



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 20 September 2023

Language: English

Classification: Public

Public Redacted Version of 'Prosecution third motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-4'

Specialist Prosecutor's Office

Ward Ferdinandusse

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Articles 37 and 40 of the Law,¹ and Rules 137-138 and 155 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby seeks admission of the statements,³ together with associated exhibits and/or other written records where applicable,⁴ of three deceased witnesses: W03875,⁵ W04828,⁶ and W04839,⁷ (collectively, 'Rule 155 Witnesses').

2. The Proposed Evidence should be admitted because: (i) the Rule 155 Witnesses are unavailable;⁸ and (ii) the Proposed Evidence is relevant, authentic and reliable, and has probative value, which is not outweighed by any prejudice.⁹ As these admissibility criteria are satisfied, admission is in the interests of justice.¹⁰

3. Attached to this Motion are four Annexes. Annexes 1-3, one for each of the Rule 155 Witnesses, contain a table identifying the Proposed Evidence for that witness, which includes the Rule 155 Statement and, where applicable, tendered associated exhibits and/or other written records.¹¹ Annex 4 contains the documents supporting the unavailability of the Rule 155 Witnesses.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article(s)' are to the Law, unless otherwise specified. Certain of the statements and associated exhibits or records are admissible pursuant to Article 37, as they were in prior criminal proceedings or investigations.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ The account of each witness tendered for admission is the 'Rule 155 Statement'.

⁴ See Annexes 1-3. The Rule 155 Statements and, where applicable, associated exhibits/other written records for each witness are the 'Proposed Evidence.'

⁵ See Annex 1, items 1-2.

⁶ See Annex 2, items 1-4

⁷ See Annex 3, items 1-14.

⁸ Rule 155(1)(a).

⁹ Rules 137-138, 155(1)(b).

¹⁰ The applicable law has been set out in prior submissions and decisions in this case. See Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential ('First Decision'), paras 10-19.

¹¹ For each item, the Annexes provide a description, date of the document, relevant ERNs, and indicia of reliability. See First Decision, KSC-BC-2020-06/F01603, paras 63-64, 101 (setting out indicia of authenticity and reliability).

II. SUBMISSIONS

4. Witnesses W03875, W04828, and W04839 are unavailable since they are deceased, as confirmed by the supporting proof of death documents presented in Annex 4. Accordingly, Rule 155(1)(a) is satisfied and the Proposed Evidence should be admitted as it also satisfies the admissibility criteria under Rules 137-138 and 155(1)(b).

5. Considering available counterbalancing factors and the ability of the Defence to challenge the Proposed Evidence,¹² there is the opportunity for a fair and proper assessment. At the end of the trial and in considering the weight to be assigned, relevant factors include whether – as here – the statement of an unavailable witness corroborates or is corroborated by: (i) statements of other witnesses about the same events; (ii) documentary evidence; (iii) evidence of the Accused's involvement in similar acts; and (iv) evidence of a consistent pattern of conduct.¹³ Further, the Proposed Evidence also complements noticed adjudicated facts relating to, *inter alia*, Klečkë/Klečka and Llapushnik/Lapušnik,¹⁴ which either independently or together with complementary evidence, including of unavailable witnesses, are sufficient to ground a conviction.¹⁵

6. More generally, evidence going to proof of the Accused's acts and conduct is admissible under Rule 155.¹⁶ Even where the Defence suggests that certain evidence is uncorroborated, the Panel will not exclude this evidence at the point of a Rule 155

¹² Relevant factors include whether the evidence is approached with caution, availability of corroborative evidence (including witness and documentary evidence), and the opportunity for the Defence to give its own version of the events, investigate the witness and his/her motives, and cast doubts on the credibility of the absent witness (for example, pointing to any incoherence or inconsistency). See ECtHR, *Schatschaschwili v. Germany* [GC], 9154/10, Judgment, 15 December 2015 ('*Schatschaschwili* Judgment'), paras 126-131.

¹³ See e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para.104; *Schatschaschwili* Judgment, para.128.

¹⁴ Annex 1 to Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534/A01, 17 May 2023, Confidential ('Adjudicated Facts'), pp.107-126, 155-162.

¹⁵ See e.g. IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment, 20 March 2019, para.49, fn.1206.

¹⁶ First Decision, KSC-BC-2020-06/F01603, paras 15, 116.

decision, but will instead make such an assessment at the end of trial in light of the entire evidentiary record.¹⁷ Ultimately, the sole or decisive rule¹⁸ should not be applied in an inflexible manner, particularly at the admissibility stage; to do so would ‘transform the rule into a blunt and indiscriminate instrument’ that runs counter to considerations of the overall fairness of the proceedings.¹⁹

7. The evidence of W03875, W04828 and W04839 is relevant to prove the charges in the Indictment related to, *inter alia*, Klečkë/Klečka,²⁰ Llapushnik/Lapušnik,²¹ and Shalë (Sedllarë)/Sedlare.²² While individual explanations regarding relevance and corroboration for these witnesses are contained in the following sub-sections,²³ it is worth noting that the evidence of W03875 and W04828 intersects with the evidence of W04839. W04839 describes being at Shalë (Sedllarë)/Sedlare when W04828 was held there, and serving as an interpreter for Hashim THAÇI and Fatmir LIMAJ as they

¹⁷ First Decision, KSC-BC-2020-06/F01603, paras 86, 88, 137. *See, similarly*, 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, paras 52-52, 62. For purposes of considering the reliability of the statement, as well as of other corroborative evidence, the whole statement should be admitted, including any specific allegations contained therein (even those that go to the acts and conduct of the Accused) that are not corroborated. *See e.g.* ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Gvero’s Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para.31; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Redacted Version of “Decision on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*”, 19 February 2009, paras 47-50.

