



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

**The 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 Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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**Public Redacted Version of
Decision on Prosecution Second Motion for Admission of Evidence pursuant to
Rule 155**

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TRIAL PANEL II (“Panel”), pursuant to Articles 19, 21, 37 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 137, 138(1), 139 and 155 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 20 July 2023, the Specialist Prosecutor’s Office (“SPO”), filed a Rule 155 motion in respect of six deceased witnesses and one incapacitated witness (“Motion”).¹
2. On 14 August 2023, the Defence filed a joint response to the Motion (“Response”).² Counsel for Victims did not respond.
3. On 21 August 2023, the SPO filed a reply to the Response (“Reply”).³

II. SUBMISSIONS

4. The SPO seeks admission pursuant to Rule 155 of witness statements and written records and exhibits associated therewith (collectively, the “Proposed Evidence”) of the following witnesses: W00716; W01994; W03821; W04239; W04379; W01718; and W02087 (collectively, “Witnesses”).⁴ The SPO submits that the Proposed Evidence meets the requirements of Rule 137, 138(1) and 155 and that their admission is in the interests of justice.⁵

¹ F01691, Specialist Prosecutor, *Prosecution second motion for admission of evidence pursuant to Rule 155*, 20 July 2023, confidential, with confidential Annexes 1-8. A public redacted version was filed on 5 September 2023 (F01691/RED).

² F01718, Specialist Counsel, *Joint Defence Response to ‘Prosecution second motion for admission of evidence pursuant to Rule 155’*, 14 August 2023, confidential.

³ F01726, Specialist Prosecutor, *Prosecution reply relating to its second Rule 155 motion (F01691)*, 21 August 2023, confidential.

⁴ Motion, para. 1.

⁵ Motion, para. 2.

5. The Defence objects to the admission of the Proposed Evidence. It argues that only live examination of witnesses can expose inaccuracies and omissions, identify mistakes of fact, and clarify or magnify seemingly unreliable testimony. As such, untested evidence of unavailable witnesses should remain the exception.⁶

6. The SPO replies that the Response is speculative and unsubstantiated, raising arguments that ignore the applicable law and this Panel's previous findings.⁷

III. APPLICABLE LAW

7. The Panel incorporates by reference the applicable law as set out in its first Rule 155 decision ("First Rule 155 Decision").⁸

IV. DISCUSSION

1. Preliminary matters

8. The Defence argues that the SPO seeks to rely on the future testimony of witnesses to mitigate the Defence's inability to cross-examine an unavailable SPO witness.⁹ In this regard, the Defence submits that grounding decisions on the admissibility of evidence on a future occurrence is fraught with risk and if the "future" SPO witnesses do not or cannot testify, this will require re-examination and wasted resources.¹⁰ Based on this argument, the Defence suggests that the SPO should be instructed to submit any forthcoming applications for the admission of

⁶ Response, para. 1.

⁷ Reply, para. 1.

⁸ F01603, Panel, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, confidential, paras 10-19.

⁹ Response, para 17.

¹⁰ Response, para. 18.

evidence under Rule 155 only once all the live witnesses intended to bolster the request have given their testimony.¹¹

9. The SPO replies that corroboration is one of many factors considered by the Panel when assessing, in particular, prejudice. The SPO argues that any admitted Rule 155 statement is more appropriately considered with any corroboration at the end of the proceedings in light of the entire body of evidence and relevant safeguards, including the “sole or decisive” rule.¹²

10. The Panel is of the view that the Defence’s inability to cross-examine witnesses whose statements are being tendered through Rule 155 is an important consideration when determining its admissibility. Allowing the Defence to question witnesses on which the SPO relies is an important safeguard of the fairness of proceedings insofar as it enables the Defence to test that evidence and put its case to relevant witnesses. At the same time, Rule 155(1) is specifically intended to deal with the statement of 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, and cannot therefore be cross-examined. Rule 155(1) enables the Panel to admit evidence of such witnesses despite their being unavailable or unable to testify. This is entirely consistent with the caselaw of the European Court of Human Rights, which made it clear that the right of the Defence to cross-examine a witness for the prosecution is not absolute and that proceedings do not become unfair merely because such a possibility was not afforded to the Defence.¹³ In such cases, the Panel must ensure, however, that proceedings remain fair to the Accused.¹⁴ It is in this context that

¹¹ Response, para. 19.

¹² Reply, para. 2.

¹³ First Rule 155 Decision, para. 18; F01821, Panel, *Decision on Prosecution Request for Admission of [REDACTED]’s Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration*, paras 29-30, (“Rule 143(2) Decision”).

¹⁴ Rule 143(2) Decision, para. 30, referring to ECtHR, *Sievert v. Germany*, no. 29881/07, [Judgment](#), 19 July 2012, para. 67; See also *Cabral v. the Netherlands*, no. 37617/10, [Judgment](#), 28 August 2018, para. 37; *Breijer v. the Netherlands*, no. 41596/13, [Decision](#), 3 July 2018, para. 35.

the possibility of cross-examining other witnesses who will testify about the same or related events and circumstances becomes relevant.¹⁵ Such a possibility, and the extent thereof, is one of the factors that the Panel will take into account to determine whether, despite the inability of the Defence to cross-examine a witness whose evidence is being offered pursuant to Rule 155, the overall fairness of the proceedings is maintained.

