances, the assertion by the SPO that the witness had “time to both correct earlier statements or provide newly developed information”²⁵³ is unsubstantiated.

120. The SPO’s assertion that W04829’s evidence is consistent with, and corroborated by statements of other witnesses who will be available for cross-examination,²⁵⁴ depends on whether these witnesses do actually testify. Any

²⁵² SITF00305092.

²⁵³ Application, para. 68.

²⁵⁴ Application, para. 69.

admission of W04829's evidence must be subject to these witnesses actually appearing for cross-examination at the KSC.

121. Even if these other witnesses do testify, this does not allow the Defence to verify extensive aspects of W04829's evidence, which is replete with alleged hearsay spoken to him, often anonymous, or spoken of merely as rumours.²⁵⁵ This is confirmed by the Rule 95(4) summary provided by the SPO which refers to allegations which he "heard", rather than something of which he has personal knowledge.²⁵⁶ Indeed, some of the SPO's description of this evidence is still redacted so it is unclear what parts of his evidence are even being relied upon in their totality.²⁵⁷ Even where the source is provided for this hearsay, such as [REDACTED], none are listed as SPO witnesses. Cross-examination of other witnesses does not sufficiently compensate for the inability to cross-examine W04829.

122. The confused manner in which these statements are presented by the SPO and certain discrepancies therein, further call into question their reliability. The Albanian version of the First Statement includes a confirmation that the witness understands that he may read the written record of interview, or have it read to him, and also that he has waived his right to silence. This is not included in the English version. Similarly, the English version of the Third Statement has been disclosed²⁵⁸ with a translation into Albanian,²⁵⁹ with no clarity as to which version is being tendered. The date of the Albanian version of the Third Statement has been adjusted by hand to

²⁵⁵ First Statement, p. SITF00305113, [REDACTED]. Again it is not specified from which people W04829 knows this information from.

²⁵⁶ KSC-BC-2020-06/F01296/A02, Annex 2 – Lesser Redacted List of Witnesses, 15 February 2023, p. 511, paras. 4-7, referring to information that W04829 had "heard" or of which he had been "informed". This form of information makes up the majority of the evidence led by the SPO of this witness.

²⁵⁷ *Ibid.*, para. 6.

²⁵⁸ SITF00299963-SITF00299964.

²⁵⁹ SITF00299963-SITF00299964-AT.

[REDACTED] 2004,²⁶⁰ whereas the separately disclosed English version has a date of [REDACTED] 2004, the same date as the Second Statement.

123. As the moving party, the failure of the SPO to either notice these discrepancies, or draw them to the attention of the Trial Panel, further undermines the request for the admission of W04829's evidence, which should be dismissed in its entirety.

N. W01456

124. The Defence objects to the admission of any portion of W01456's ICTY statement U008-2500-U008-2535 RED2 relating to acts and conduct of the Accused; uncorroborated allegations of W01456; and an excerpt of [REDACTED] pages from W01456's [REDACTED].²⁶¹

125. *Acts and conduct of the Accused:* The admission of the following excerpts of W01456's statement, most of which is hearsay, would be so prejudicial as to outweigh any probative value.

126. W01456 states that Rexhep Selimi attended the funeral [REDACTED] as a **KLA member**.²⁶² W01456 does not seem to have attended this funeral himself, and admits that he learnt Rexhep Selimi's name only "at a later stage".²⁶³ The source of this information is unknown and cannot be tested through cross-examination.

127. W01456 maintains that at a later stage, undefined, the KLA General Staff was composed of a "'trinity' of Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi", who

²⁶⁰ SITF00305089.

²⁶¹ U008-2728-U008-2846-ET.

²⁶² U008-2500-U008-2535 RED2, para. 15.

²⁶³ *Ibid.*, para. 15.

issued guidelines to Operational Zone Commanders,²⁶⁴ that Hashim Thaci replaced Adem Demaçi, KLA political representative, at an undefined time,²⁶⁵ and that [REDACTED].²⁶⁶ W01456 does not provide any source for these statements which are vague and cannot be tested through cross-examination. W01456 further concedes that he was introduced to Hashim Thaçi, Fatmir Limaj and Sylejman Selimi only after the war,²⁶⁷ does not refer to any meeting with Jakup Krasniqi during the Indictment Period, and refers to a single encounter with Rexhep Selimi during this period, which is of dubious reliability, as will be developed below.