¹⁸ The term ‘sole or decisive rule’ refers to the standard codified in Rule 140(4), which should be interpreted consistently with ECtHR jurisprudence applying this standard.

¹⁹ ECtHR, *Al-Khawaja and Tahery v. UK* [GC], 26766/05 & 22228/06, Judgment, 15 December 2011, para.146.

²⁰ Amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022, Confidential (‘Indictment’), paras 59-61, 78-79, 97, 115-116, 136, 138, 161-165; Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’, KSC-BC-2020-06/F01594/A03, 9 June 2023, Confidential (‘Pre-Trial Brief’), paras 479-518.

²¹ Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022, paras 59-61, 64, 97, 101, 136, 138, 145-146; Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 303-337.

²² Indictment, KSC-BC-2020-06/F00999/A01, paras 59-61, 77, 97, 112-113, 136; Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 469-478.

²³ In addition to the witnesses and documentary evidence identified below, the evidence of these witnesses is also corroborated by similar acts (including by the Accused) of detention, interrogation, and mistreatment of Opponents, and evidence of a consistent pattern of detentions and mistreatment by KLA members, which formed part of a campaign of persecution against Opponents. *See* Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 112-113, 267, 704; *see also* para.2 (defining ‘Opponents’).

interrogated W04828 and W03880.²⁴ W04839 was also at Klečkë/Klečka when W03875 was detained there, and comments on W03875's presence there explicitly, including that he spoke with W03875.²⁵

A. W03875

8. *Relevance.* W03875, a Montenegrin, now deceased,²⁶ was a Serbian soldier in 1999.²⁷ W03875 was arrested by KLA soldiers on 3 March 1999, during a short home leave.²⁸ Thereafter, W03875 was taken to different locations within the Shala, Drenica and Pashtrik Operational Zones where he was detained and mistreated.²⁹

9. On or around 21 March 1999, the KLA moved W03875 to the Klečkë/Klečka detention centre, where he stayed for approximately 10 days.³⁰ During his detention he met Commander Sahit JASHARI, who introduced himself as a military police commander.³¹ W03875 was detained with, *inter alia*, six other Albanians, including the former prison director known as 'Shero', a former Kosovo-Albanian MUP Officer from Orahovac, and a man named Shaban.³² W03875 witnessed the continuous mistreatment of 'Shero'.³³ According to W03875, all prisoners were there before his arrival and all had been beaten and abused.³⁴

10. Altogether, W03875 was illegally detained for a period of over 25 days until he was released together with three other prisoners.³⁵

²⁴ Annex 3, item 2: 050966-051004 RED, paras 16-17.

²⁵ Annex 3, item 2: 050966-051004 RED, para.75; and item 5: 051032-051055 RED, p.9.

²⁶ Annex 4, item 1: 113395-113396-ET.

²⁷ Annex 1, item 1: SPOE00078774-00078791, p.SPOE00078776.

²⁸ SPOE00078774-00078791, p.SPOE00078776.

²⁹ SPOE00078774-00078791, pp.SPOE00078776- SPOE00078777.

³⁰ SPOE00078774-00078791, p.SPOE00078777.

³¹ SPOE00078774-00078791, p.SPOE00078777; Annex 1, item 2: SITF00010859-00010874 RED2, p.SITF00010876.

³² SPOE00078774-00078791, pp.SPOE00078777- SPOE00078779.

³³ SPOE00078774-00078791, p.SPOE00078777.

³⁴ SPOE00078774-00078791, p.SPOE00078778.

³⁵ SPOE00078774-00078791, p.SPOE00078779.

11. *Authenticity and reliability.* The Proposed Evidence for W03875, with an individualised explanation of circumstances militating for each item's *prima facie* reliability, is listed in Annex 1.

12. W03875's EULEX Police interview was conducted by a duly empowered police officer on 24 December 2010, and translated into a language understood by the witness, by an interpreter duly certified.³⁶ During the interview, W03875 was duly advised of his rights and obligations as a witness.³⁷ The statement was initialled on all pages and included a witness acknowledgement signed by the witness.³⁸ The date, time and place of the interview, as well as all persons present, are reflected in the record of the interview.³⁹ Additionally, W03875 confirmed that the contents of his statement are true and accurate, and that his statement was given voluntarily.⁴⁰

13. The SPRK Record of the Witness hearing in an investigation taken on 18 January 2011 (the 'SPRK Record')⁴¹ is also *prima facie* reliable and corroborates W03875's EULEX interview, permitting a full assessment of this deceased witness's evidence and credibility. The SPRK Record was taken by a duly empowered Public Prosecutor under the framework of a criminal investigation.⁴² W03875 was informed of his rights and obligations, and translated into a language understood by the witness.⁴³ The date, time and place of the statement are also included in the record.⁴⁴

14. The consistency of the Proposed Evidence – considered together and with corroborating evidence – further demonstrates its reliability.