11. Furthermore, should a prospective witness on whose testimony the Panel relied to admit a witness statement under Rule 155 not be called, the Defence may seek reconsideration of the Panel's admission decision where the requirements of Rule 79 are met. Finally, the absence of a fair opportunity for the Defence to confront evidence tendered through Rule 155 is a factor affecting the weight which the Panel will give to such evidence.¹⁶

12. In relation to the Defence's request that the SPO submit future Rule 155 applications only after all essential witnesses supporting the request have given their testimonies, the Panel notes that Rule 155 does not impose such a requirement, and the Defence has not provided any legal authority in support. Furthermore, as noted above, a failure on the part of the SPO to call a "corroborating" witness who was relied upon by the Panel to admit a Rule 155 statement may lead to a request for reconsideration of the admission decision and/or impact the weight which the Panel might be prepared to give to that evidence. Thus, the Panel will not grant the relief requested by the Defence on this matter.

¹⁵ F01671, Panel, *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, paras 11-12; Rule 143(2) Decision, para. 44.

¹⁶ First Rule 155 Decision, para. 18.

13. Finally, as an additional safeguard, the Panel will order the SPO to produce the audio- and video-recordings of any interviews which the SPO seeks to tender pursuant to Rule 155 and for which this type of recording exists.

2. W00716

14. The SPO submits that the Proposed Evidence of W00716 is: (i) relevant;¹⁷ (ii) authentic and reliable;¹⁸ and (iii) its admission would not cause undue prejudice.¹⁹

15. The Panel notes that the SPO has submitted the following Proposed Evidence of W00716: (i) SITF's transcript of W00716, dated 16 July 2013; (ii) transcript of audio recording of trial hearing of W00716, dated 17 December 2007; and (iii) ICTY Witness Statement of W00716, dated 2 October 2001.²⁰

16. The Defence argues that W00716's Proposed Evidence contains a significant volume of overlapping information and duplication, and there can be no justification for tendering duplicative material.²¹

17. The Panel notes that the SPO has submitted W00716's death certificate.²² The Defence did not dispute that the witness is dead and unavailable to testify. The Panel therefore finds that the witness is unavailable within the meaning of Rule 155(1)(a).

18. With regard to the *prima facie* reliability of W00716's prior statements, the Panel notes that: (i) W00716's SITF interview was recorded in an audio-video format and a verbatim transcript of this interview was submitted; (ii) W00716's statements were taken by duly empowered authorities and in the presence of interpreters understood by the witness; (iii) the statements indicate the date, time,

¹⁷ Motion, paras 16-18.

¹⁸ Motion, paras 17-18.

¹⁹ Motion, para. 19.

²⁰ Annex 1 to the Motion.

²¹ Response, para. 20.

²² Annex 8 of the Motion, item 1.

and place of the interview and contain the witness's details; and (iv) W00716 confirmed his signature in the ICTY statement and that the contents of his statements were true and accurate and that his statement was given voluntarily. In light of the above, the Panel is satisfied that W00716's prior statements are *prima facie* reliable.

19. Turning to the requirement set out in Rule 155(5), the Panel notes that W00716's prior statements do not go to proof of the acts and conduct of the Accused as charged in the Indictment. The Defence did not suggest otherwise.

20. Regarding the specific requirements of Rule 138(1), the Panel is satisfied that the proposed evidence is relevant (including in respect of alleged crimes committed in or around Rahovec/Orahovac during the period relevant to the charges) and *prima facie* authentic and probative. The Panel accepts that some of the records offered by SPO are partly duplicative and/or repetitious. However, the Panel is prepared in this case to admit all offered records as their consistency (or otherwise) might be relevant to assessing the reliability of the W00716's Proposed Evidence and might ensure that all relevant aspects of the proposed evidence is before the Panel.

21. Lastly, the Panel must assess whether the probative value of any submitted evidence is not outweighed by its prejudicial effect to the Accused. As noted, W00716's evidence does not go to proof of the acts and conduct of the Accused. The Panel also notes that the Defence has not pointed to any material aspect of the proposed evidence with which it takes issue. Furthermore, live testimony going to several aspects of the witness's evidence will be offered at trial, which the Defence will have an opportunity to confront. In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

22. Accordingly, the Panel finds that W00716's Proposed Evidence is admissible pursuant to Rules 138(1) and 155.

3. W01994

23. The SPO submits that the Proposed Evidence of W01994 is: (i) relevant;²³ (ii) authentic and reliable;²⁴ and (iii) its admission would not cause undue prejudice.²⁵

24. The Panel notes that the SPO has submitted the following Proposed Evidence of W01994: (i) Redacted version of UNMIK witness statement of W01994; (ii) Redacted version of Interview of War Crimes Documentation Project (“WCDP”) with W01994; and (iii) ICTY witness statement of W01994.²⁶

25. The Panel notes that the Defence does not dispute the admissibility of the ICTY statement of W01994. The Defence opposes the admission of the UNMIK witness statement and the interview of W01994 with the WCDP,²⁷ arguing that they do not contain sufficient indicia of reliability to warrant admission.²⁸ With regard to the WCDP interview, the Defence submits that: (i) the institution that conducted the interview is not a judicial authority and there is no indication who conducted the interview; (ii) the interview lacks official markings, stamps or headers; (iii) it is unsigned; and (iv) there is no indication that the witness re-read the “draft summary” and agreed to the accuracy of its contents.²⁹ With regard to the UNMIK statement of 25 October 2005, the Defence submits that it is inadmissible as it does not contain the signature of the witness that would confirm that it was read by her in a language she understands and adopted by her.³⁰

26. The Panel notes that the SPO has submitted W01994’s death certificate.³¹ The Defence does not dispute that the witness is dead and unavailable to testify. The

²³ Motion, paras 24-27.

²⁴ Motion, paras 28-30.

²⁵ Motion, para. 31.

²⁶ Annex 2 to the Motion.

²⁷ Response, paras 22-25.

²⁸ Response, para. 22.

²⁹ Response, para. 23.

