

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

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

Registrar: Dr Fidelma Donlon

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

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Public Redacted Version of Joint Defence Response to ‘Prosecution second motion for admission of evidence pursuant to Rule 155’

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I. INTRODUCTION

1. As the proceedings in this case have again demonstrated, as a means of testing a witness' evidence, there is no substitute for examination 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 inaccuracies and omissions, identify mistakes of fact, and clarify or magnify seemingly unreliable testimony. As such, the admission of the untested evidence of unavailable witnesses, directly into the record of the case, should remain the exception.

2. On many occasions since the opening of the trial, the Defence for Mr Thaçi, Mr Veseli, Mr Selimi and Mr Veseli (collectively, "Defence") have raised their legitimate concern about the volume of evidence which is being entered – untested - into the record of the case,¹ through, *inter alia*, the bar table,² Rule 155,³ Rule 153,⁴ or as adjudicated facts.⁵ Notwithstanding the safeguards in place, the current rate of admission of untested out-of-court evidence means that a point will necessarily be

¹ See, e.g., 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; KSC-BC-2020-06/F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, 21 March 2023, paras. 1-4; KSC-BC-2020-06/F01391, Joint Defence Response to "Prosecution first motion for admission of evidence pursuant to Rule 155", 22 March 2023 ("Joint Response"), para. 2; KSC-BC-2020-06/F01688, Joint Defence Response to 'Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153', 20 July 2023, para. 4.

² KSC-BC-2020-06/F01409, Trial Panel II: Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023; KSC-BC-2020-06/F01596, Trial Panel II: Second Decision on Specialist Prosecutor's Bar Table Motion, 9 June 2023; KSC-BC-2020-06/F01705, Trial Panel II: Third Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023. The SPO has informed the Defence *inter partes* that it intends to submit a second bar table motion concerning approximately 2,500 items by the end of August.

³ KSC-BC-2020-06/F01603, Trial Panel II: Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, 14 June 2023 ("First Decision").

⁴ The first Prosecution motion for admission of evidence pursuant to Rule 153 is pending, see: KSC-BC-2020-06/F01658, Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153, 7 July 2023.

⁵ KSC-BC-2020-06/F01534, Trial Panel II: Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023; KSC-BC-2020-06/F01536, Trial Panel II: Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 18 May 2023.

reached at which the trial record is so expansive as to become unmanageable. The volume of evidence admitted at the request of the SPO, and over repeated Defence objections, is already significant. The Defence's ability to absorb this volume of out-of-court evidence and incorporate it into the hearings themselves is not without limits. The parties and the Trial Panel must also dedicate resources to reading all material again in light of the Rule 155 parameters and criteria, and then litigating or adjudicating its admission, at the same time as live SPO witnesses are being prepared for or presented. Perhaps more importantly, this admission is happening out of the public eye, with obvious implications for the right of the accused to a fair and public trial.

3. Specifically in relation to unavailable witnesses, the Trial Panel has recalled the need to view any evidence going to the acts and conduct of the accused with "cautious scrutiny".⁶ This should now be put into practice, as the SPO seeks the admission of hundreds of pages of additional evidence from SPO witnesses who will not be subjected to the fair trial safeguards of confrontation and examination by an adverse party, nor will they face questions from members of the bench. With these concerns in mind, the Defence makes the following submissions in response to the admission sought by the SPO pursuant to Rule 155.

II. PROCEDURAL BACKGROUND

4. The SPO first identified the specific modes of testimony for its witnesses in an updated list of witnesses filed on 2 September 2022.⁷ This list included 32 witnesses whose evidence was proposed for admission through Rule 155.⁸ This number has

⁶ First Decision, para. 15.

⁷ KSC-BC-2020-06/F00948/A02, Annex 2 - Prosecution submission of revised witness list, 2 September 2022.