15. *Fairness.* The probative value of the Proposed Evidence is not outweighed by any prejudice. Indeed, this evidence: (i) does not go to proof of the acts and conduct

³⁶ SPOE00078774-00078791, p.SPOE00078782.

³⁷ SPOE00078774-00078791, p.SPOE00078774.

³⁸ SPOE00078774-00078791, p.SPOE00078781.

³⁹ SPOE00078774-00078791, p.SPOE00078774.

⁴⁰ SPOE00078774-00078791, pp.SPOE00078781- SPOE00078782.

⁴¹ SITF00010859-00010874 RED2, pp.SITF00010875-00010877.

⁴² SITF00010859-00010874 RED2, p.SITF00010875.

⁴³ SITF00010859-00010874 RED2, p.SITF00010875.

⁴⁴ SITF00010859-00010874 RED2, p.SITF00010875.

of the Accused;⁴⁵ (ii) may not be relied upon to a sole or decisive extent in reaching a conviction;⁴⁶ (iii) was recorded in a manner – including by different law enforcement bodies and at different times – that enables the Parties and Panel to assess the witness's demeanour and credibility; (iv) is consistent with, and corroborated by, *inter alia*, documentary evidence and statements of another witness in the case;⁴⁷ and (v) the Defence is aware of the witness's identity, may investigate the witness, his motives and credibility, and has the opportunity to challenge the Proposed Evidence at trial and put forward its own version of events.

B. W04828

16. *Relevance.* In 1998, W04828 – now deceased⁴⁸ – was a cameraman for the Tanjug news agency, working with journalist W03880. On or around 18 October 1998, W04828 and W03880 were arrested by the KLA near Magurë/Magura, Lipjan/Lipljan and thereafter imprisoned in various locations.⁴⁹ During their first detention, in a former infirmary in Shalë (Sedllarë)/Sedlare, they were questioned and told they were being investigated for espionage, but were not given the benefit of any judicial process. Nevertheless, after several weeks of detention they were informed of a purported conviction for illegally entering KLA territory.⁵⁰ When they were neither released nor given any documentation of their arrest, investigation, or conviction, W04828 and W03880 began a hunger strike that lasted approximately three days.⁵¹ They were eventually told they had been sentenced to 60 days of imprisonment.⁵²

17. W04828 and W03880 were transferred to a series of detention sites during October-November 1998. They were also beaten, in particular when they were taken

⁴⁵ Cf. Rule 155(5).

⁴⁶ Rule 140(4)(a).

⁴⁷ See e.g. W04839's statements: 050966-051004 RED, paras 75-76 (Annex 3, item 2); SITF00009578-00009648 RED, pp.2, 13 (Annex 3, item 9); 051032-051055, p.8 (Annex 3, item 5). See also paras 5, 7 above.

⁴⁸ Annex 4, item 2: 083821-083822.

⁴⁹ Annex 2, item 1: 083812-083822-ET RED, p.2.

⁵⁰ 083812-083822-ET RED, p.3.

⁵¹ 083812-083822-ET RED, p.3.

⁵² 083812-083822-ET RED, p.3.

from Shalë (Sedllarë)/Sedlare to another detention site in a house at the top of a mountain, where they were kept in a cellar.⁵³ They were held at two other locations before being released.⁵⁴ At both Shalë (Sedllarë)/Sedlare and the second detention site, W04828 was aware of other detainees also being present.⁵⁵

18. W04828 and W03880 were released on 27 November 1998 to officials of the OSCE's Kosovo Verification Mission as part of an 'amnesty' in celebration of Albanian National Day.⁵⁶

19. *Authenticity and reliability.* W04828's Proposed Evidence, with an individualised explanation of circumstances militating for its *prima facie* reliability, is listed in Annex 2. The record of the witness interview in front of a Belgrade District Court investigating judge is an official record which bears the case number, date, time and place of the interview, names and roles of the persons present, witness details and relevant signatures.⁵⁷ This record has related documents attached to the witness interview, which include a Reuters photograph of W04828 and RADOŠEVIĆ after their release,⁵⁸ and news articles from Voice of America.⁵⁹

20. *Fairness.* The probative value of the Proposed Evidence is not outweighed by any prejudice. Indeed, the evidence: (i) may not be relied upon to a sole or decisive extent in reaching a conviction; (ii) is consistent with, and corroborated by, *inter alia*, documentary evidence and statements of other witnesses in the case;⁶⁰ and (iii) the Defence is aware of the witness's identity, may investigate the witness, his motives

⁵³ 083812-083822-ET RED, p.4.

⁵⁴ 083812-083822-ET RED, p.5.

⁵⁵ 083812-083822-ET RED, pp.3-4.

⁵⁶ 083812-083822-ET RED, p.5.

⁵⁷ 083812-083822 RED (Cyrillic original).

⁵⁸ See Annex 2, item 2.

⁵⁹ See Annex 2, item 3: 083812-083822 ET RED, pp.083818-083819 (pages not being tendered for admission) and item 4: 083812-083822 ET RED, p.083820 (tendered for admission).