³⁰ Response, para. 25.

³¹ Annex 8 of the Motion, item no. 2.

Panel therefore finds that the witness is unavailable within the meaning of Rule 155(1)(a).

27. With regard to the *prima facie* reliability of W01994's prior statements, the Panel notes that: (i) the ICTY statement was taken by duly authorized officials, translated into a language understood by the witness by an interpreter duly certified by the ICTY Registry, and includes W01994's acknowledgement and the signature of the witness and was initialled on all pages; (ii) the UNMIK statement was taken by a duly empowered investigator of UNMIK and contains the official template of UNMIK that indicates date time and place of the statement and includes personal details of W01994. The Panel further observes that the UNMIK statement lacks the witness's signature. The fact that a document is unsigned does not, *a priori*, render it inadmissible if there are other indicators of its authenticity and reliability.³² Furthermore, the Panel observes that the content of the UNMIK statement closely aligns with the testimony provided by the witness before the ICTY in 2000, which constitutes further indication of its authenticity. The Panel notes that the final assessment of the Panel regarding probative value and weight will be made when the Panel considers all of the evidence at the end of the trial.

28. With regard to the Defence's objection to W01994's interview with the WCDP, the Panel recognises that there is a lack of clarity surrounding the circumstances in which the interview was conducted and the manner in which it was conducted. The document is a draft summary which does not contain any acknowledgment of the witness nor is it clear who conducted the interview and what procedure was followed to ensure the accuracy of the record. These ambiguities raise serious questions about the reliability of this record.

³² ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, Annex A "Guidelines on the Standards Governing the Admission of Evidence", para. 5.

29. Based on the above, the Panel finds that, but for W01994's interview with the WCDP, W01994's prior statements are *prima facie* reliable. W01994's interview with the WCDP will not be admitted.

30. Turning to the requirement set out in Rule 155(5), the Panel notes that W01994's prior statements do not go to proof of the acts and conduct of the Accused as charged in the Indictment. The Defence did not suggest otherwise.

31. Regarding the requirements of Rule 138(1), the Panel is satisfied that the proposed records are relevant (including in respect of alleged crimes committed in or around Rahovec/Orahovac during the period relevant to the charges) and *prima facie* authentic and probative. Furthermore, several aspects of the witness's evidence are consistent with, and corroborated by, statements of other witnesses and other materials which have already been admitted and/or which the SPO plans to offer as evidence.

32. The Panel is satisfied that the probative value of this evidence is not outweighed by its prejudicial effect to the Accused. In particular, the Panel notes that W01994's evidence does not go to proof of the acts and conduct of the Accused. The Panel also considers that evidence pertaining to many of the same facts and circumstances will be offered by witnesses who the Defence will be able to question. In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

33. Accordingly, but for the WCDP interview, the Panel finds that W01994's tendered statements are admissible pursuant to Rules 138(1) and 155. The Panel will not admit the WCDP statement of W01994.

4. W03821

34. The SPO submits that the Proposed Evidence of W03821 is: (i) relevant;³³ (ii) authentic and reliable;³⁴ and (iii) its admission would not cause undue prejudice.³⁵

35. The Panel notes that the SPO has submitted the following Proposed Evidence of W03821: (i) SPRK, Transcript of Pre-Trial Testimony [REDACTED] (“Item 1”); and (ii) SPO Transcript of interview of [REDACTED] (“Item 2”).³⁶

36. The Defence opposes the admission of this evidence in its entirety.³⁷ It argues that W03821’s evidence is central to the alleged acts and conduct of the Accused in the relevant charged event, and is therefore not appropriate for admission under Rule 155.³⁸ The Defence argues that W03821’s evidence is contradictory and inconsistent in key respects, including the basis for his identification and knowledge of Mr Thaçi and their alleged interaction.³⁹ It submits that W03821 gives inconsistent accounts in relation to direct accusations against Mr Thaçi.⁴⁰ In addition, the Defence submits that W03821 is the only witness who places Mr Krasniqi at Qirez or Baicë and the Defence will therefore not have a fair opportunity to confront this allegation.⁴¹ It argues that the basis for the identification of Mr Krasniqi is unclear and as a result the evidence has no probative value.⁴² The Defence submits that W03821’s evidence regarding Mr Krasniqi is uncorroborated by any other witness and is not relevant as the

³³ Motion, para. 34.

³⁴ Motion, paras 35-37.

³⁵ Motion, para. 38.

³⁶ Annex 3 to the Motion.

³⁷ Response, para. 27.

³⁸ Response, para. 27.

³⁹ Response, para. 29.

⁴⁰ Response, para. 33.

⁴¹ Response, para. 34.

⁴² Response, para. 34.

allegations are not pleaded in the Indictment nor are they contained in the SPO Pre-Trial Brief.⁴³

37. The Defence also disputes the suggestion that other witnesses and evidence that the SPO intends to offer will corroborate W03821's prior statements. With regard to [REDACTED], the Defence claims that [REDACTED]'s fitness to testify remains an open question and therefore is not a meaningful alternative to mitigate the prejudice of admitting W03821's evidence under Rule 155.⁴⁴ With regard to W03825, the Defence claims that he retracted earlier statements he gave to EULEX and the SPO and he expressed that he will not testify before the Panel due to lapses in memory.⁴⁵ Lastly, with regard to [REDACTED], the Defence claims that [REDACTED] has previously stated that [REDACTED] never witnessed the alleged continued detention and beating of W03821 and the other male delegates.⁴⁶

38. The SPO replies that the Defence's arguments fail as W03821's evidence falls within the parameters of Rule 155.⁴⁷ The SPO argues that W03821's evidence corroborates other documentary and witness evidence concerning events at Qirez/Ćirez and Baicë/Banjica, and the involvement of senior KLA officials.⁴⁸ The SPO also submits that the evidence going to proof of the acts and conduct of the Accused is admissible under Rule 155.⁴⁹ It argues that the Defence's claim that W03821's evidence is contradictory and inconsistent is based on exaggerations or a misreading of the evidence.⁵⁰ Lastly, the SPO replies that the Defence's claims of lack of clarity regarding W03821's basis for identifying Mr Krasniqi are specious.⁵¹

⁴³ Response, para. 35.

