



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 15 December 2023

Language: English

Classification: Public

**Decision on Prosecution Third Motion for Admission of Evidence pursuant to
Rule 155**

Specialist Prosecutor's Office

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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 September 2023, the Specialist Prosecutor’s Office (“SPO”) filed a Rule 155 motion in respect of three deceased witnesses (“Motion”).¹
2. On 17 October 2023, the Defence filed a joint response to the Motion (“Response”).² Counsel for Victims did not respond.
3. On 31 October 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: W03875, W04828, and W04839 (collectively, “Witnesses”).⁴ The SPO submits that the Proposed Evidence meets the requirements of Rules 137, 138(1) and 155 and that their admission is in the interest of justice.⁵

¹ F01804, Specialist Prosecutor, *Prosecution third motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-4*, 20 September 2023, confidential, with confidential Annexes 1-4. A public redacted version was filed on XX.

² F01865, Specialist Counsel, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155*, 17 October 2023, confidential.

³ F01897, Specialist Prosecutor, *Prosecution reply regarding joint Defence response to third rule 155 motion*, 31 October 2023, confidential.

⁴ Motion, para. 1.

⁵ Motion, para. 2.

5. The Defence objects to the admission of the Proposed Evidence. It argues that the amount of untested evidence admitted into the case record is becoming untenable and to permit the admission of evidence that has been found to lack credibility and probative value in other trials, without safeguards in the form of cross-examination from opposing parties, would severely undermine the fair trial rights of the Accused.⁶

6. The SPO replies that the Response fails to substantiate any reason why the evidence of W03875, W04828 and W04839 should not be admitted and that the Defence's arguments are irrelevant to the question of admissibility of the Proposed Evidence.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. W03875

8. The SPO submits that the Proposed Evidence of W03875 is: (i) relevant;⁹ (ii) authentic and reliable;¹⁰ and (iii) its admission would not cause undue prejudice.¹¹

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 Motion, paras 8-10.

¹⁰ Motion, paras 11-14.

¹¹ Motion, para. 15.

9. The Panel notes that the SPO has submitted the following Proposed Evidence in respect of W03875: (i) EULEX, Report of Interrogation Statement of Witness W03875, dated 24 December 2010 (“EULEX Statement”); and (ii) SPRK Record of the Witness Hearing in an Investigation related to W03875, dated 18 January 2011 (“SPRK Record”).¹²

10. The Defence argues that neither of the tendered statements were taken while the witness was under oath and there is no record that W03875 was subjected to cross-examination.¹³ The Defence submits that the SPRK Record lacks W03875’s acknowledgment that the statement is true to the best of his recollection. Lastly, it argues that it contains inconsistencies that militate against the admission of W03875’s Proposed Evidence.¹⁴

11. The Panel notes that the SPO has submitted W03875’s death certificate.¹⁵ 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).

12. With regard to the *prima facie* reliability of W03875’s prior statements, the Panel notes that: (i) both statements were recorded by duly empowered authorities and in the presence of interpreters understood by the witness; (ii) during both interviews, the witness was advised of his rights and obligations as a witness; (iii) the EULEX Statement has initials on all pages and includes a witness acknowledgement signed by the witness; (iv) both statements contain the date, time and place of the interviews; and (v) W03875 confirmed that the content of the EULEX Statement is true and accurate and that his statement was given voluntarily. The Panel notes that while the statements were not given under oath and were not tested through cross-examination, the Panel is satisfied that the

¹² Annex 1 to the Motion.

¹³ Response, para. 9.

¹⁴ Response, para. 10

¹⁵ Annex 4 to the Motion, item 1.

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 can account for when assessing the weight and probative value of this evidence.¹⁶

13. With regard to the Defence's argument that inconsistencies in the witness's account militate against the admission of W03875's Proposed Evidence, the Panel recalls the following. As set out in Rule 139(6), inconsistencies in a piece of evidence do not per se require a Panel to reject it as unreliable. The Panel further notes that the inconsistencies to which the Defence has pointed pertain to issues of a limited, and generally secondary, nature. The Panel will consider the purported inconsistencies when deciding the probative value and weight, if any, to be given to that evidence.¹⁷

14. In light of the above, the Panel is satisfied that W03875's prior statements are *prima facie* reliable.

15. Turning to the requirement set out in Rule 155(5), the Panel notes that W03875'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.

16. 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 Klečkë/Klečka, Llapushnik/Lapušnik, and Shalë /Sedlare during the period relevant to the charges) and *prima facie* authentic and probative.