⁶⁰ See e.g. W04408, W03880, [REDACTED], and [REDACTED]; U003-8552-U003-8690, p.U003-8645; IT-05-87.1 P00741, p.93; SPOE00225208-SPOE00225208-ET, p.1; 061427-12; SPOE00213932-00213936, p.1; and IT-03-66 P212.4, pp.24-25. See also para.5, 7 above.

and credibility, and has the opportunity to challenge the Proposed Evidence at trial and put forward a different version of events.

C. W04839

21. *Relevance.* W04839 (*a.k.a.* Murrizi), a Kosovar-Albanian now deceased,⁶¹ was a KLA Military Police member,⁶² who had functions including guarding prisoners in Llapushnik/Lapušnik, Klečkë/Klečka, and Shalë (Sedllarë)/Sedlare.⁶³ He was KLA Military Police commander in Shalë (Sedllarë)/Sedlare.⁶⁴ W04839 witnessed numerous beatings and executions, and also observed evidence of beatings and executions, which he did not see first-hand.⁶⁵

22. W04839 observed that Ajeta GASHI was detained and beaten at Llapushnik/Lapušnik including by Isak MUSLIU,⁶⁶ and subsequently executed by a group of KLA, including Fatmir LIMAJ.⁶⁷ He witnessed the execution of Serb prisoners by Fatmir LIMAJ, in the presence of other KLA members including Isak MUSLIU and Haxhi SHALA,⁶⁸ and noted that mock executions also occurred in Llapushnik/Lapušnik prison.⁶⁹ W04839 explained that Isak MUSLIU was in charge of the Llapushnik/Lapušnik detention site, and that MUSLIU gave him orders, including as regards beating prisoners.⁷⁰

⁶¹ Annex 4, item 3: 108798-108798.

⁶² Rexhep SELIMI issued him one of his Military Police ID cards. *See* Annex 3, item 5: 051032-051055 RED, p.17.

⁶³ *See e.g.* Annex 3, item 1: 050951-050965 RED, paras 3-17; Annex 3, item 2: 050966-051004 RED, paras 28-48, 99.

⁶⁴ 050966-051004 RED, paras 9-10.

⁶⁵ *See e.g.* Annex 3, item 1: 050951-050965 RED, paras 5-9, 12-13, 16; item 9: SITF00009578-00009648 RED, p.SITF00009584; item 2: 050966-051004 RED, paras 66-74; item 5: 051032-051055 RED, pp.3-8, 10, 16; item 3: SITF00009503-00009529 RED, p.24.

⁶⁶ SITF00009503-00009529 RED, p.10.

⁶⁷ 050951-050965 RED, paras 5-9; SITF00009503-00009529 RED, p.9.

⁶⁸ 050951-050965 RED, paras 12-13; SITF00009503-00009529 RED, p.15.

⁶⁹ SITF00009503-00009529 RED, p.18.

⁷⁰ SITF00009503-00009529 RED, p.6.

23. When Serb forces approached Llapushnik/Lapušnik, W04839 attempted to escort the 30 remaining prisoners to Kleçkë/Klečka.⁷¹ Fatmir LIMAJ observed W04839 and two other guards escorting the prisoners and ordered W04839 to execute the prisoners instead of taking them to Kleçkë/Klečka.⁷² W04839 released 20 prisoners he deemed 'not dangerous'.⁷³ Other guards attempted to execute the 10 remaining prisoners, but an unknown number escaped the attempted execution.⁷⁴

24. W04839 was then ordered by Fatmir LIMAJ to take up KLA command of Terpezë/Trpeza, but after a few months he was sent to Shalë (Sedllarë)/Sedlare.⁷⁵ There, W04839 conducted surveillance for Fatmir LIMAJ, and Sabit SHALA ordered W04839 to execute suspected collaborators.⁷⁶ W04839 warned those individuals to stay in their houses and did not arrest or execute them, despite SHALA's orders.⁷⁷ During W04839's time in Shalë (Sedllarë)/Sedlare, two Serbian journalists were arrested and detained there. While there, they were interviewed by Hashim THAÇI and Fatmir LIMAJ,⁷⁸ and W04839 served as the interpreter during these interviews.⁷⁹

25. Eventually, W04839 left Shalë (Sedllarë)/Sedlare and was sent to Kleçkë/Klečka.⁸⁰ Fatmir LIMAJ appointed W04839 to guard prisoners at the detention site in Kleçkë/Klečka,⁸¹ and W04839 corresponded with Sokol DOBRUNA about the prisoners there.⁸² At one point, he was told by Nexhmi KRASNIQI that he

⁷¹ 050951-050965 RED, para.17.

⁷² 050951-050965 RED, paras 17-18.

⁷³ 050951-050965 RED, paras 19-20, 29-30.

⁷⁴ 050951-050965 RED, paras 20-25.

⁷⁵ 050966-051004 RED, paras 2-10.

⁷⁶ 050966-051004 RED, paras 12-13.

⁷⁷ 050966-051004 RED, paras 12-14.

⁷⁸ 050966-051004 RED, paras 16-18.

⁷⁹ 050966-051004 RED, para.16.

⁸⁰ 050966-051004 RED, paras 27-28.

⁸¹ 050966-051004 RED, para.28.

⁸² 050966-051004 RED, paras 30-31; SITF00009578-00009648 RED, pp.2-3.