⁴⁴ Response, para. 36.

⁴⁵ Response, para. 37.

⁴⁶ Response, para. 37.

⁴⁷ Reply, para. 5.

⁴⁸ Reply, para. 6.

⁴⁹ Reply, para. 8.

⁵⁰ Reply, para. 9.

⁵¹ Reply, para. 12.

39. With regard to the requirement of unavailability of the witness to testify orally, the Panel is satisfied that W03821's medical records prove that the witness suffers from serious health issues⁵² that prevent the witness from testifying. The Panel also notes that the Defence does not dispute that the witness is unable to testify within the meaning of Rule 155(1)(a).

40. With regard to the *prima facie* reliability of W3821's prior statements, the Panel notes that: (i) they contain information about dates, times and locations of the interview and witness hearing, the witness's personal details, witness warning and acknowledgment; (ii) Item 1 contains initials of the witness on each page and a signature at the end of the document; (iii) Item 2 contains the transcript of the audio/video recorded witness interview; and (iv) during the SPO interview (Item 2) the witness confirmed the accuracy of his statement in Item 1.

41. Regarding W03821's identification of Mr Thaçi and alleged interaction with him, the Panel observes that this evidence might be relevant to establishing the acts and conduct of the Accused, as alleged in the Indictment. The Panel is, nevertheless, prepared to admit this evidence for the following reasons. First, the Panel recalls that Rule 155 does not exclude evidence going to acts and conduct of the Accused but only requires the Panel to account for this fact when exercising its discretion whether to admit it. Second, the Panel notes that at least five (5) SPO witnesses have knowledge of the incident and circumstances in relation to which this witness's evidence pertains.⁵³ One of these witnesses has already testified and was extensively cross-examined by the Defence.⁵⁴ Two other witnesses are expected to testify and the Defence will be able to cross-examine those witnesses.⁵⁵ The Panel notes that the evidence of another witness, [REDACTED], was admitted pursuant to a Rule 143(2) Decision and the Defence was able to conduct limited, and not entirely

⁵² Annex 8 to the Motion, item 3: 106342-106344 RED2.

⁵³ See Reply, para. 6; See, generally, Rule 143(2) Decision, para. 34.

⁵⁴ [REDACTED].

⁵⁵ W04147; W03825.

effective, cross-examination of this witness.⁵⁶ Based on the above, the Panel is satisfied that the Defence will have an effective opportunity to test and challenge the evidence on which the SPO seeks to rely in relation to the incident of concern here.

42. Regarding the Defence's submissions about inconsistencies and contradictions, the Panel notes the following. First, the fact that the witness did not mention Mr Selimi as being present does not render his evidence unreliable and does not necessarily affect the witness' credibility or the reliability of his statements. Second, to the extent that the Panel determines that there are inconsistencies between his and other witnesses' account of this incident, it would evaluate the evidence as a whole and account, in this context, for the fact that the Defence was unable to cross-examine this witness.

43. In particular, the Defence suggests that there is a material inconsistency regarding the identification of Mr Thaçi during an interaction which the witness claims to have had with him.⁵⁷ The Panel notes that the witness remained consistent about the substance of the matter: the witness claims that Sabit Geci introduced Mr Thaçi as his superior. The fact that the witness claims that Sabit Geci introduced Mr Thaçi once by name and another time by his nickname ("the Snake") does not suggest that Sabit Geci introduced a different person to the witness. Insofar as the accounts of the witness differ as to the name/nickname used by Sabit Geci to introduce that person, the Panel will consider these matters when evaluating the evidence as a whole, and it will also account for the fact that the Defence was unable to question the witness.

44. The Defence also claims that W03821's evidence is inconsistent regarding the basis of his knowledge of Mr Thaçi.⁵⁸ The Panel notes that the only discrepancy to which the Defence points in that regard concerns the year – 1991/1992 or 1990 –

⁵⁶ Rule 143(2) Decision, para. 43.

⁵⁷ Response, para. 29.

⁵⁸ Response, para. 30.

when the witness would have become acquainted with Mr Thaçi as an [REDACTED].⁵⁹ The Defence has failed to explain how such a difference would render the witness's evidence so unreliable as to be inadmissible. The Panel will assess this factor as part of the process of assessing this witness's credibility and the reliability of his statements.

45. Finally, the Defence claims that W03821 is inconsistent in the way he describes his interaction with Mr Thaçi.⁶⁰ For that purpose, the Defence points to an account of a meeting which the witness said he had with Mr Thaçi and details he gave about a statement that Mr Thaçi is said to have made to the witness in his [REDACTED] UNMIK statement and the absence of a similar account in his [REDACTED] testimony. The Panel notes that the [REDACTED] to which the Defence refers forms part of the record of the EULEX statement.⁶¹ As such, there is no apparent material contradiction between the two. The fact that EULEX investigators did not feel that they should ask additional questions on this matter does not render either record so unreliable as to be inadmissible. Furthermore, the Panel notes that the witness provides further evidence of his purported meeting with Mr Thaçi during his [REDACTED] SPO interview.⁶² The Defence has not pointed to any material discrepancy that would render either record inadmissible.