128. W01456 alleges that an attempt was made to execute him by the KLA on 31 October 1998.²⁶⁸ The plan for his execution was allegedly made by [REDACTED].²⁶⁹ W01456 affirms that, at this date, he went to the KLA headquarters in Jabllanicë, where he met [REDACTED]. Then, a representative from the KLA General Staff arrived, and blamed the witness for having criticised the KLA.²⁷⁰ W01456 then left Jabllanicë, stopped at Bardhaniq to pay condolences, and was thereafter stopped on the way to Gjakovë by 5-6 soldiers wearing masks, who talked to him in Serbian – he thinks they were masked KLA Albanians trying to speak in Serbian – but he was “saved” from being shot by a friend, [REDACTED], who was passing by.²⁷¹

129. W01456 declares that [REDACTED].²⁷² W01456’s statement on this alleged meeting and involvement of Mr. Selimi is uncorroborated and W01456 fails to clarify how he would have been able to identify Mr. Selimi after the events. W01456 also

²⁶⁴ *Ibid.*, paras. 35-36; *see also* para. 40.

²⁶⁵ *Ibid.*, para 40.

²⁶⁶ *Ibid.*, para. 135.

²⁶⁷ *Ibid.*, para. 136.

²⁶⁸ *Ibid.*, para. 54.

²⁶⁹ *Ibid.*, paras. 59, 77, 79.

²⁷⁰ *Ibid.*, para. 57.

²⁷¹ *Ibid.*, paras. 62-67.

²⁷² *Ibid.*, paras. 58, 78.

stated that one of his sources, [REDACTED], told him that his attempted murder [REDACTED], but W01456 refused to believe it given that he considered himself “such a well-known person”.²⁷³ The prejudicial effect of admitting such uncorroborated and untested evidence relating to the acts and conduct of an Accused, without cross-examination, outweighs any probative value.

130. *Uncorroborated allegations.* The Defence opposes the admission of the parts of W01456’s evidence which are uncorroborated and/or appear to rely only on hearsay. In particular, W01456 maintains that “[REDACTED]” by the “[REDACTED]”,²⁷⁴ implying that it was a general practice, without mentioning any source of information or names of alleged KLA staff who would have committed such crimes.

131. W01456 alleges that his “name was mentioned by LPK on a “blacklist” of ten people for execution on the alleged charges of “national betrayal””, the LPK being a sort of territorial army of left wing of KLA.²⁷⁵ Asked how could he be sure that this list was prepared by the LPK, W01456 stated that [REDACTED]received it from the LPK.²⁷⁶ Yet, [REDACTED].²⁷⁷ [REDACTED].²⁷⁸ Therefore, the origin of this “blacklist” cannot be established through W01456’s evidence.

132. *Excerpt of [REDACTED] pages from W01456’[REDACTED].* This excerpt is mostly irrelevant; it falls partly out of the scope of the Indictment Period. While W01456 states that he used to take daily notes based on personal visits to the field and details given by victims’ families,²⁷⁹ it is not clear whether [REDACTED] is a compilation of these daily notes, or whether the notes were amended subsequently,

²⁷³ *Ibid.*, paras. 74-77 (emphasis added).

²⁷⁴ *Ibid.*, paras. 43, 94.

²⁷⁵ *Ibid.*, paras. 46, 52, 54.

²⁷⁶ *Ibid.*, para. 52.

²⁷⁷ 074714-TR-ET Part 2 RED, pp. 10-14.

²⁷⁸ *Ibid.*, p. 14, lines 20-25.

²⁷⁹ U008-2500-U008-2535 RED2, para. 115.

and if so on which basis. Absent such clarification and the inability to cross-examine the witness on his methodology, the probative value of this excerpt is extremely limited, precluding its admission.

O. W04597

133. The SPO seeks to tender the following material for W04597: the interview transcripts and witness statement corresponding to his ICTY interview on 24 March 2006; an ICTY witness statement of 24 September 2010; a supplemental ICTY statement of 30 August 2011; and transcripts of in-court testimony from the *Haradinaj* retrial dated 1 and 2 September 2011,²⁸⁰ together with six exhibits tendered through the witness.²⁸¹ By the SPO's admission, much of his evidence is not directly relevant, but the statements are tendered "to permit a full evaluation of this deceased witness's evidence."²⁸²

134. The Defence objects to the admission of the following portions of W04597's evidence which relate to the acts and conduct of the Accused.

135. W04597 states that Rexhep Selimi attended a meeting on or around 23 June 1998, where the Dukagjini Operational Zone would have been established and Ramush Haradinaj appointed as zone commander, and that Mr. Selimi may have put the name of Lahi Brahimaj forward – but he is [REDACTED].²⁸³ Yet, while the witness refers to this alleged meeting in several statements, he mentions Mr. Selimi's presence only once, in his ICTY 2 September 2011 trial testimony, in which he states that he only remembers that, "[REDACTED]" and that "[REDACTED]".²⁸⁴ Therefore, this

²⁸⁰ Note that W04597 testified in the *Haradinaj* retrial only.