(KRASNIQI) had an order from Rexhep SELIMI to kill a prisoner.⁸³ Kadri VESELI also gave him orders regarding prisoners.⁸⁴

26. At Kleçkë/Klečka, W04839 observed the command structure, as well as numerous beatings and signs of torture on the prisoners.⁸⁵ It was clear to W04839 that Hashim THAÇI and Jakup KRASNIQI, as well as Fatmir LIMAJ, had a lot of power in the area.⁸⁶ He saw Kadri VESELI many times at Kleçkë/Klečka, and noted that it was clear he knew Naser SHALA.⁸⁷ He also saw Jakup KRASNIQI at Kleçkë/Klečka⁸⁸ and Rexhep SELIMI gave W04839 orders concerning how to handle prisoners held at Kleçkë/Klečka.⁸⁹ He observed the execution of a Serbian man with a scythe,⁹⁰ and he observed further beatings and murders of other Serb prisoners.⁹¹ W04839 admitted to murdering two Serb prisoners in Kleçkë/Klečka himself on Fatmir LIMAJ's orders.⁹² He saw and interacted with various KLA persons at Kleçkë/Klečka,⁹³ and explained that '[a]ll t[he]se individuals would come to the prison and do whatever they wanted to the prisoners.'⁹⁴

27. Because of his roles, W04839 was very familiar with the command structure of the KLA in Llapushnik/Lapušnik, as well as Kleçkë/Klečka.⁹⁵ He knew the names and nicknames of KLA soldiers and was able to identify images of many of them.⁹⁶ Further, W04839 kept extensive notes during the war and afterwards detailing prison

⁸³ 051032-051055 RED, p.18; SITF00009578-00009648 RED, p.2; *see also* Annex 3, item 13: SITF00009996-00010122 RED, p.15.

⁸⁴ SITF00009578-00009648 RED, p.2.

⁸⁵ 051032-051055 RED, pp.4, 6, 10, 16; SITF00009578-00009648 RED, p.7; 050966-051004 RED, para.47.

⁸⁶ 050966-051004 RED, paras 36-37.

⁸⁷ 051032-051055 RED, p.9; SITF00009996-00010122 RED, p.4.

⁸⁸ SITF00009996-00010122 RED, p.5.

⁸⁹ 051032-051055 RED, p.18.

⁹⁰ 050966-051004 RED, paras 66-71.

⁹¹ 051032-051055 RED, pp.3-8-; SITF00009578-00009648 RED, p.7.

⁹² 051032-051055 RED, pp.10-12.

⁹³ 050966-051004 RED, p.8.

⁹⁴ 050966-051004 RED, p.8.

⁹⁵ *See e.g.* 050951-050965 RED, paras 1-14; 050966-051004 RED, paras 36-48.

⁹⁶ *See e.g.* Annex 3, item 7: SITF00009866-00009902 RED, pp.4-11; Annex 3, item 8: SITF00009537-00009566 RED, pp.4-6.

conditions, rosters of prisoners (including entry and exit dates, executions, and KLA figures that brought them, released them, or received them), and KLA conduct.⁹⁷ These notes include information on many named victims, including [REDACTED], W03875 (including that he was brought to Klečkë/Klečka by Kadri VESELI), Ymer XHAFIQI, Sherafdin AJETI, [REDACTED], and Arben AVDYLI.⁹⁸ W04839 saw Ymer XHAFIQI and Sherafdin AJETI being beaten while in detention at Klečkë/Klečka, and was told by [REDACTED] that they had killed XHAFIQI and AJETI.⁹⁹

28. *Authenticity and reliability.* W04839's Rule 155 Statement, with an individualised explanation of circumstances militating for *prima facie* reliability, is listed in Annex 3. W04839's EULEX Police Statements,¹⁰⁰ SPRK transcripts of interview,¹⁰¹ EULEX/WCIU Photo Board Identification Procedure Report,¹⁰² and SPRK transcripts of interview with defence counsel¹⁰³ are all signed by the attendees at those meetings among other indicia of reliability. Annex 3 also lists the exhibits associated to the Rule 155 Statement, including their relevance. The associated exhibits should be admitted as an inseparable and indispensable part of the Rule 155 Statement, which would be less comprehensible or have lesser probative value without such exhibits.

29. *Fairness.* The probative value of the Proposed Evidence for W04839 is not outweighed by any prejudice. Indeed, the evidence (i) may not be relied upon to a sole or decisive extent in reaching a conviction;¹⁰⁴ (ii) was recorded in a manner that enables the Parties and Panel to assess the witness's credibility; (iii) is consistent with, and corroborated by, *inter alia*, documentary evidence and statements of other witnesses

⁹⁷ See e.g. Annex 3, item 4: SITF00009653-00009681 RED, pp.18, 22-25; 051032-051055 RED, pp.8, 13-14, 1-18-; Annex 3, item 12: SITF00009959-00009995 RED, paras 21, 91-99, 107, 114-121, 144-146, 152; 050966-051004 RED, paras 52-94.

⁹⁸ See 050966-051004 RED, paras 52-94; SITF00009653-00009681 RED, pp.24-25; 051032-051055 RED, pp.8, 9, 16.

⁹⁹ SITF00009653-00009681 RED, p.24.

¹⁰⁰ Annex 3, items 1-2.

¹⁰¹ Annex 3, items 3, 4, 5, 6, 7, 8, and 9.

¹⁰² Annex 3, item 10.