⁸ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

expanded subsequently, and there are currently 42 witnesses whose evidence is proposed for admission through Rule 155.⁹

5. On 25 January 2023, the Trial Panel issued the ‘Order on the Conduct of Proceedings’, in which it instructed the parties to conduct *inter partes* discussions with a view to identifying witnesses whose evidence could be tendered, by agreement, pursuant to Rules 153, 154 or 155.¹⁰

6. On 1 March 2023, following an order from the Trial Panel,¹¹ the SPO filed its first motion in accordance with Rule 155, in respect of 15 deceased witnesses and one unavailable witness.¹² On 22 March 2023, the four defence teams filed a joint response identifying specific arguments rendering the material submitted by the SPO largely inadmissible pursuant to Rule 155, as well as expressing general concerns as to the volume of material sought to be admitted.¹³ The SPO replied on 29 March 2023.¹⁴

7. On 14 June 2023, the Trial Panel issued its decision granting the SPO First Motion in large part; admitting into evidence the statements and records of the 16 witnesses with only limited exceptions.¹⁵

8. On 26 June 2023, the Defence for Mr Thaçi, Mr Veseli and Mr Krasniqi filed a request for certification to appeal the First Decision on the basis of four issues.¹⁶ The

⁹ See KSC-BC-2020-06/F01594/A02, Annex 2 - Confidential Redacted Version of ‘Amended List of Witnesses’, 9 June 2023 (“SPO Witness List”).

¹⁰ KSC-BC-2020-06/F01226/A01, Annex 1 - Order on the Conduct of Proceedings, 25 January 2023 (“Order on the Conduct of Proceedings”), para. 39.

¹¹ KSC-BC-2020-06, Transcript of Hearing (Trial Preparation Conference), 18 January 2023, Oral Order 6, p. 1903.

¹² KSC-BC-2020-06/F01329, Prosecution first motion for admission of evidence pursuant to Rule 155, 1 March 2023 (“SPO Motion”).

¹³ See, e.g., Joint Response, paras. 1-5.

¹⁴ KSC-BC-2020-06/F01406, Prosecution reply to ‘Joint Defence Response to “Prosecution first motion for admission of evidence pursuant to Rule 155”’, 29 March 2023.

¹⁵ First Decision, para. 220.

¹⁶ KSC-BC-2020-06/F01628, Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the ‘Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155’, 26 June 2023.

SPO responded on 6 July 2023.¹⁷ This request was denied by the Trial Chamber on 13 July 2023.¹⁸

9. By email on 22 June 2023, the SPO advised the parties that its second Rule 155 motion would include 12 identified witnesses. Then, on 20 July 2023, the SPO filed its second motion for admission of the evidence of seven witnesses pursuant to Rule 155.¹⁹

10. The Trial Panel granted an extension of time to respond to the SPO Second Motion, to 20 days after the distribution of the motion,²⁰ and a variation of the word limit to 12,000 words.²¹

III. APPLICABLE LAW

11. Rule 155(1) provides that evidence in the form of a written statement, any other record written or otherwise expressed of what a person has said or transcript of a statement by a person who has died or who can no longer be traced with reasonable diligence, or who is by reason of physical or mental impairment or other compelling reason unable to testify orally, may be admitted, whether or not the written statement is in the form prescribed by these Rules, if the Panel is satisfied:²²

- (i) of the person's unavailability or inability to testify orally; and

¹⁷ KSC-BC-2020-06/F01647, Prosecution response to 'Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the "Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155"', 6 July 2023.

¹⁸ KSC-BC-2020-06/F01671, Trial Panel II: Decision on Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the 'Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155', 13 July 2023 ("Certification Decision").

¹⁹ KSC-BC-2020-06/F01691, Prosecution second motion for admission of evidence pursuant to Rule 155, 20 July 2023 ("SPO Second Request").

²⁰ KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 20 July 2023, Oral Order, p. 6243.

²¹ KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 19 July 2023, Oral Order, p. 6088.

²² First Decision, para. 10.

- (ii) that the statement, written record or transcript is *prima facie* reliable, having regard to the circumstances in which it was made, recorded, and maintained.