17. 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, W03875'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, the Proposed Evidence

¹⁶ See F01864, Panel, *Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155*, 17 October 2023, confidential, para. 57 ("Second Rule 155 Decision").

¹⁷ See First Rule 155 Decision, para. 37.

is consistent with, and corroborated by, *inter alia*, documentary evidence and statements of at least one other witness in the case.¹⁸ Consistent with Rule 140(4), the question of whether the Defence was able to fairly challenge this part of the witness's evidence will be considered by the Panel when assessing whether the SPO has met its burden of proof in relation to relevant material allegations. In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

18. Accordingly, the Panel finds that W03875's Proposed Evidence is admissible pursuant to Rules 138(1) and 155.

2. W04828

19. The SPO submits that the Proposed Evidence of W04828 is: (i) relevant;¹⁹ (ii) authentic and reliable;²⁰ and (iii) its admission would not cause undue prejudice.²¹

20. The Panel notes that the SPO has submitted the following Proposed Evidence in respect of W04828: (i) District Court of Belgrade, Record of Witness Interview of W04828, dated 26 November 1999; (ii) Reuters photograph of W04828 and W03880 after their release, dated 27 November 1998; (iii) Voice of America article, dated 4 November 1998; and (iv) Voice of America article, dated 27 November 1998.²²

21. The Defence opposes the admission of W04828's Proposed Evidence. It argues that the Proposed Evidence is inconsistent, undermined by other evidence on the record and affected by key questions as to the witness's motivation, credibility and character, and as such its prejudicial effect outweighs any probative value,

¹⁸ 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).

¹⁹ Motion, paras 16-18.

²⁰ Motion, para. 19.

²¹ Motion, para. 20.

²² Annex 2 to the Motion.

and that it is inadmissible under Rule 138(1).²³ The Defence argues that the evidence of W04828 goes to proof of the acts and conduct of Mr Thaçi as charged in the Indictment and therefore the Panel should invoke Rule 155(5) to refuse admission.²⁴

22. The Defence also submits that the evidence of a witness known to be a suspected 'war criminal' is highly prejudicial without the possibility to cross-examine him. The Defence argues that the inability to question W04828 about the true purpose of his activities in Kosovo is prejudicial and militates against admission of W04828's statement.²⁵ The Defence alleges that some of the witnesses cited as corroborative of the Proposed Evidence are cited to give evidence about the witness's release from detention, but have no independent knowledge about why he was detained or who he really was.²⁶ The Defence also argues that W03880's self-serving insistence that he knew nothing about the real status of W04828 adds to the prejudice arising from the inability of the Defence to question W04828.²⁷ According to the Defence, this prejudice is reinforced by the contradictions between W04828's Rule 155 statement and other evidence.²⁸ Lastly, the Defence submits that if the Panel admits the evidence of W04828 through Rule 155, the Defence reserves its right to tender additional material regarding the witness's credibility through the bar table, including items cited.²⁹

23. The SPO replies that there is no prejudice in admitting W04828's Proposed Evidence. It argues that the Defence has had the opportunity to cross-examine witnesses that corroborate W04828's evidence and that it will put forward the evidence of other witnesses to corroborate the events discussed by W04828.³⁰ The

²³ Response, para. 26.

²⁴ Response, para. 14.

²⁵ Response, para. 15.

²⁶ Response, paras 20-21.

²⁷ Response, para. 24.

²⁸ Response, para. 25.

²⁹ Response, para. 27.

³⁰ Reply, paras 2-3.

SPO also replies that the Defence has already secured admission of the documents referenced in the Response and therefore can use that material to argue what weight W04828's evidence should be afforded at the appropriate time.³¹

24. Regarding the Defence argument that W04828's evidence goes to proof of the acts and conduct of Mr. Thaçi, the SPO replies that Mr Thaçi is mentioned nowhere in W04828's Proposed Evidence either directly or indirectly.³² The SPO submits that the Defence's submissions are misleading in respect of W03880's evidence³³ and argues that W04828's evidence is entirely consistent with the statement he gave to the media on his release that he did not see other prisoners; he only heard them.³⁴ Lastly, the SPO replies that the allegations raised by the Defence concerning W04828's activities years prior to the Indictment period, and outside of Kosovo, do not preclude the admissibility of W04828's Proposed Evidence.³⁵

25. The Panel notes that the SPO has submitted W04828's death certificate.³⁶ The Defence does 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).