²⁸¹ See Application, Annex 15, items 10-15.

²⁸² Application, para. 79.

²⁸³ IT-04-84bis T1067-T1122, pp. 18 & 22.

²⁸⁴ *Ibid.*, pp. 23-24.

allegation, untested, which relates to the acts and conduct of an Accused, should be excluded. The prejudicial effect of admitting such untested evidence relating directly to the acts and conduct of an Accused, without cross-examination, outweighs any probative value.

136. W04597 further alleges that Rexhep Selimi and Hashim Thaçi, together with Bislim Zyrapi and Lahi Brahimaj, as members of the KLA General Staff, attended a meeting in Prapaçan, at an undetermined date, where they would have opposed the appointment of Tahir Zemaj as commander of the Dukagjini Operational Zone and pushed for the reinstatement of Ramush Haradinaj as Zone commander.²⁸⁵ The witness made this statement during an interview by the ICTY OTP on 24 March 2006, during which he signed a written statement. The transcript of interview is difficult to follow given that there are often overlapping speakers, including during the discussion about this meeting. This meeting was not discussed during the witness' ICTY trial testimony. The Defence does not dispute Mr. Selimi and Mr. Thaçi's presence at this meeting but challenges their alleged role and speeches therein. Therefore, the prejudicial effect of admitting such untested evidence relating to the acts and conduct of an Accused, without cross-examination, outweighs any probative value. The fact that such an allegation may be corroborated by another witness, W04752, who could be subject to cross-examination, is insufficient to remedy the prejudice caused to the Defence, since it is still unsure if and when this witness may testify.

137. The admission of *all* W04597's statements and in-court testimony is unnecessary, and no justification for seeking to admit substantially similar statements is provided. The admission of both the interview transcripts of 24 March 2006 and statement corresponding to the same interview is wholly unnecessary. Of these two

285 T000-5322-TR-ET Part 1, pp.12-15; U009-4688-U009-4698, paras. 31-33.

records, the transcripts and audio/video are a better source of evidence than the statement, being the more accurate and complete version. The Trial Panel should exercise its discretion to admit only W04597's ICTY testimony and associated exhibits. Considering the cumulative nature of the statements; the transcript of his testimony before the ICTY bears the greatest indicia of reliability, having been provided in court and subjected to cross-examination.

P. W04836

138. The SPO seeks admission of W04836's prior testimony from *Idriz Balaj et al.*, dated 26 November 2022;²⁸⁶ his pre-trial statement of 2 July 2022 in the same case;²⁸⁷ and Parts 1 and 2 of W04836's memoirs, published in 2000 and 2001.²⁸⁸

139. W04836's evidence does not relate to any crimes alleged in the indictment. Insofar as it relates to the structure of the KLA in the Dukagjin Zone, or the relationship with FARK, it adds little if anything beyond what will be provided by other SPO witnesses whose evidence was, or will be, adduced under circumstances more conducive to assessing their reliability.²⁸⁹ To the extent that it includes allegations on the acts and conduct of the Accused,²⁹⁰ such portions of his statements should be excluded, as it would be unfairly prejudicial for such hearsay evidence to be admitted in the absence of any meaningful opportunity for the Defence to challenge it.

²⁸⁶ SPOE00083495- SPOE00083512.

²⁸⁷ SPOE00084827-SPOE00084854 RED.

²⁸⁸ U002-3153-U002-3228-ET; 0189-2635-0189-2652-ET etc.

²⁸⁹ W01511 (proposed as Rule 154); W01493 (proposed as Rule 154); W0475 (proposed as Rule 154); W04569 (proposed as Rule 153). All of these witnesses testified before the ICTY where their evidence was memorialised in verbatim transcripts and audio-visual recordings and/or will testify live before this Court.

²⁹⁰ Application, para. 85.

140. W04836 states that in August 1998 he was appointed commander of the Third Operational Zone (Rrafshi i Dukagjinit), with Ramush Haradinaj as his deputy, in Prapacan, with the approval of the Ministry of Defence in exile.²⁹¹ Shortly after, Hashim Thaçi and Rexhep Selimi, together with other KLA members, came to see him in Bardhaniq and allegedly opposed his appointment, reinstating Ramush Haradinaj as zone commander, with W04836 as his deputy.²⁹² W04836 reports an alleged phone conversation between the Minister of Defence, Rexhep Selimi and Hashim Thaçi, during which W04836 and the Minister of Defence objected to W04836 being under the KLA command, and Mr Thaçi said that he would fight W04836 and anyone who opposed him.²⁹³

141. W04836 is inconsistent as to what he was offered; Haradinaj's deputy and/or membership of the KLA General Staff. He is also inconsistent as to why he refused to be appointed as Haradinaj's deputy and subsequently withdrew; because he did not want to have two heads, because the Minister of Defence objected, because it was against the will of the Dukajin region, and/or because there was a Serb attack shortly after this meeting which led to his withdrawal upon the Minister of Defence's order, *etc.*²⁹⁴ The inconsistencies in this evidence warrant proper exploration during cross-examination, which is now impossible. In addition, a NATO report alleging that W04836 was [REDACTED] and involved in organised criminal activities,²⁹⁵ also should be properly explored during cross-examination.