12. Rule 155 material must also satisfy the admissibility criteria in Rules 137 and 138. 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”. 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.²³

13. The Trial Panel has previously identified a non-exhaustive list of seven factors to be considered when assessing the reliability of statements: (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgment that the statement is true to the best of his or her recollection; (iii) whether the statement was given voluntarily; (iv) whether the statement was taken with the assistance of an interpreter duly qualified; (v) whether the statement has been subject to cross-examination; (vi) whether the statement, in particular if it is an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (vii) other factors, such as the absence of manifest or obvious inconsistencies in the statement.²⁴

²³ See, e.g., 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, 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.

²⁴ First Decision, para. 14.

14. The Defence incorporates by reference its prior submissions regarding the factors to be taken into account by the Trial Panel in assessing the admissibility of evidence pursuant to Rule 155.²⁵

15. The Defence notes specifically that, pursuant to Rule 155(5), evidence going to the proof of acts and conduct of the Accused may be a factor militating against the admission of such evidence, in whole or in part. The Panel has noted “the purpose of this provision is to ensure a fair trial and the reliability of the evidence”, and it invites “cautious scrutiny on the part of the Panel of this sort of evidence”.²⁶ 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”.²⁷

16. Exhibits accompanying a Rule 155 statement may only be admitted where they meet the requirements of Rule 138(1) and form an inseparable and indispensable part of the statement.²⁸

IV. SUBMISSIONS

A. TIMING OF THE SPO SECOND REQUEST

17. Throughout its request, the SPO has again sought to rely on the *future* testimony of SPO witnesses. Namely, submitting that any prejudice arising from the Defence’s inability to cross-examine an unavailable SPO witness, is mitigated by the

²⁵ Joint Response, paras. 14-29.

²⁶ First Decision, para. 15.

²⁷ 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, as confirmed by the Trial Panel in the First Decision, para. 16.

²⁸ First Decision, para. 17.

fact that other future witnesses, allegedly addressing the same facts, will be made “available for cross-examination by the Defence”.²⁹

18. Grounding decisions on the admissibility of evidence on a future (uncertain) occurrence is fraught with risk, particularly given the current rate at which the proceedings are progressing, and the remaining number of witnesses on the SPO Witness List. In reality, these “future” witnesses may or may not ultimately be called. Even if they are called, they may or may not testify on the facts for which admission is being sought. If, for whatever reason, the “future” SPO witnesses do not or cannot testify, this will require re-examination and wasted resources.

19. On this basis, the Defence proposes that the SPO be ordered to file any future applications for the admission of evidence under Rule 155 only after all live witnesses relied upon to support the request have testified. This will ensure that both the Defence and the Trial Panel have all relevant information required to inform their respective submissions and deliberations. The lack of urgency in finalising the admission of Rule 155 evidence prior to the end of the SPO case mitigates in favour of this approach. As regards the present request, the Defence offers the following submissions:

B. W00716

20. The SPO seeks to tender three witness statements from W00716 which contain a significant volume of overlapping information and duplication. W00716 provided a statement to the ICTY in 2001³⁰ and later before a trial hearing in 2007.³¹ The Defence submits that there can be no reasonable justification for tendering 78 pages of

²⁹ See, e.g., SPO Second Request, paras. 38, 44, 48, 53, 58.

³⁰ U002-4810-U002-4818; U002-4810-U002-4818-AT.

³¹ SITF00063311-SITF00063318; SITF00063311-SITF00063318-AT; SITF00063311-SITF00063318-ET.

duplicative material, particularly as regards the concerns repeatedly cited as to the impact of this process on the size of the trial record.

21. As such, if any of this material is considered by the Trial Panel to fulfil the criteria for admission pursuant to Rule 155, the Defence submits that only the SITF transcript of interview with W00716 dated 16 July 2013 should be admitted, on the basis that it contains the relevant amendments and clarifications from the two previous statements and includes the previous statements being read into the record.³²

C. W01994

22. Rule 155(1)(b) directs the Trial Panel to consider the “circumstances in which [the written evidence] was made, recorded and maintained”. The interview with W01994 dated 17 April 2000,³³ and the UNMIK statement of 25 October 2005,³⁴ do not contain sufficient indicia of reliability to warrant admission.