26. With regard to the *prima facie* reliability of W04828's prior statement, the Panel notes that the record of the witness interview before the District Court of Belgrade contains: (i) the witness's personal details and signature; (ii) an indication of a witness warning; (iii) an indication of the date, time and place of the interview; (iv) an official template, stamp and signature of authorised officials; and (v) the signature of the investigating judge and recording clerk. The Panel also notes that

³¹ Reply, para. 3.

³² Reply, para. 5.

³³ Reply, para. 5.

³⁴ Reply, para. 5.

³⁵ Reply, para. 6.

³⁶ Annex 4 of the Motion, item no. 2.

the Reuters photograph of W04828 and W03880 after their release and the news articles from Voice of America are documents attached to the witness interview and form an inseparable and indispensable part of the statement.

27. With regard to the Defence's arguments about alleged contradictions between W04828's prior statement and the testimony of W03880 and between W04828's prior statement and other evidence,³⁷ these would not render W04828's evidence inadmissible. The Panel will assess alleged inconsistencies and contradictions in W04828's prior statement and with other evidence when considering the probative value and weight to be given to that evidence.³⁸ Insofar as such inconsistencies have been established, they would be relevant to the question of weight to be given to his evidence, if any.

28. Moreover, the Panel is of the view that the questions of whether W04828 was, as the Defence alleges, a suspected war criminal and questions raised by the Defence as to his role in Kosovo at the time do not render the Proposed Evidence inadmissible. These are issues which, if established, could affect the credibility of W04828 and the reliability of his prior statement. As such, they are factors that the Panel will assess as part of the process of determining the weight and probative value of the evidence.³⁹

29. Based on the above, the Panel finds that W04828's Proposed Evidence is *prima facie* reliable.

30. Regarding probative value versus prejudicial effect, the Panel considers that the Defence's arguments opposing the admission of the Proposed Evidence without cross-examination because it is prejudicial must fail. In this regard, the Panel first recalls that Rule 155(1) is specifically intended to deal with the

³⁷ Response, paras 23-25.

³⁸ First Rule 155 Decision, para. 37.

³⁹ ICC, *The Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 25 January 2012, para. 83.

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 where there are sufficient indicia of reliability under Rule 155(1) and the other criteria for the admissibility of evidence in Rule 138 have been established.⁴⁰

31. The Panel agrees with the Defence that W04828's Proposed Evidence goes, albeit to a limited extent, to the alleged acts and conduct of Mr Thaçi. It is indeed the SPO's case that the men who interviewed W04828 and W03880 were Mr Thaçi and Fatmir Limaj. The Panel will assess this evidence in light of the fact that neither W04828 nor W03880 recognised and identified Mr Thaçi as one of their interviewers, as well as the evidence of another witness, dealt with below, who has claimed that Mr Thaçi was in fact one of the interviewers. The Panel considers, however, that the fact that neither W04828 nor W03880 recognised Mr Thaçi does not render the Proposed Evidence inadmissible, for two primary reasons. First, as W04828 did not claim that he recognised his interviewer as being Mr Thaçi, cross-examination would not have assisted the Defence in challenging what is not being alleged by him. Secondly, the Defence had a fair and full opportunity to put questions to W03880 regarding the identity of those who questioned them. For these reasons, the Panel does not find the fact that a limited aspect of W04828's Proposed Evidence goes to the acts and conduct of the Accused justifies the exclusion of that evidence.

32. Regarding other aspects of the Proposed Evidence of this witness, the Panel notes once again that the Defence was given a full and fair opportunity to question

⁴⁰ Second Rule 155 Decision, para. 10.

W03880 in respect of the facts and circumstances that form the basis of the evidence now being offered. The Defence made extensive use of that possibility.

33. In addition, the Panel notes that W04147 and W04492 are scheduled to testify later in this trial about the detention and release of W03880 and W04828. The Defence will have the opportunity to cross-examine these witnesses in respect of some of the facts and circumstances outlined in the evidence of W04828 now being offered. The Panel reiterates that the admission of evidence pursuant to Rule 155 is not conditioned by the existence of corroborating evidence.⁴¹ Moreover, the lack of corroboration, of the whole of the statement or a portion thereof, does not automatically preclude the admission of the evidence if the Panel is satisfied that the requirements under Rule 155 are met.⁴² In this case, the Defence has or will be able to challenge at least three witnesses whose evidence pertains to some of the same facts and circumstances as form the basis of W04828's Proposed Evidence.