46. The Panel reiterates that corroboration is not a pre-condition to admission of a statement under Rule 155.⁶³ And, as noted above, the SPO's is expected to call several further witnesses, who will be available for cross-examination, in relation to this incident. The Panel will assess the extent to which this witness's evidence is corroborated at the end of the trial, taking into account the fact that the Defence was unable to cross-examine him.

⁵⁹ Response, para. 30.

⁶⁰ Response, paras 31-32.

⁶¹ Response, para. 31; [REDACTED].

⁶² [REDACTED].

⁶³ First Rule 155 Decision, para. 137.

47. Regarding the Defence's objection to the admissibility of a part of the Item 2 which places Mr Krasniqi at Qirez or Baicë during W03821's detention, the Panel notes that the SPO does not appear to challenge the Defence's assertion that there is no corroboration for the proposed evidence on that point. Nor does the SPO question the Defence's submission that Mr Krasniqi's alleged presence at that location is not part of its case as pleaded in the Indictment, as further articulated in the Pre-Trial Brief. The Panel concurs with the Defence's assertion that the grounds upon which the witness could identify Mr Krasniqi are not clear in the presented evidence. Furthermore, the Panel acknowledges that if this evidence were accepted, it could have some, albeit limited, relevance in establishing Mr Krasniqi's awareness of certain facts and circumstances pertinent to the charges. As a result, in light in particular of the inability of the Defence to cross-examine this witness, of the absence of corroboration of the matter in question, and the potentially incriminating nature of the evidence on that point, the Panel finds that the probative value of the proposed evidence of the witness on that specific point is outweighed by the prejudicial effect that would result from its admission. Consequently, the Panel declines to admit this portion of the proposed evidence. The SPO is instructed to provide a revised version of this record, removing the section pertaining to the alleged incident in question.

48. The Panel also notes that the Defence seeks to challenge the reliability of W03821's prior statements based on documents that have not yet been formally introduced as evidence. The Panel reiterates that it will not consider documents for admission that have not been introduced as evidence.⁶⁴ If the Defence intends to rely on documents to challenge the witness's credibility, it may request their admission into evidence. Lastly, regarding the alleged discrepancy between W03825 and [REDACTED], the Panel will evaluate this matter when the testimony

⁶⁴ F01671, Panel, *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, para. 32.

of both witnesses is part of the record of these proceedings and when evaluating the evidence as a whole. Any discrepancies regarding the accounts of different witnesses will be accounted for by the Panel, where those are material to assessing the reliability and weight of that evidence.

49. In light of the above, the Panel finds that W03821's prior statements are *prima facie* reliable.

50. With regard to the requirements of Rule 138(1), the Panel is satisfied that the proposed evidence is relevant (including in respect of crimes allegedly committed Qirez/Ćirez and Baicë /Banjica in September 1998) and *prima facie* authentic and probative.

51. Subject to what has been said above in respect of one aspect of the witness's proposed evidence, the Panel is further satisfied that the probative value of the proposed evidence is not outweighed by its prejudicial effect.

52. Accordingly, the Panel finds that W03821's Proposed Evidence is admissible pursuant to Rules 138(1) and 155 and will be admitted aside from the parts containing the allegations against Mr Krasniqi. The Prosecution is directed to prepare and tender a version of that document from which the impugned section is redacted.

5. W04239

53. The SPO submits that the Proposed Evidence of W04239 is: (i) relevant;⁶⁵ (ii) authentic and reliable;⁶⁶ and (iii) its admission would not cause undue prejudice.⁶⁷

⁶⁵ Motion, paras 41-43.

⁶⁶ Motion, para. 43.

⁶⁷ Motion, para. 44.

54. The Panel notes that the SPO has submitted the following Proposed Evidence in respect of W04239: an EULEX Witness Statement [REDACTED].⁶⁸

55. The Defence responds that W04239's evidence should be excluded because its probative value is outweighed by its prejudicial effect.⁶⁹

56. The Panel notes that the SPO has submitted a photograph of the grave of W04329 with an official note.⁷⁰ The Defence does not question the death of the witness or his unavailability for the purpose of Rule 155. The Panel therefore finds that the witness is unavailable within the meaning of Rule 155(1)(a).

57. With regard to the *prima facie* reliability of W04239's prior statement, the Panel notes that it contains: (i) information about the date, time and location of the statement; (ii) the witness's personal details, signature and acknowledgment; and (iii) the name and signature of the police officers. Furthermore, it was taken in the presence of a qualified interpreter and the statement was given voluntarily and freely, and was before duly empowered official authorities. While the statement was not given under oath and was not tested through cross-examination, the Panel is satisfied that the record is *prima facie* reliable. The absence of an opportunity to cross-examine and the fact that the evidence was not given under oath are matters that the Panel will account for when assessing the weight and probative value of this evidence.

58. The Panel notes that the Defence submits that the probative value of W04239's evidence is outweighed by the prejudice engendered by its admission. However, the Panel recalls that reliability for the purpose of admission under Rule 155 and as an element of probative value, only requires *prima facie* reliability. Measured against that standard, the Panel is satisfied that the statement bears sufficient indicia of reliability to be admitted and that the considerations advanced by the

⁶⁸ Annex 4 to the Motion.

⁶⁹ Response, para. 40.

⁷⁰ Annex 8 of the Motion, item no. 4: 108472-10847 4 RED

Defence are matters to be accounted for when assessing the evidence at the end of the trial. As such, the Panel is satisfied that the statement holds sufficient probative value to be admitted into evidence.