23. The 17 April 2000 interview is put forward by the SPO as being “[a]n interview with the War Crimes Documentation Project”.³⁵ While a heading of the document refers to the “ABA/CEELI War Crimes Documentation Project”, which is not a judicial authority, there is no indication who conducted the interview, or in what context. There are no official markings, stamps or headers of the War Crimes Documentation Project, or otherwise. The document is called a “draft summary”. It is unsigned. There is no indication that the witness re-read the “draft summary” and agreed to the accuracy of its contents. The language of the interview is not recorded, so it is unclear if this is a translation, or a transcription. The story is presented as an unbroken narrative in the first person, with no indication of the questions that were asked to

³² 004724-TR-ET, Parts 1-3; 004724-TR-AT, Parts 1-3.

³³ SPOE00200060-00200061 RED; SPOE00200060-SPOE00200061-AT RED.

³⁴ SPOE00193670-00193671.

³⁵ SPO Second Request, para. 30.

elicit the information. The title above this narrative is “1st incident”, which indicates that the document may be an extract from a larger document, and may therefore be incomplete.

24. The SPO does not address the lack of information about the circumstances of the creation of this interview, simply stating that its contents corroborate earlier statements, which “therefore reaffirms the truthfulness of the witness’s statements”.³⁶ With nothing more, the lack of indicia of even *prima facie* authenticity and reliability, and the fact that the document does not contain information going beyond that already being admitted, precludes its admission.

25. The UNMIK statement of 25 October 2005,³⁷ is similarly not admissible. The SPO submits that “W01994 was informed of her rights and obligations, and the statement was read to her in her native language”.³⁸ However, the space to be signed by the witness to confirm that it was read by her in a language she understands has been left blank. This confirmation exists for a reason. Without it, the reliability of the evidence contained therein cannot be verified, and should not form part of the record of a criminal case.

D. W03821

26. The SPO seeks to admit W03821’s [REDACTED] testimony [REDACTED],³⁹ and a [REDACTED] interview [REDACTED].⁴⁰ Annexed to his [REDACTED] testimony, is an [REDACTED]Statement[REDACTED].⁴¹

³⁶ SPO Second Request, para. 30.

³⁷ SPOE00193670-00193671; SPOE00193670-SPOE00193671-AT RED.

³⁸ SPO Second Request, para. 29.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

27. W03821's evidence is not admissible under Rule 155. The SPO characterises it as being "relevant to prove the charges in the Indictment related to Qirez/Ćirez and Baic./Banjica in September 1998."⁴² More accurately, W03821's evidence goes directly to the acts and conduct of Mr Thaçi and [REDACTED] in relation to these charged incidents. The Pre-Trial Judge previously found that W03821 provides "highly incriminating evidence, as direct victims and/or witnesses of the crimes charged [...] and/or by identifying perpetrators, one or more of the Accused, and other named JCE members in the Confirmed Indictment."⁴³ This characterisation reinforces that W03821's evidence is central to the alleged acts and conduct of the accused in this charged event, and is therefore not appropriate for submission under Rule 155, by the Trial Panel's standards. For this, and the numerous other reasons set out below, the SPO's attempt to admit this evidence directly into the record of the case, untested by the Defence and unheard by the public, should fail.

28. The SPO alleges that on or around 20 September 1998, Mr Thaçi, Mr Selimi and others including Sabit Geci, participated in and led the arrest, detention, and intimidation of 13 members of a parliamentary delegation on a humanitarian visit to Qirez/Ćirez.⁴⁴ As an initial point, W03821's evidence does not line up with the Prosecution allegation in key aspects, not mentioning [REDACTED] as having been involved or even present, for example.

29. In addition, W03821's evidence is contradictory in key respects, including the basis for his identification of Mr Thaçi, and their alleged interaction. Because of this,

⁴² SPO Second Request, para. 33, citing: "Indictment, KSC-BC-2020-06/F00999/A01, paras 20, 46, 76, 110-111 and Pre-Trial Brief, KSC-BC-2020-06/F01594/A03, paras 112, 458-468".

⁴³ KSC-BC-2020-06/F00133, Pre-Trial Judge: Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, 10 December 2020, para. 49.