34. The Defence argues, however, that those witnesses have no independent knowledge about why W04828 was being detained or who he really was.⁴³ In this regard, the Panel notes that during the testimony of W04408 and W03880, the Defence extensively cross-examined these witnesses about these two issues.⁴⁴ The Panel also notes and reiterates that the Panel admitted several documents offered by the Defence, which were discussed with W04408 and W03880, and which pertain to these two same facts. The Panel also observes that the Defence was able to cross-examine W02161 about her knowledge of W04828.⁴⁵ Lastly, the Panel notes that the documents on which the Defence seeks to rely in support of the two above matters pertain to events unrelated to Kosovo and pre-date the events relevant to

⁴¹ 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. 11.

⁴² ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 19 February 2009, para. 47.

⁴³ Response, para. 20 (W04147 and W04492).

⁴⁴ Transcripts of hearing of W04408, 6 and 7 September 2023; Transcripts of hearing of W03880, 9 and 10 October 2023.

⁴⁵ Transcripts of hearing of W02161, 6 December 2023, pp. 10709.

this case by several years. To that extent, the inability of the Defence to question W04408 in respect of his alleged role and actions years earlier in an unrelated context would have been of relatively limited relevance. In those circumstances, the Panel finds that any prejudice arising from the inability of the Defence to cross-examine W04828 in respect of these two matters does not outweigh the probative value of that evidence.

35. 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 Kleçkë/Klečka, Llapushnik/Lapušnik, and Shalë (Sedllarë)/Sedlare Rahovec/Orahovac during the period relevant to the charges) and *prima facie* authentic and probative. Furthermore, as discussed above, 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.

36. The Panel is satisfied that, as explained above, the probative value of this evidence is not outweighed by its prejudicial effect to the Accused. The factors and circumstances outlined above and the inability of the Defence to cross-examine the witness in respect of his actions in Croatia and Bosnia-Herzegovina years earlier will be accounted for when assessing his evidence.⁴⁶ In light of the foregoing, the Panel finds that the probative value of the submitted evidence is not outweighed by its prejudicial effect.

37. Accordingly, the Panel finds that W04828's Proposed Evidence is admissible pursuant to Rules 138(1) and 155.

⁴⁶ First Rule 155 Decision, para. 34.

3. W04839

38. The SPO submits that the Proposed Evidence of W04839 is: (i) relevant;⁴⁷ (ii) authentic and reliable;⁴⁸ and (iii) its admission would not cause undue prejudice.⁴⁹

39. The Panel notes that the SPO has submitted the following prior statements of W04839: (i) Two Redacted versions of EULEX WCIU, Witness Statement of W04839, dated 20 November 2009; (ii) Redacted version of SPRK, Record of Hearing of Suspect Agim ZOGAJ under investigation, dated 4 February 2010; (iii) Redacted version of SPRK, Record of Hearing of Suspect Agim ZOGAJ under Investigation, dated 9 February 2010; (iv) Redacted version of SPRK Record of Hearing of Suspect Agim ZOGAJ in investigation case, dated 11 February 2010; (v) Redacted version of SPRK signed Record of Hearing of Suspect W04839, dated 16 March 2010; (vi) Redacted version of SPRK signed Record of the Suspect Hearing in an investigation of W04839, dated 9 June 2010; (vii) Redacted version of PPS 07/2010, signed Record of Hearing of Suspect W04839, dated 20 August 2010; (viii) Redacted version of SPRK Record of Hearing of Witness Agim ZOGAJ in investigation against Skender HOTI et al., dated 5 October 2010, PPS No. 07/10; (ix) Redacted version of PPS 07/2010, Signed EULEX statement regarding photo ID with W04839 in case against Arben KRASNIQI et al.; (x) Redacted version of SPRK signed Record of Co-operative Witness in Fatmir Limaj and others case, dated 5 July 2011; (xi) Redacted version of SPRK signed Record of Co-operative Witness in Fatmir Limaj and others case, dated 6 July 2011; (xii) Redacted version of SPRK signed Record of Co-operative Witness in Fatmir Limaj and others case, dated 7 July 2011; and (xiii) SPRK Record of W04839 hearing, dated 9 July 2011.

⁴⁷ Motion, paras 21-27.

⁴⁸ Motion, para. 28.

⁴⁹ Motion, paras 29-42.