142. The Defence does not dispute Mr Selimi and Mr Thaçi's presence at a meeting in Bardhaniq but takes a different position as to their alleged role, influence and speeches. The fact that such allegations may be corroborated, in part, by W01511,

²⁹¹ SPOE00084827-SPOE00084854 RED, pp. 5-6; SPOE00083495-SPOE00083512 RED, p. 3.

²⁹² SPOE00084827-SPOE00084854 RED, pp. 6-7; SPOE00083495-SPOE00083512 RED, p. 3.

²⁹³ *Ibid.*

²⁹⁴ SPOE00084827-SPOE00084854 RED, p. 7; SPOE00083495-SPOE00083512 RED, pp. 3-4, 10-11, 15, 17.

²⁹⁵ 7005930-7005931.

[REDACTED] or W04752, who could be subject to cross-examination, is insufficient to remedy the prejudice, given that it is unclear how or if these witnesses will testify. Importantly, the Defence notes that these witnesses do not refer to the alleged phone call with the Minister of Defence, nor does the documentary evidence cited by the SPO refer to the Bardhaniq meeting. Therefore, the prejudicial effect of admitting W04836's evidence relating to the acts and conduct of the Accused, without cross-examination, outweighs any probative value.

143. The SPO does not provide any justification for tendering W04836's evidence from both the pre-trial and trial phases from the same case. If W04836's evidence is to be admitted at all, only the latter should be admitted. W04836's testimony at trial, where the witness was also questioned by the Defence, is the more authoritative record.

144. The witness's books, which appear to be memoirs of his time before and during the war, are not *prima facie* reliable. While purporting to contain direct quotations from W04836, the books also contain editorial notes and observations. Moreover, there is no way of confirming the extent to which the books are an accurate reflection of statements made by W04836. Nor is the purpose for which the book was written clear, though given the timing (post-war) and W04836's status as a public figure, it may be assumed that political or reputational concerns were at issue.

145. In particular, the Defence notes that, in Part II of the memoir, the author refers to an alleged meeting between [REDACTED] and Jakup Krasniqi, which W04836 did not attend and for which no basis of knowledge is indicated.²⁹⁶ The same event is not reflected in W04836's witness statements. The low probative value of this hearsay

²⁹⁶ 0189-2671-0189-2709 -ET, p. 0189-2674.

evidence, which is untested and of unclear provenance, is outweighed by the prejudice caused to the Accused, who cannot cross-examine the witness on this point.

146. The quantity of such evidence, which is of dubious quality, is also concerning. Part 1 of the memoirs, 135 pages in length, is tendered in its entirety. While the SPO appears to have omitted some page ranges from the Part II of the memoirs, it still seeks to tender approximately 90 pages. This evidence should not be admitted through Rule 155.

IV. CONCLUSION

147. The charges and allegations in the present case occurred over two decades ago. In this context, it is unsurprising that the SPO should seek to admit the statements and transcripts of witnesses who are now unavailable.

148. The timing of these proceedings, however, cannot work to the detriment of the accused, or result in an encroachment on their rights to confront, question and test the evidence against them. The admission of the testimony of unavailable witnesses is an extraordinary remedy, requiring particular caution,²⁹⁷ and within the strict parameters set out in Rule 155 and the prior practice of international courts.

149. The material put forward by the SPO for admission through Rule 155 is largely inadmissible for the reasons set out above. Outside the instances of the formal requirements not being met, the SPO also seeks admission of evidence which is central to its allegations, which goes directly to the acts and conduct of the accused where its probative value is outweighed by its prejudice, which is duplicative and voluminous, which amounts to second and third hand hearsay from anonymous sources, much of

²⁹⁷ *Karadžić* Admission Decision, para. 8; *Dorđević* Admission Decision, para. 9.

which has not been tested and verified before the witness became unavailable. For these reasons, the Defence invites the Trial Panel to take note of the Defence objections to the admission of the SPO Rule 155 statements and associated exhibits, and dismiss, in part, the SPO Application.

[Word count: 17,431 words]

Respectfully submitted on 22 March 2023,



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