⁴⁴ KSC-BC-2020-06/F00999/A01, Annex 1 – Amended Indictment, 30 September 2022 ("Indictment"), para. 46; KSC-BC-2020-06/F01594/A03, Annex 3 - Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', 9 June 2023 ("SPO Pre-Trial Brief"), paras. 112, 459-468.

in its [REDACTED] interview, the [REDACTED] tries to reconcile, for example, the different ways in which W03821 identifies Mr Thaçi, undoubtedly because this identification is central to the credibility of the allegations being made. The SPO notes that in his [REDACTED] statement, W03821 had stated that “[REDACTED]”, but that in his [REDACTED] testimony, he said that Sabit GECI and ” [REDACTED].”⁴⁵ W03821 is unable to give a coherent answer, and does not explain the inconsistency.⁴⁶ Regardless, the [REDACTED] had a chance to try to understand (or smooth out) inconsistencies in W03821’s different accounts in [REDACTED],⁴⁷ as was rightly considered necessary. To deprive the Defence of the same opportunity to explore these and other inconsistencies, and the motivation or failings behind them, would be unfair, and prejudicial.

30. W03821 is also inconsistent regarding the basis for his knowledge of Mr Thaçi. The SPO has disclosed two English versions of [REDACTED] interview with W03821, which differ significantly.⁴⁸ It is seeking admission of Version 2. However, in Version 1, W03821 is asked to confirm his [REDACTED] statement that he knew Hashim Thaçi because he was [REDACTED]. W03821 then declines to confirm his prior statement, saying that in fact this was in [REDACTED].⁴⁹ This exchange is missing from Version 2. The basis for W03821’s ability to identify and/or recognise Mr Thaçi is an important point. It is precisely the kind of evidence the Defence would seek to clarify during cross-examination, particularly given the confusion arising from the multiple SPO versions of his interview(s). The Defence’s inability to do so, is prejudicial.

⁴⁵ [REDACTED].

⁴⁶ [REDACTED]

⁴⁷ [REDACTED].

⁴⁸ [REDACTED] (“Version 1”), and [REDACTED] (“Version 2”).

⁴⁹ [REDACTED].

31. W03821 is also inconsistent in the way he describes his interaction with Mr Thaçi. In his [REDACTED] Statement, W03821 describes his first interaction with Hashim Thaçi, following their introduction, as follows:⁵⁰

[REDACTED]

32. This is an objectively memorable and jarring allegation. It features nowhere in W03821's [REDACTED] evidence. This is the kind of "manifest" and "obvious" inconsistency which affects admissibility.⁵¹ The Defence should not be deprived of the chance to explore it. To this end, the SPO seeks to downplay the prejudice of the admission of W03821's evidence on the basis that "the Defence is aware of the witness's identity, may investigate the witness, including motives and credibility, and has the opportunity to challenge the Proposed Evidence".⁵² Essentially, that Mr Thaçi's rights are safeguarded because the Defence can *prepare* for cross-examination. The work done in investigating a witness, including his or her motives and credibility, only bears fruit when the information gathered is put to the witness who can (or is unable to) explain and elaborate. Simply having the ability to investigate the witness is by no means an adequate alternative to this process.

33. The Trial Panel has previously undertaken to consider inconsistencies in determining the weight to be ascribed to Rule 155 evidence, once admitted. However, it has also recognised that there will be occasions on which "the seriousness of the purported inconsistencies" will affect admissibility, particularly where "they relate to an issue of central importance to the proposed evidence of the witness".⁵³ In this case, W03821 gives inconsistent accounts in relation to direct accusations against Mr Thaçi, on issues of central importance to his evidence, and to the charges.

⁵⁰ [REDACTED].

⁵¹ First Decision, para. 14.

⁵² SPO Second Request, para. 38.

⁵³ First Decision, para. 50. *See also* para. 14.