40. In addition, the SPO seeks admission of the following associated exhibits: (i) Manual on Procedure Implementation towards the Detainees from the KLA Main Headquarters Judicial Service, dated 2 March 1999; (ii) Hand-drawn sketch of detention site in Kleçkë/Klečka by W04839; (iii) Four Excerpts of W04839's Diary; (iv) Photo of W04839 taken during war time; (v) a collection of photo line-ups shown to W04839; (vi) Duty Reports to KLA Military Court signed by W04839; (vii) three Requests to KLA Military Court signed by W04839; (viii) KLA Military Court order signed by Petrit UJMIRI ordering the detention of Vahid UKAJ and Jakup MUHARREMI; (ix) KLA Military Court order signed by Petrit UJMIRI ordering the detention of Haki JASHARI and signed by W04839; (x) Decision issued by Refki MAZREKU to Brigade 121 concerning Besim SOPA; (xi) KLA Judgment issued by Agim ÇEKU concerning Islam QADRAKU; (xii) Judgment of KLA Military Court against Petrit HOXHA signed by Petrit UJMIRI; (xiii) Decision by Haxhi SHALA concerning Agim DUGOLLI; (xiv) Discharge form from University Clinical Center Psychiatric Clinic in Pristina for W04839; (xv) Decision by Kosovo Police Inspectorate declining to open investigation; (xvi) Certification of W04839 service in KLA and in Brigade 121 (11.05.2004); (xvii) Certification of W04839 service in KLA and in Brigade 121 (02.06.2008); (xviii) Report by KLA 122 Brigade MP Platoon Commander; (xix) Order by Nexhmi Krasniqi to 122 Brigade MP Platoon to undertake investigation; and (xx) Certificate from the TMK zone 2.⁵⁰

41. The Defence opposes the admission of this evidence in its entirety.⁵¹ In particular, the Defence submits that W04839's prior statements should be rejected given that W04839: (i) has lied before; (ii) had significant psychiatric issues; and (iii) evinced clear animosity towards Fatmir Limaj. Moreover, the Defence argues that W04839's testimony (i) is full of inconsistencies; (ii) was found in the

⁵⁰ Annex 3 to the Motion.

⁵¹ Response, para. 28.

Klečkë/Klečka Re-Trial to be fundamentally unreliable; and (iii) lacks probative value. The Defence argues that the prejudicial effect of being unable to cross-examine the witness outweighs its limited probative value.⁵²

42. Lastly, the Defence objects to the admission of most of W04839's associate exhibits, in particular: (i) the W04839's Psychiatric Assessment;⁵³ (ii) W04839's Handwritten Diary;⁵⁴ and (iii) KLA Military Court Documents.⁵⁵ It does not dispute that the remaining documents meet the standards required for authenticity.⁵⁶

43. The SPO replies that the Panel should not outsource its determinations concerning probative value to other judges in other cases.⁵⁷ It submits that W04839 did not have a recognised psychiatric disorder that might have affected his ability to give accurate evidence about events in 1999.⁵⁸ It replies that the Defence: (i) acknowledges that W04839 was present at the places regarding which he provides evidence; (ii) accepts as 'materially evident' that W04839 was a KLA member, and a member of Brigade 121 during the Indictment period; (iii) leaves unchallenged the vast majority of W04839's evidence, making only a smattering of claims across W04839's 14 proposed statements comprising hundreds of pages; and (iv) does not challenge that various aspects of W04839's evidence are corroborated by other evidence.⁵⁹

44. The SPO also replies that: (i) *prima facie* reliability for the purposes of admission of Rule 155 material does not require proof of reliability of each and every fact or circumstance in relation to which the witness gives evidence;

⁵² Response, paras 31-47.

⁵³ Response, paras 48-50.

⁵⁴ Response, paras 51-53.

⁵⁵ Response, paras 54-57.

⁵⁶ Response, para. 58.

⁵⁷ Reply, para. 7.

⁵⁸ Reply, para. 8.

⁵⁹ Reply, para. 9.

(ii) corroboration is not a pre-condition for admission and the absence thereof is not ground for refusal to admit evidence because the Panel will conduct this assessment at the end of the trial, in light of the entire body of evidence admitted at trial;⁶⁰ (iii) discrepancies regarding the accounts of different witnesses should be assessed, where necessary, on the evidence as a whole, go to weight and probative value and do not render proposed Rule 155 evidence of a particular witness inadmissible; (iv) material that has not been introduced as evidence when assessing Rule 155 admissibility cannot be considered;⁶¹ (v) the Panel has been unequivocal that there is no bar to admitting evidence of acts and conduct of the Accused through Rule 155;⁶² and (vi) any considerations as to quantity and quality of corroboration can be accounted for by the Panel in assessing weight and probative value at the end of trial.⁶³

45. Lastly, with regard to the Defence's allegation that there are portions of W04839's notebooks that the SPO has sought to keep from the Panel by not including them as an associated exhibit, the SPO replies that the claim is not supported by any citation to items that the Defence believe are associated exhibits of W04839's tendered statements and that were not included in the SPO's list of associated exhibits. Thus, the SPO cannot address this claim with any specificity.⁶⁴

46. The Panel notes that the SPO has submitted W04839's death certificate.⁶⁵ 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).