59. Regarding the Defence's claims that W04239's evidence would not be corroborated by [REDACTED], the Panel is satisfied that the proposed evidence of [REDACTED] pertains in part to the treatment of W04239 during their detention. Furthermore, the Defence's opportunity to cross-examine this witness regarding his knowledge of the alleged mistreatment of W04239 will, to some extent, enable the Defence to exercise its right of confrontation concerning this allegation of mistreatment. Any constraints that might impact the Defence's ability to fully exercise this right, and any absence of corroboration of W04239's evidence, will be accounted for by the Panel when evaluating the weight and probative value to attach to this evidence.

60. In light of the above, the Panel finds that W04239's prior statement is *prima facie* reliable.

61. The Panel notes that W04239's prior statement does not go to proof of the acts and conduct of the Accused as charged in the Indictment. The Defence did not suggest otherwise.

62. With regard to the requirements of Rule 138(1), the Panel finds that the proposed evidence is relevant (in particular, in respect of crimes allegedly committed in or around Likoc/Likovac) and *prima facie* authentic and probative.

63. With regard to whether the probative value of the Proposed Evidence is outweighed by its prejudicial effect to the Accused, the Panel first reiterates that W04239's evidence does not go to proof of the acts and conduct of the Accused. The Panel also considers that evidence pertaining to many of the same facts and circumstances will be offered by other witnesses which the Defence will be able to

question. In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

64. Accordingly, the Panel finds that W04239's tendered statement is admissible pursuant to Rules 138(1) and 155.

6. W04379

65. The SPO submits that the Proposed Evidence of W04379 is: (i) relevant;⁷¹ (ii) authentic and reliable;⁷² and (iii) its admission would not cause undue prejudice.⁷³

66. The Panel notes that the SPO has submitted the following Proposed Evidence of W04379: a redacted version of the SPO witness interview of W04379 (Parts 1 and 2), dated [REDACTED].⁷⁴

67. The Defence objects to the admission of the proposed evidence. It argues that this evidence concerns the acts and conduct of Mr Thaçi and that its probative value is outweighed by its prejudice.⁷⁵ The Defence also submits that W04379's evidence supports several allegations regarding the Kukës Metal Factory that are not corroborated by any other witness.⁷⁶ It submits that the absence of corroboration renders the admission of this evidence prejudicial.⁷⁷ In addition, the Defence submits that the proposed evidence fails to meet the formal requirements as: (i) the interpreter is never introduced on the record; (ii) there is no reference to any audio/visual recording; and (iii) the investigators' names have not been referenced.⁷⁸ Lastly, the Defence claims that it is prevented from eliciting any

⁷¹ Motion, para. 46.

⁷² Motion, para. 47.

⁷³ Motion, para. 48.

⁷⁴ Annex 5 to the Motion.

⁷⁵ Response, para. 42.

⁷⁶ Response, para. 43.

⁷⁷ Response, para. 43.

⁷⁸ Response, para. 45.

exonerating information from W04379, in particular because the witness recently gave media interviews criticising the SPO.⁷⁹

68. The Panel notes that the SPO has submitted the death certificate of W04379.⁸⁰ The Defence does not question the death of the witness or the witness's unavailability. The Panel is therefore satisfied that the witness is unavailable within the meaning of Rule 155(1)(a).

69. With regard to the *prima facie* reliability of W04379's prior statement, the Panel notes that the documents contain *inter alia*: (i) the transcript of an audio/video recorded witness interview; (ii) an indication of date, time and place of the interview; (iii) the witness's personal details; and (iv) witness warnings and an acknowledgment. The Panel has also accounted for the fact that the interview was not given under oath and was not subject to cross-examination. Despite these considerations, which will be relevant to weight and probative value, the Panel finds that W04379's proposed record of interview is *prima facie* reliable.

70. The Defence argues that the probative value of W04379's prior statement is outweighed by its prejudicial effect due to the reference to Mr Thaçi's alleged presence at the Kukës Metal Factory. The Panel considers that some portions of the evidence contained in W04379's prior statement might go, albeit in a limited fashion, to proof of the acts and conduct of the Accused, in particular as far as may be relevant to inferring the state of Mr Thaçi's knowledge of certain events and circumstances. However, the Panel recalls that Rule 155(5) does not prevent the introduction of this type of evidence and that the extent to which the proposed evidence might bear upon Mr Thaçi's 'acts and conduct' is most limited. The Panel further notes that several other SPO witnesses place Mr Thaçi at the Kukës Metal Factory.⁸¹ To that extent, the evidence is said by the SPO to be corroborated and

⁷⁹ Response, para. 46.

⁸⁰ Annex 8, item no. 5: 113294-113294 RED.

⁸¹ In particular, [REDACTED], W04754 and [REDACTED].

the Defence will get an opportunity to challenge at least two witnesses who claim to have seen Mr Thaçi at that particular location. The extent to which W04379's evidence on that point is, or is not, corroborated will be determined at the end of the trial and what weight will be given to that part of the witness's evidence will depend in part on the extent and quality of the corroboration that is before the Panel at that point. For present purposes, the Panel is satisfied that the proposed evidence is probative and is not outweighed by the claimed prejudice put forth by the Defence.

71. With regard to the Defence's claims that the proposed evidence fails to meet the relevant requirement of form, the Panel considers that the factors mentioned by the Defence at paragraph 67 above (name of interpreter and investigator; existence or otherwise of an audio- or video-record) do not constitute formal requirements under Rule 155 and do not otherwise have a bearing on the reliability of the proposed record.