34. W03821 is also the only witness who places [REDACTED] at Qirez or Baicë, and the Defence will therefore not have a fair opportunity to confront this allegation.⁵⁴ When questioned during his [REDACTED] interview, W03821 claimed that [REDACTED] was one of a number of [REDACTED] individuals who was present in Baicë during his detention.⁵⁵ The basis for the identification of [REDACTED] is wholly unclear. The witness himself acknowledges that [REDACTED].⁵⁶ Though the witness adds that he later learned the names because [REDACTED],⁵⁷ the [REDACTED] elected not to elicit any further details of the date, nature and context of these alleged conversations, or to distinguish between his alleged source of knowledge for the four or five names listed.⁵⁸ As a result, the evidence about [REDACTED] has no probative value.

35. Moreover, the evidence is highly prejudicial. No other witness claims to have identified [REDACTED] in Baicë or Qirez at this time. Indeed, the Defence is aware of no other allegation that [REDACTED] ever wore a [REDACTED] or acted as a soldier overlooking or watching those detained.⁵⁹ The allegation is thus not corroborated. Furthermore, these allegations are not pleaded in the Indictment,⁶⁰ nor are they contained in the SPO Pre-Trial Brief. As a result, they are not relevant to the Prosecution's pleaded case and the Defence are not on notice of them. The absence of corroboration both diminishes the probative value of these allegations and magnifies their prejudicial effect because [REDACTED]. For these reasons it should not be admitted.

⁵⁴ First Decision, para. 107.

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ KSC-BC-2020-06/F01296/A03, Public Lesser Redacted Version of Amended Indictment, 15 February 2023, public.

36. The SPO submits that other witnesses and other evidence corroborate W03821's evidence, and will be made available for Defence cross-examination.⁶¹ This claim does not survive serious scrutiny. [REDACTED] to testify remains an open question, with the Trial Panel noting already in June that [REDACTED].⁶² Despite a direction to the SPO to ascertain [REDACTED]⁶³ the Defence remains in the dark, undermining any argument that [REDACTED] exists as a meaningful alternative, and thereby mitigates the obvious prejudice of admitting W03821's evidence under Rule 155.

37. Similarly, [REDACTED], W03825 [REDACTED]. He noted that the information contained therein was [REDACTED].⁶⁴ W03825 expressed [REDACTED].⁶⁵ Crucially, W03825 confirmed that [REDACTED].⁶⁶ [REDACTED] is also said to be corroborative, but [REDACTED] has previously stated that [REDACTED].⁶⁷ In the First Decision, the Trial Panel did not admit evidence that went to the **acts and conduct of the Accused** which could not be corroborated by other evidence proposed by the SPO.⁶⁸

38. In these circumstances, and considering the centrality of this incoherence, and the centrality of the allegation to this case,⁶⁹ the prejudice of W03821's evidence outweighs any probative value. As the Panel has recognised, evidence going to the

⁶¹ SPO Second Request, para. 38, fns 116 and 117, *referring to* W03825, [REDACTED]; P00158_ET, 034172-034173; 034157-034158-ET.

⁶² KSC-BC-2020-06/F01595, Trial Panel II: Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, 9 June 2023, para. 16.

⁶³ *Ibid.*

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ First Decision, para. 193.

⁶⁹ First Decision, para. 144. See also 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, 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, para. 630; ICTY, *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.

acts and conduct of the accused “invites cautious scrutiny on the part of the Panel”.⁷⁰ Applying such scrutiny to this kind of evidence, would preclude its admission.

E. W04239

39. The SPO submits that the probative value of W04239’s written statement is not outweighed by any prejudice. The two reasons given are that “this evidence does not go to proof of the acts and conduct of the Accused”, and it “is consistent with, and corroborated by, statements of other witnesses in the case, who will be available for cross-examination by the Defence.”⁷¹

40. Despite referring in its submissions to “statements” of corroborating witnesses, the SPO cites to only [REDACTED] as being available for cross-examination. On the basis of [REDACTED], it is clear that he did not witness [REDACTED]. In fact, [REDACTED].⁷² As such, the SPO’s submissions are without merit, and the probative value of W04239’s written statement is indeed outweighed by the prejudice of its admission.