⁶⁰ Reply, para. 10.

⁶¹ Reply, para. 11.

⁶² Reply, para. 14.

⁶³ Reply, para. 15.

⁶⁴ Reply, para. 16.

⁶⁵ Annex 4 to the Motion, Item 3.

47. With regard to the *prima facie* reliability of W04839's prior statements, the Panel notes that they contain: (i) information about dates, times and locations of the interview and witness hearings, the witness's personal details, witness warning and acknowledgment; (ii) the witness's signature; (iii) official headings; and (iv) the presence of interpreters. Moreover, the witness was duly advised of his rights and obligations and the statements were given voluntarily and freely. Regarding the associated exhibits, the Panel is satisfied that they were discussed in W04839's statements and form an indispensable and inseparable part of his evidence.

48. Thus, the Panel finds that W04839's prior statements and associated exhibits are *prima facie* reliable in terms of accurately recording the information which they contain. Issues raised in relation to the actual content of those statements and their relevance to the question of reliability and probative value are addressed below.

A. PRIOR STATEMENTS

49. The Defence objects to the admission of W04839's prior statements because they are unreliable and have low probative value.⁶⁶ To support its argument, the Defence primarily invokes the findings of credibility and probative value of W04839's evidence made by other courts and panels in other cases. For instance, the Defence relies on the finding in the Kleçkë/Klečka Re-Trial Judgment that W04839 was "not a credible witness and that in consequence it would be unsafe to rely upon his evidence."⁶⁷ The Defence also invokes the findings in the Kleçkë/Klečka case to raise doubt about W04839's mental state and an alleged personal animosity towards Fatmir Limaj, which affected his evidence.⁶⁸

50. Regarding the reliance that the Defence seeks to place upon the findings of other tribunals, the Panel notes the following: First, while the Trial Panel in the

⁶⁶ Response, para. 31.

⁶⁷ Response, para. 32.

⁶⁸ Response, para. 35.

Klečkë/Klečka Re-Trial Judgment referred to by the Defence ultimately made adverse findings regarding W04839's credibility, it did so *after* it found his prior statements to be admissible.⁶⁹ To that extent, the 'precedents' relied upon by the Defence would as much undermine its position as it would support it. Secondly, the Panel notes that deciding upon the admissibility of evidence in this case is its sole and exclusive responsibility. It will not, therefore, delegate that responsibility to any other party or entity.⁷⁰ To that extent, what view other courts might have taken regarding the credibility of a witness and/or reliability of his or her evidence has no binding effect on the Panel. Third, an assessment of both the requirements of admissibility of evidence and, ultimately, findings regarding weight and probative value must be conducted in each case and in light of (and only in light of) the evidence on the record of the relevant proceedings.⁷¹ This is to account for the fact, *inter alia*, that the admissibility (as well as the weight and/or probative value) of the same evidence might not be identical in two cases as their probative value and reliability might be bolstered or undermined in one case by evidence not present in the other case. The Panel's determination on that point will depend, in particular, upon the existence of corroboration of a witness's account and the nature, extent and reliability of any such corroborating evidence.⁷² Therefore, the Panel rejects the Defence's argument that findings from other Judges regarding the reliability of W04839's evidence in those cases preclude the admission of W04839's prior statements in the present case.

51. With regard to the Defence's allegation that there are material inconsistencies and contradictions within W04839's prior statements and also with other evidence that inherently reduce the reliability of the W04839's Proposed Evidence, the Panel further notes: First, the SPO appears to concede, that the evidence of the proposed

⁶⁹ See Motion, para. 32; see also Klečkë/Klečka Re-Trial Judgment, pp. 39, 63-64, 66.

⁷⁰ First Rule 155 Decision, para. 49.

⁷¹ ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-AR73.17, Decision On Joseph Npirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, para. 16.