72. With regard to the Defence's argument that the prejudice arising from the admission of the W04379's proposed evidence is heightened by the fact that it will be unable to put to the witness "the wealth of media interviews" which the witness is said to have given and which the Defence claims would be relevant to his credibility and/or reliability, the Panel notes the following. First, as already noted, cross-examination does not constitute an absolute right as is apparent from the very terms of Rule 155. Second, the material which the Defence refers to has not yet been tendered in evidence so that its effect, if any, on the reliability of the witness's account and what prejudice might arise from the Defence being unable to put it to the witness cannot be evaluated. Third, it would be purely hypothetical to suggest what this witness might have been able to say about those newspaper articles, assuming that they are reliable records of what he said. Fourth, insofar as the Defence considers that these articles are relevant to these proceedings and meet the requirements of Rule 138, they can be offered for admission. Lastly, the

Panel emphasises once again that the Defence's inability to cross-examine the witness will be a factor of relevance to the Panel's assessment of the reliability and weight to be given to that witness's evidence.

73. The Defence also submits that a part of the proposed evidence is "impossible to follow" without a sketch which the SPO has not offered. The Defence has failed to establish that this part of the evidence becomes "impossible to follow" or would render it inadmissible without the sketch in question. Also, should the Defence take the view that the sketch in question is material to its case, it can seek to tender it for admission.

74. With regard to the requirements of Rule 138(1), the Panel is satisfied that the evidence is relevant (including in respect of the charges in the Indictment related to Kukës, Albania) and is *prima facie* authentic and probative.

75. With regard to whether the probative value of the Proposed Evidence is outweighed by its prejudicial effect, the Panel first reiterates that while a limited aspect of W04379's evidence might go to proof of the acts and conduct of the Accused, Rule 140(4)(a) provides that a conviction may not be based solely or to a decisive extent on the statement of a witness whom the Defence had no opportunity to examine. The Panel further reiterates that the Defence will be able to cross-examine other witnesses who claim to have seen Mr Thaçi at that location. The Panel also considers that evidence pertaining to many of the same facts and general circumstances will be offered by witnesses who the Defence will be able to question. In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

76. Accordingly, the Panel finds that W04379's tendered statement is admissible pursuant to Rules 138(1) and 155.

7. W01718

77. The SPO submits that the Proposed Evidence of W01718 is: (i) relevant;⁸² (ii) authentic and reliable;⁸³ and (iii) its admission would not cause undue prejudice.⁸⁴

78. The Panel notes that the SPO has submitted the following Proposed Evidence in respect of W01718: a redacted version of W01718's UNMIK Witness Statement of [REDACTED].⁸⁵

79. The Defence objects to the admission of W01718's statement. The Defence argues that the proposed evidence does not meet the requirements for admission. It submits that: (i) there is no indication that W01718 was read his rights; (ii) there is no reference to a signed oath; and (iii) there is no confirmation that the witness was aware of the obligation to tell the truth.⁸⁶ The Defence also argues that W01718's account exhibits significant discrepancies with other witnesses and contradictions.⁸⁷

80. With regard to the requirement of unavailability of the witness to testify orally, the Panel notes that the SPO has submitted W01718's death certificate.⁸⁸ The Defence does not question the witness's death or unavailability. The Panel therefore considers that the witness is unavailable within the meaning of Rule 155(1)(a).

81. With regard to the *prima facie* reliability of W01718 the Panel notes that the statement contains: (i) the use of an official template of UNMIK; (ii) the witness's personal details identified; (iii) an indication of the date and time of the interview;

⁸² Motion, para. 51.

⁸³ Motion, para. 52.

⁸⁴ Motion, para. 53.

⁸⁵ Annex 6 to the Motion.

⁸⁶ Response, para. 49.

⁸⁷ Response, para. 50.

⁸⁸ Annex 8, item no. 6: 112117-112118-ET RED.

(iv) the witness's signature; and (v) the name and signature of the Officer and interpreter. The Panel also notes that the statement does not appear to have been given under oath and was not subject to cross-examination. Thus, the Panel finds that W01718's prior statement is *prima facie* reliable.

82. The Defence's suggestion that the proposed evidence should be rejected on the ground that it does not meet the formal requirements of Rule 155 is without merit.⁸⁹ The Panel notes that the Defence omits to specify which particular requirement of the Rule 155 was allegedly disregarded. Furthermore, the Panel considers that the fact that the witness was not read his rights and that he did not give evidence under oath and that he was not given a reminder to testify truthfully, do not constitute mandatory prerequisites under Rule 155.

83. With regard to the Defence's argument that W01718's proposed evidence should be rejected on the ground that there exist discrepancies between that witness's account and the account of other witnesses, the Panel notes the following. First, discrepancies or contradictions between two accounts do not, without more, render them inadmissible. Second, the purported discrepancies to which the Defence refers do not affect the *prima facie* reliability and/or admissibility of the proposed statement.⁹⁰ The Defence suggests that W01718's evidence that he was hit on the head is contradicted by W02087's suggestion that W01718 hit his head against the stairs. It is not readily apparent why the two accounts would be inconsistent. Furthermore, to the extent they are, it is not apparent which account would be more reliable, a matter that the Panel would determine in light of the evidence as a whole. The Defence also points to W02087's evidence that W01718 was the only other detainee that W02087 saw at the MUP building in Prizren and the suggestion that W02087 said that W01718 was not

⁸⁹ See Response, para. 49.

⁹⁰ See Response, para. 50.

mistreated, which the Defence says contradicts W01718's claim of mistreatment.⁹¹ First, the Panel notes that the proposed evidence of W02087 does not appear to support the suggestion of the Defence according to which this witness would dispute the fact that W01718 was mistreated. Second, and in any case, the fact that W02087 might not be aware of W01718 having been mistreated and the latter claiming that he was would not necessarily conflict. To the extent that their accounts do conflict, the Panel would evaluate the reliability of their respective accounts in light of the totality of the evidence on this matter rather than warranting the exclusion of W01718's proposed evidence.