F. W04379

41. The SPO seeks to admit the transcripts of an interview given by W04379 in Albanian in May 2019, which exists in two parts.⁷³ Again, this evidence concerns the acts and conduct of Mr Thaçi. Specifically, he was alleged to have visited the Kukës Metal Factory, the site of crimes charged in the Indictment, together with an alleged JCE member, Fatmir Limaj.⁷⁴

⁷⁰ First Decision, para. 15.

⁷¹ SPO Second Request, para. 44.

⁷² [REDACTED].

⁷³ 060124-TR-ET Part 1 Revised RED, 060124-TR-ET Part 2 Revised RED3.

⁷⁴ 060124-TR-ET Part 2 Revised RED3, pp. 158-162.

42. The SPO submits that admission of these transcripts will not impact the fairness of the trial, because “[t]he evidence concerning the Accused is limited to a mention of Hashim THAÇI visiting the soldiers at the Kukës Metal Factory on his way to Tirana together with Fatmir LIMAJ, on an unspecified period during the war”, and that it “does not concern the direct involvement of the Accused in any crime.”⁷⁵ The SPO’s attempt to downplay the prejudice of this evidence is at odds with the centrality of the Kukës Metal Factory in the Indictment in this case, and the way in which Mr Thaçi’s presence at the site is relied on in the charging documents to attempt to link him to the alleged crimes committed there.⁷⁶ The SPO cannot have it both ways. Reliance on a lack of “direct involvement” in a crime to seek its admission, when the SPO has characterised Mr Thaçi’s individual criminal liability as aiding and abetting, command responsibility, and as arising through a joint criminal enterprise, is entirely unpersuasive. The probative value of this evidence is outweighed by its prejudice.

43. Even putting Mr Thaçi to one side, the SPO Pre-Trial Brief cites to this interview with W04379 to support the allegations that: [REDACTED];⁷⁷ [REDACTED];⁷⁸ [REDACTED];⁷⁹ and [REDACTED].⁸⁰ W04379 is the only source cited in the SPO Pre-Trial Brief in support of these allegations. W04379’s statement also implicates other KLA members such as [REDACTED],⁸¹ and [REDACTED],⁸² as also being present at the Metal Factory. The absence of corroboration renders the admission of this evidence hugely prejudicial. The Defence must be able to cross-examine and test evidence relating directly to alleged JCE members, particularly given their particular positions within the KLA.

⁷⁵ SPO Second Request, paras. 47-48.

⁷⁶ Indictment, paras. 82, 88, 167; SPO Pre-Trial Brief, paras. 549-569.

⁷⁷ SPO Pre-Trial Brief, para. [REDACTED].

⁷⁸ SPO Pre-Trial Brief, para. [REDACTED].

⁷⁹ SPO Pre-Trial Brief, para. [REDACTED].

⁸⁰ SPO Pre-Trial Brief, para. [REDACTED].

⁸¹ SPO Pre-Trial Brief, para. [REDACTED].

⁸² SPO Pre-Trial Brief, para. [REDACTED].

44. This prejudice is reinforced by the proposed evidence failing to meet the formal requirements, and the deficient procedure followed by the SPO. The interpreter is never introduced on the record, despite obviously being used. There is no reference to any audio/visual recording, nor have the investigators' names been referenced. These deficiencies all militate against admission.

45. Moreover, as has previously been pleaded,⁸³ the strategy adopted by a Defence team in relation to a witness will depend on the apparent ability of that witness to offer exonerating evidence, or material which reinforces the Defence theory of events. The SPO asserts that the prejudice of admitting the untested evidence of W04379 is mitigated by the fact that the Defence "has the opportunity to challenge the Proposed Evidence at trial and put forward its own version of events."⁸⁴ This does not account for the fact that the Defence will lose the opportunity to explore the wealth of [REDACTED] interviews which have been given by W04379, [REDACTED].⁸⁵

46. In this situation, it becomes impossible to assert that there is no prejudice to the accused: the SPO seeks to rely on this evidence to support its allegations, while the accused themselves are not only prevented from testing this evidence, but from eliciting any exonerating information from W04379, making the exercise entirely one sided. The value of W04379's evidence, if any, cannot possibly be said to outweigh the prejudice of its admission in these circumstances, particularly considering the cautious scrutiny which the Trial Panel is required to apply to evidence of deceased witnesses going to the acts and conduct of the accused.