⁷² First Rule 155 Decision, para. 49.

witness indeed contains inconsistencies and contradictions. The record being offered also contains explanations and justifications for some of these. These discrepancies are quite numerous and pertain to important aspects of the witness's evidence. They also suggest that the witness must perforce have given false, sworn, evidence on at least some of these occasions. At the same, the Panel accounts for the fact that witnesses who have sought to incriminate high level KLA members have, as in the present case, been subject to a variety of pressures and threats. The Panel also takes into consideration that some of the evidence provided by the witness would, if accepted, be highly incriminating. In addition, the Panel reiterates that *prima facie* reliability for the purposes of admission of Rule 155 material 'does not require proof of reliability in relation to each or every fact or circumstance in relation to which the witness gives evidence.'⁷³ The Panel also notes that the true significance of many of the inconsistencies and explanations given by this witness will only become apparent once his evidence is measured and evaluated against the evidence of other witnesses and against documents which might either bolster and corroborate his account or, instead, further undermine it. In accordance with Rule 139(2), the Panel is required to "assess each piece of evidence in light of the entire body of evidence admitted before it at trial". As a result, the Panel will at the end of the case assess these inconsistencies and what impact they may have on the weight and reliability of this witness's evidence. Furthermore, as set out in Rule 139(6), "[i]nconsistencies in a piece of evidence do not per se require a Panel to reject it as unreliable". Therefore, the purported inconsistencies contained in the offered records are not such as to make the evidence inadmissible in its entirety.⁷⁴ The Panel has considered separately a number of instances where inconsistencies are put forward by the Defence in support of its suggestion that certain aspects of his evidence should be excluded.

⁷³ First Rule 155 Decision, para. 64.

⁷⁴ See also First Rule 155 Decision, para. 50.

52. The Panel also observes that the Defence seeks to challenge the reliability of W04839's prior statements based on documents that have not yet been formally offered or admitted as evidence.⁷⁵ The Panel has given no weight to those submissions, as they are not substantiated by information on which the Panel could rely.⁷⁶

53. With regard to the Defence's argument that it cannot be assumed that witnesses who will testify later in this trial will corroborate W04839's evidence,⁷⁷ the Panel notes the following: First, corroboration is not a pre-condition for admission of a statement under Rule 155.⁷⁸ However, as noted above, the Panel recalls that in the context of the admission of witness's prior statements under Rule 155, the possibility of cross-examining other witnesses who will testify about the same or related events and circumstances becomes relevant.⁷⁹ Secondly, trying at this stage to evaluate the extent of future corroboration of this witness is an exercise in hypotheticals in which the Panel cannot and will not engage. Lastly, the Panel will assess the extent to which this witness's evidence is corroborated at the end of the trial,⁸⁰ taking into account the fact that the Defence was unable to cross-examine the present witness.

54. The Defence also submits that W04839's evidence concerns in a "limited" and "largely tangential" manner acts and conduct of the Accused and as such, it should not be admitted because it cannot be fairly confronted by the Defence.⁸¹ In this regard, the Panel concurs with the Defence that limited sections of the statements refer to facts or circumstances that might go to the acts and conduct of the Accused. However, the Panel recalls that Rule 155(5) does not prohibit the

⁷⁵ Response, fns 76, 103, 104, 107, 114, 136 and 149.

⁷⁶ First Rule 155 Decision, para. 50; Second Rule 155 Decision, para. 48.

⁷⁷ Response, para. 33.

⁷⁸ First Rule 155 Decision, para. 137; Second Rule 155 Decision, para. 46.

⁷⁹ Second Rule 155 Decision, para. 10.

⁸⁰ First Rule 155 Decision, para. 86. Second Rule 155 Decision, para. 46.

⁸¹ Response, paras 37, 38.

admission of such evidence, providing instead that this element “may be a factor against the admission of such evidence, in whole or in part”.⁸² In this context, the Panel observes that some of the references to acts and conduct of the Accused in W04839’s prior statements are, in the Defence’s view, exculpatory.⁸³ Other parts of the evidence pertain merely to the presence of two of the Accused at a given location.⁸⁴ Some of those instances have little or no bearing on the charges. Where they do, the Panel will be mindful when assessing that evidence of the inability of the Defence to cross-examine this witness, pay particular attention to the presence or otherwise of corroboration which the Defence was able to test and make application of Rule 140(4)(a). The Panel has considered below a number of other aspects of the witness’s Proposed Evidence to which the Defence draws attention.