84. With regard to the requirements of Rule 138(1), the Panel is satisfied that this evidence is relevant (in particular, in respect of alleged crimes committed at MUP Building in Prizren) and *prima facie* authentic and probative.

85. Also, in light of the foregoing, the Panel is satisfied that the probative value of the submitted evidence is not outweighed by its prejudicial effect. The Panel notes, in particular, that W01718's evidence does not go to proof of the acts and conduct of the Accused and that evidence pertaining to many of the same facts and circumstances will be offered by other witnesses who the Defence will be able to question.

86. Accordingly, the Panel finds that W01718's tendered statement is admissible pursuant to Rules 138(1) and 155.

8. W02087

87. The SPO submits that the Proposed Evidence of W02087 is: (i) relevant;⁹² (ii) authentic and reliable;⁹³ and (iii) its admission would not cause undue prejudice.⁹⁴

⁹¹ Response, para. 50.

⁹² Motion, paras 54-55.

⁹³ Motion, paras 56-57.

⁹⁴ Motion, para. 58.

88. The Panel notes that the SPO has submitted the following Proposed Evidence of W02087: (i) a redacted version of the transcript of SPO Interview with W02087, dated [REDACTED]; and (ii) a redacted version of W02087's statement given to the competent authorities of the Republic of Serbia, [REDACTED] 2002 (as further signed on 17 March 2015).⁹⁵

89. The Defence objects to the admission of W02087's Proposed Evidence. It argues that the discrepancies between the accounts of W02087 and W01718 render W02087's Proposed Evidence unreliable and thus insufficient for admission. Lastly, the Defence argues that it is unnecessary to admit a statement that was read into the record of a later statement.⁹⁶

90. The Panel notes that the SPO has submitted W02087's death certificate.⁹⁷ The Defence does not question the death or unavailability of the witness. The Panel therefore considers that the witness is unavailable within the meaning of Rule 155(1)(a).

91. With regard to the *prima facie* reliability of W02087's Proposed Evidence, the Panel notes that: (i) the SPO's interview contains the transcript of an audio/video record, indication of date, time and attendees of the interview, witness personal details and witness warning and acknowledgement; and (ii) the witness statement of W02087 before the Serbian authorities contains witness details, an indication of the date of the statement and witness signature. The Panel further notes the general consistency of these two records. At the same time, the Panel notes that neither of these was given under oath and that the Defence did not and will not be able to cross-examine this witness. In light of these considerations, the Panel finds that W02087's prior statements are *prima facie* reliable.

⁹⁵ Annex 7 to the Motion.

⁹⁶ Response, para. 52.

⁹⁷ Annex 8 to the Motion, item no. 7: 112182-112183-ET RED.

92. With regard to the Defence's argument that W02087's Proposed Evidence should be rejected due to the existence of discrepancies with W01718's prior statement, and therefore their accounts cannot be clarified,⁹⁸ the Panel notes and reiterates the findings that it made above in respect of W01718. The claim that discrepancies exist is a matter of weight and probative value, and does not render these statements inadmissible. Furthermore, the Panel is aware that neither of these witnesses – W02087 nor W01718 – will be available for cross-examination, and the Defence will be unable to cross-examine those witnesses in respect of any discrepancy that might exist between their respective accounts. Therefore, consistent with Rule 140(4)(a), the Panel will carefully consider what corroboration might exist between their accounts in light of that fact.

93. With regard to the requirements of Rule 138(1), the Panel is satisfied that this evidence is relevant (in particular, in respect of alleged crimes committed at MUP Building in Prizren) and *prima facie* authentic and probative.

94. The Panel is further satisfied that the probative value of the evidence of this witness is not outweighed by its prejudicial effect. First, the proposed evidence does not go to issues of acts and conduct of the Accused. Second, the SPO points to a large number of witnesses who will testify about the same general issues, facts, and circumstances, several of whom the Defence will be able to cross-examine. The Panel will conduct its assessment of the evidence of this witness in light of the evidence as a whole and, in particular, in light of any corroboration from witnesses which the Defence was able to question.

95. Accordingly, the Panel finds that W02087's tendered statements are admissible pursuant to Rules 138(1) and 155.

⁹⁸ Response, para. 52.

V. CLASSIFICATION

96. The Panel notes that the Response was filed confidentially. The Panel therefore orders the Defence to submit public redacted versions of the Response by no later than Monday, 23 October 2023.

VI. DISPOSITION

97. For the foregoing reasons, the Panel hereby:

- a) **GRANTS**, the SPO Rule 155 Motion, in part;
- b) **ADMITS** into evidence the following items and their corresponding translations: SPOE00193670-00193671 RED; K019-5134-K019-5140; 004724-TR-ET Part 1 RED; 004724-TR-ET Part 2; 004724-TR-ET Part 3; SITF00063311-SITF00063318-ET; U002-4810-U002-4818; SITF00370905-00370916 RED (pp.1-6); 060124-TR-ET Part 1 Revised RED, 060124-TR-ET Part 2 Revised RED3; SITF00034172-SITF00034176 RED2; 025792-TR-ET RED3; SITF00256222-SITF00256222-ET RED2;
- c) **ADMITS**, 034318-034362 RED2, pp. 034318-034330 and [REDACTED] under the conditions set out above in paragraph 52;
- d) **ORDERS** the SPO to disclose the audio- and video-recordings of interviews of witnesses' subject to the present application as well as those witnesses whose evidence was admitted pursuant to Decision F01603, where such recordings exist and are in possession of the SPO; and
- e) **REJECTS**, the admission of SPOE00200060-00200061 RED.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 17 October 2023

At The Hague, the Netherlands.