¹⁰³ Annex 3, items 11, 12, 13, and 14.

¹⁰⁴ Rule 140(4)(a).

in the case, including multiple witnesses who will be available for cross-examination;¹⁰⁵ and (iv) the Defence is aware of the witness's identity, may investigate the witness, his motives and credibility, and has the opportunity to challenge the Proposed Evidence at trial and put forward a different version of events.

30. *Decisions in the KRASNIQI et al. trial.* The Trial Panel has recently confirmed in the Rule 155 context that:

Findings regarding the credibility of a witness are within the discretion and responsibility of *this* Panel. While potentially relevant, the findings of other courts and Panels regarding the credibility of a witness whose statement is being offered in evidence are not binding upon this Panel and it will not delegate that responsibility to others. The Panel's determination on that point will depend, in particular, upon the existence of corroboration of a witness's account and the reliability of any such corroborating evidence.¹⁰⁶

31. The Panel has likewise explained that any purported inconsistencies in the statements of a witness can be considered 'when deciding what weight, if any, to give to the witness's evidence.'¹⁰⁷ Nevertheless, because the Defence has previously referenced prior judicial holdings concerning W04839's evidence to argue that his evidence should not be admitted,¹⁰⁸ the SPO takes this opportunity to briefly respond.

32. The starting point for considering the treatment of W04839's evidence in the *Krasniqi et al.* decisions is to recognise that his evidence in that case was ultimately held to be admissible. Doubts that some chambers expressed about the veracity of portions of his evidence therefore went entirely to weight. In ruling W04839's evidence admissible, the Supreme Court of Kosovo ('Supreme Court') explained, in a

¹⁰⁵ See e.g. [REDACTED], W03880, [REDACTED], W04828, and W04839. These witnesses discuss detentions and mistreatment at, *inter alia*, the locations that W04839 was stationed at, and/or the involvement, knowledge, or presence of relevant KLA members, including the Accused. Among others, [REDACTED] identify W04839 by name or known alias, and provide evidence concerning his role and involvement in the relevant detention sites. See also paras 5, 7 above.

¹⁰⁶ First Decision, KSC-BC-2020-06/F01603, para.49 (emphasis in original). See also Transcript, 5 September 2023, p.7269.

¹⁰⁷ First Decision, KSC-BC-2020-06/F01603, para.52.

¹⁰⁸ See e.g. Selimi Defence Motion for Exclusion of Evidence of Witness W02652, KSC-BC-2020-06/F01438, 6 April 2023, Confidential, paras 18-22; Pre-Trial Brief of Jakup Krasniqi, KSC-BC-2020-06/F01051, 21 October 2022, Confidential, para.25; Corrected Version of the Pre-Trial Brief on Behalf of Kadri Veseli, KSC-BC-2020-06/F01052/COR, 25 October 2022, Confidential, para.53.

manner that echoes the principles expressed by the Trial Panel above, the difference between determinations as to admissibility and weight.¹⁰⁹

With regards to whatsoever piece of evidence it needs to be underlined in this context that as a rule there is a significant difference between admissibility and reliability, with the former referring to the manner in which evidence has been obtained, while reliability being the determination of the weight to be accorded to a certain piece of evidence in comparison to others. Reliability of a specific piece of evidence can only be assessed after all evidence has been presented and in the comparative view with all other evidence. Despite discussions and differences regarding some details, all legal systems in Europe clearly distinguish between issues of admissibility and issues of well-founded reasoning, which difference also applies with regards to the assessment of evidence. Whilst the question of the admissibility of evidence usually becomes relevant already at a quite early stage of proceedings such as the confirmation stage and may be re-considered by the main trial panel later on, the question of reliability goes together with the question of credibility of a witness and needs to be raised at a much later stage, usually at the end of the main trial, after all the admissible evidence was presented and assessed in conjunction with all other evidence in the case.

33. The reliability assessment that is appropriate at this stage of the proceedings is, as noted above, a simple *prima facie* assessment, and further consideration of reliability as regards the weight to be afforded a piece of evidence is a later determination. The Supreme Court went on to explain that there may be times where *prima facie* reliability is not met, such as where ‘a statement was extorted by force, threat or similar prohibited means’ and therefore would be considered ‘inherently unreliable by definition and therefore inadmissible’, but observed that that was not the case with W04839’s evidence in that case.¹¹⁰ It instead held that possible flaws in the evidence ‘may indeed open room for discussion and careful assessment of the evidence. It however does not automatically result in the inadmissibility of that evidence.’¹¹¹ Subsequent to the Supreme Court’s ruling, the Basic Court of Prishtina (‘Basic Court’) and Court of Appeals of Kosovo (‘Court of Appeals’) decisions acknowledge that

¹⁰⁹ Supreme Court of Kosovo, *Prosecutor v. Krasniqi et al.*, Ruling, 20 November 2012 (‘Supreme Court Ruling’), para.32.

¹¹⁰ Supreme Court Ruling, para.32.

¹¹¹ Supreme Court Ruling, para.32.

W04839's evidence was admissible and that their determinations went solely to weight.¹¹²

34. Turning to the subsequent Basic Court and Court of Appeals judgments shows: (i) that both courts ascribed weight to W04839's evidence; and (ii) the extensive differences between that case and the present one.