47. Nine pages of the transcript describe W04379 drawing a sketch of the factory and its surrounds, which is impossible to follow without the sketch, or without

⁸³ KSC-BC-2020-06/IA028/F00002, *Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning*, 30 May 2023, paras. 8-10, 38-39.

⁸⁴ SPO Second Request, para. 48.

⁸⁵ *See, e.g.*, [REDACTED].

watching the video recording simultaneously.⁸⁶ The SPO has not sought the admission of either.

G. W01718

48. Again, Rule 155(1)(b) itself directs the Trial Panel to consider the circumstances in which the written evidence “was made, recorded and maintained”.

49. The SPO is seeking to admit an UNMIK statement of W01718 dated 4 May 2002,⁸⁷ which does not meet the requirements for admission. There is also no indication that W01718 was read his rights, no reference to a signed oath, and no confirmation by W01718 that he is aware of the obligation to tell the truth, or of the consequences of being untruthful. These indicia of reliability are part of the official UNMIK Statement template, but have not been signed by the witness. Nor has the UNMIK Officer signed all pages of the statement.⁸⁸

50. The SPO asserts that the evidence is “consistent with, and corroborated by, documentary evidence and statements of other witnesses in the case, including those who will be available for cross-examination by the Defence.”⁸⁹ In reality, rather than being corroborative, W01718’s account exhibits significant discrepancies with other witnesses who were allegedly detained at the same time, or had knowledge of his allegations, which the Defence will be prevented from exploring. For example, while W01718 says that he was hit on his head,⁹⁰ W02087 (also unavailable), who was allegedly detained with W01718, recounted that W01718 had told him that he was slamming his head against the stairs because he wanted to commit suicide.⁹¹

⁸⁶ 060124-TR-ET Part 1 Revised RED, pp. 54-63.

⁸⁷ SITF00034172-SITF00034176 RED2; SITF00034172-SITF00034176-AT RED2.

⁸⁸ SITF00034172-SITF00034176 RED2, p. SITF00034175.

⁸⁹ SPO Second Request, para. 53.

⁹⁰ SITF00034172-SITF00034176 RED, p. SITF00034173.

⁹¹ 025792-TR-ET RED3, p. 11, lines 6-9.

Additionally, W02087 told the SPO that W01718 was the only detainee he saw at the MUP Building in Prizren, and he was not mistreated.⁹² This contradicts W01718's statement, that "all [detainees] were beaten and tortured".⁹³

51. It is precisely these kinds of details that an adverse party is entitled to examine and test, and which require clarification before evidence of this kind can ever be relied upon by a finder of fact. W01718's evidence should not be admitted through Rule 155. To populate the casefile of a criminal trial with this quality of untested contradictory evidence risks undermining fairness and, it is submitted, was never the purpose of the procedure contemplated in Rule 155.

H. W02087

52. For the reasons set out directly above, the unavailability of W01718 and W02087 mean that the discrepancies between their accounts cannot be clarified, meaning the reliability of their evidence is insufficient for admission directly into the record of the case. In addition, it is entirely unnecessary to admit a statement that is read into the record of a later statement, and the Defence also objects to the admission of the 20 May 2002 statement⁹⁴ on this basis.

V. CONCLUSION & RELIEF SOUGHT

53. For the reasons set out above, the Defence asks that the Trial Panel

DISMISS, in part, the SPO Second Motion for the reasons set out herein; and

⁹² *Ibid*, p. 11, line 12.

⁹³ *Ibid*, p. 11, line 25.

⁹⁴ SITF00256222-SITF00256222-ET RED2.

ORDER the SPO to file any remaining requests for admission of evidence under Rule 155, only after all live witnesses relied upon to support the request have testified.

[Word count: 6,710 words]

Respectfully submitted on 14 August 2023,



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