35. First, review of both the Basic Court and Court of Appeals judgments show that, contrary to the impression given by the Defence, those chambers found portions of W04839's evidence credible, corroborated by other evidence in the record before them, and ascribed it weight. The Basic Court noted that parts of W04839's evidence were consistent with other evidence before it, including in regards to his presence at Kleçkë/Klečka,¹¹³ the dates he was there and the identity of persons detained at Kleçkë/Klečka,¹¹⁴ the dates they were there,¹¹⁵ and incidents of murder.¹¹⁶ It ascribed authorship of certain notebooks to W04839,¹¹⁷ credited W04839's evidence without qualification in establishing some of its factual findings,¹¹⁸ and also credited the evidence of other witnesses who attested to W04839's role and position at Kleçkë/Klečka.¹¹⁹ The Court of Appeals, too, credited parts of W04839's evidence,

¹¹² See Basic Court of Pristina, *Prosecutor v. Krasniqi et al*, Judgment, 17 September 2013 ('Basic Court Judgment'), p.66; Court of Appeals of Kosovo, *Prosecutor v. Krasniqi et al*, Judgment, PAKR 266/14, 26 January 2016 ('Court of Appeals Judgment'), p.30.

¹¹³ Basic Court Judgment, p.68.

¹¹⁴ Basic Court Judgment, p.67.

¹¹⁵ Basic Court Judgment, p.130 ('The Trial Panel finds that many of the events to which AZ refers in the war diary are correct. For example, evidence given by witnesses about the dates they say they were detained at the prison in Klečka is consistent with entries in the diary, including information regarding the identity of other persons detained during the same period.').

¹¹⁶ Basic Court Judgment, p.168 ('The evidence of AZ regarding the fact and manner in which a Serbian detainee was executed is consistent with evidence recovered in the village of Klecke/Klečka at site KER01.').

¹¹⁷ Basic Court Judgment, p.72 (finding handwriting attributable to W04839).

¹¹⁸ Basic Court Judgment, pp.150-151 (regarding the structure, layout, conditions, prisoner numbers, prisoner distribution and treatment of the various buildings in the Kleçkë/Klečka detention site).

¹¹⁹ Basic Court Judgment, pp.67, 149-150, 158, 220, 232.

thereby attributing it weight,¹²⁰ as well as crediting other witnesses that provided evidence regarding W04839's presence at Kleçkë/Klečka and his functions there.¹²¹

36. Second, the factual context in which the Basic Court and the Court of Appeals Judgments were reached is vastly different than the case here, in ways that further buttress the need for this Trial Panel to make its own assessment of W04839's evidence in relation to the case before it.

37. The *Krasniqi et al.* case only dealt with crimes in and around the Kleçkë/Klečka crime site, and so does not address W04839's evidence regarding the other crime sites in this case to which his proposed evidence pertains, such as Llapushnik/Lapušnik and Shalë (Sedlarë)/Sedlare. Indeed, the *Krasniqi et al.* chambers were examining W04839's evidence against a far more limited factual backdrop generally. The indictment itself in the *Krasniqi et al.* case stated that 'in the instant case, the well-grounded suspicion against all the defendants arises mainly from the declarations of Cooperative Witness X [i.e., W04329]'.¹²² The Basic Court noted that: 'The Trial Panels [*sic*] assessment of the credibility of AZ is central to its determination of the charges against each of the Accused.'¹²³ It would go on to hold that 'the fundamental flaw in the prosecution case' was that there was no corroboration in the anaemic record before

¹²⁰ Court of Appeals Judgment, pp.41 ('The UNMIK report reveals the Basic Court erred when concluding that he invented the whole story. On the contrary, the report shows that Zogaj told the truth.'), 51 ('[...] the Court of Appeals concludes that the war diaries [...] specifically are authentic, written by Agim Zogaj, and that they constitute credible evidence insofar as they confirm the identity of the prisoners, and the dates of the detention and release of such prisoners from Kleçkë/Klečka.'). 64 (noting, *inter alia*, in regards to the killing of four Serbian detainees, 'the Court of Appeals notes that Agim Zogaj's story is in this part coherent and credible. It is corroborated by material, forensic and testimonial evidence.'). 70 ('the Court of Appeals finds that Agim Zogaj's evidence is reliable in so far as it confirms that Arben Avdyli was killed'), 71 ('the Court of Appeals finds Agim Zogaj's evidence is partially credible and reliable insofar as Sherafedin Ajeti and Ymer Gjafiqi were detained in Kleçkë/Klečka detention facility and killed on 3 April 1999'), 86 ('The cooperative witness Agim Zogaj confirms that witness C was detained in Kleçkë/Klečka from 20 March 1999 to 2 April 1999').

¹²¹ See e.g. Court of Appeals Judgment, pp.76-78.

¹²² Basic Court Judgment, p.64.

¹²³ Basic Court Judgment, p.67.

it.¹²⁴ This dynamic was also noted by the Court of Appeals.¹²⁵ It is evident, therefore, that those chambers had much less to draw upon in assessing corroboration of W04839's evidence, and his credibility, than this Panel does and will at the conclusion of this trial.

38. That practically the entire *Krasniqi et al.* case turned on W04839's evidence also necessarily coloured the chambers' analyses of that evidence: the chambers were required not only to assess the weight that should be afforded to W04839's evidence, but implicitly to assess whether it was sufficiently strong to support the entire case. The richer evidentiary record in the instant case ensures that there will be far more evidence from various quarters regarding the aspects of the case to which W04839's evidence pertains, and for the Trial Panel to consider alongside his evidence in making its determinations as to weight.

39. Indeed, the position and presence at relevant times and places of W04839 are amply corroborated by evidence already in the record, including evidence of KLA insiders, victims, and contemporaneous documents.¹²⁶ W04264, who was head of the KLA Legal Department and the KLA Military Court,¹²⁷ [REDACTED],¹²⁸ W03897,¹²⁹ and [REDACTED]¹³⁰ all corroborate W04839's presence, position, and role at the Klečkë/Klečka detention site. Further, [REDACTED] confirms W04839 performed guard duties [REDACTED] at the KLA's detention site in Shalë (Sedllarë)/Sedlare.¹³¹

¹²⁴ Basic Court Judgment, p.130; *see also* pp.204, 214-215, 224-225, 237, 239, 244, 246- 249. The Basic Court was applying then-Kosovo Code of Criminal Procedure Article 157(4), which did not permit conviction based solely on the evidence of a cooperative witness. The Court of Appeals would go on to explain that the Basic Court read this provision in an overly restrictive manner. *See* Court of Appeals Judgment, pp.26-30.

¹²⁵ Court of Appeals Judgment, p.32 ('In this case the reliability and credibility of the cooperative witness Agim Zogaj is crucial for the outcome of the case due to the fact that the Indictment, as well as the Judgment, is mainly based on his evidence.').

¹²⁶ *See also* fn.105 above.

¹²⁷ 054739-TR-ET Part 5, pp.6-7 and 054739-TR-ET Part 6, pp.22, 28

¹²⁸ 064763-TR-ET Part 3 RED2, pp.2-3; [REDACTED].

¹²⁹ 070961-TR-ET Part 2 RED, pp.5-11.

¹³⁰ SITF00010564-00010615 RED, pp.SITF00010567, SITF00010569.

¹³¹ SPOE00070598-00070610 RED, pp.SPOE00070607- SPOE00070609.

Among others, [REDACTED]¹³², [REDACTED]¹³³, [REDACTED]¹³⁴, [REDACTED]¹³⁵, and [REDACTED]¹³⁶ all corroborate W04839's position in a KLA detention site in Llapushnik/Lapušnik.

40. Significantly, this Trial Panel's adjudicated facts drawn from the *Krasniqi et al.* judgments are also consistent with and complement W04839's evidence.¹³⁷ Indeed, one of the adjudicated facts references W04839 explicitly:¹³⁸

Grave site KER01, indicated by Agim Zogaj, was exhumed and the bodies of Dragoljub Tanasković, Dragan Vučetić, Bojan Cvetković, Zarko Filipović and Zivota Todorović were recovered from it. Military clothing was recovered from the grave. Two bodies had their hands tied behind their backs and ligatures were recovered.

41. Other particularities of the *Krasniqi et al.* case relevant to the analysis of W04839's evidence, such as rejection of corroborative evidence because it was offered too late,¹³⁹ and opinions about competing views of graphologists and criminologists put forward by the parties in that case,¹⁴⁰ also do not transfer to the current context.

42. In sum, the admissibility criteria for W04839's Proposed Evidence, as well as that of W03875 and W04828, are satisfied. Accordingly, it is essential that the Prosecution has the opportunity to rely upon – and the Panel, consider – the Proposed Evidence, which constitutes compelling evidence of the commission of serious international crimes as charged in this case.¹⁴¹

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ SITF00010786-00010809 RED, pp.SITF00010788- SITF00010789.

¹³⁷ Adjudicated Facts, KSC-BC-2020-06/F01534/A01, pp.155-162. *See also* para.5 above.

¹³⁸ Adjudicated Facts, KSC-BC-2020-06/F01534/A01, p.160 (adjudicated fact 550).

¹³⁹ Court of Appeals Judgment, p.42.

¹⁴⁰ Basic Court Judgment, pp.71-74. *Cf.* Court of Appeals Judgment, pp.48-52.

¹⁴¹ *See, similarly*, ECtHR, *Marguš v Croatia* [GC], 4455/10, Judgement, 27 May 2014, paras 124-127; ECtHR, *Ibrahim and Others v. UK* [GC], 50541/08 et al., Judgement, 13 September 2016, para.252.

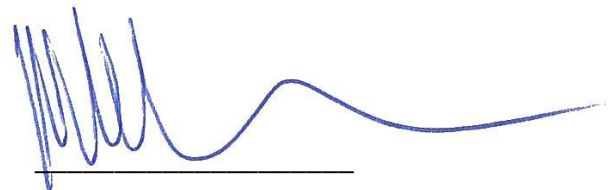
III. CLASSIFICATION

43. This motion and the Annexes are confidential as they contain information concerning witnesses with protective measures and/or whose identities are not public at this time. A public redacted version of the motion will be filed in due course.

IV. RELIEF REQUESTED

44. For the foregoing reasons, the SPO requests that the Trial Panel admit the Proposed Evidence as identified in Annexes 1-3.

Word Count: 5,877



Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Wednesday, 20 September 2023

At The Hague, the Netherlands.