55. The Panel notes that elements of W04839’s evidence will be relevant to assessing whether Mr Thaçi was, as the SPO alleges, the person who interrogated W04828 and W03880.⁸⁵ Regarding this aspect of W04839’s evidence, the Panel notes following: First, while W04839 is the only one to name Mr Thaçi as one of the interrogators, both W04828 and W03880 provide evidence regarding those interrogators, including in respect of their physical appearance and other relevant traits. W03880 was questioned in the present trial about some of these issues and the Defence was in a position to question him in respect of those. Secondly, the principle 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, as reflected in Rule 140(4)(a), does not regulate the question of admission of such evidence but that of the basis that must underlie any guilty verdict. While the Panel can, in its discretion, refuse to admit evidence on account of the inability of the Defence to fairly challenge it,⁸⁶ the Panel notes that the Defence was able to

⁸² First Rule 155 Decision, para. 90. Second Rule 155 Decision, para. 70.

⁸³ Response, para. 38.

⁸⁴ 050966-051004 RED, p. 050973; SITF00009996-00010122 RED, p. SITF00010000.

⁸⁵ See *supra*.

⁸⁶ First Rule 155 Decision, para. 125; Second Rule 155 Decision, paras 10, 47.

cross-examine W03880 in the present trial respect of this matter. The fact that the Defence was not able to also cross-examine W04828 will be accounted for when the Panel assess the entirety of the evidence relevant to this matter to determine whether the SPO has met its burden of proof.

56. With regard to the Defence's arguments about the evidence that refers to the acts and conduct of Mr Selimi, the Panel concurs with the SPO that there is corroboration for W04839's evidence placing Mr Selimi at Kleçkë/Klečka.⁸⁷ Moreover, the Panel notes that during the testimony of W03879, the Defence extensively cross-examined the witness about this fact.⁸⁸ The Defence also points to W04839's evidence regarding his claim that Nexhmi KRASNIQI had received an order from Rexhep Selimi to kill a person called 'Islam' from Duga village.⁸⁹ The Panel first notes that this allegation is not contained in the Indictment against Mr Selimi. Nor is it alleged in the Indictment that the individual concerned was in fact killed. At the same time, the Panel accepts that if it were to find that Mr Selimi gave such an order, this would be relevant to Mr Selimi's participation in the charged joint criminal enterprise. Secondly, the Panel also regards such evidence as potentially highly incriminating and prejudicial to the Accused. Thirdly, the Panel notes that the alleged recipient of that order (Nexhmi KRASNIQI) does not appear on the SPO witness list. The Defence will not, therefore, have an opportunity to cross-examine him. Nor does any other SPO witness appear capable of a meaningful cross-examination by the Defence on that point. Neither is it apparent that any witness, other than Mr Selimi himself, could effectively address this allegation. In those circumstances, 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.⁹⁰ Consequently, the

⁸⁷ See 065314-TR-ET Part 4 RED, pp.39–43; 065315-TR-ET Part 2 RED, pp.1–2, 4–5; SITF00009578-SITF00009648, p. SITF00009590.

⁸⁸ Transcript of hearing of W03879, 15 and 16 August 2023.

⁸⁹ See, SPO PTB para. 513, referring to W04839's SPRK hearing of 11 February 2010.

⁹⁰ Second Rule 155 Decision, para. 47.

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.

57. The Panel also notes that the Defence objects to the allegation that Mr. Selimi hired the son of one of the detainees referred to as “Adem” as a bodyguard after the conflict so that “Adem would not testify against anybody”.⁹¹ The Defence argues that this allegation is non-specific, it is uncharged and falls outside the Indictment period and is uncorroborated.⁹² The Panel is of the view that, in light in particular of the inability of the Defence to cross-examine this witness, the questionable relevance of this allegation to the case and the absence of other SPO witnesses whom the Defence could question on this, 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 prepare and tender a revised version of this record, removing the section pertaining to the alleged incident in question.

B. ASSOCIATED EXHIBITS

58. With regard to W04839’s associated exhibits objected to by the Defence,⁹³ the Panel first recalls that when a statement is admitted pursuant to Rule 155, exhibits accompanying the statement may be admitted as well where they meet the requirements of Rule 138(1) and form an inseparable and indispensable part of the statement.⁹⁴

59. Secondly, contrary to the Defence’s assertion, the Panel observes that there is no requirement for the witness to be questioned about the specificities of the

⁹¹ Response, para. 42.

⁹² Response, para. 42.

⁹³ KLA Military Court Documents; W04839’s Handwritten Diary; W04839’s Psychiatric Assessment.

⁹⁴ First Rule 155 Decision, para. 17.

exhibits in his statement or testimony.⁹⁵ All that is required is that the associated exhibit is used or explained by the witness, and that it, as such, forms an integral part of the testimony itself.⁹⁶ Having carefully reviewed W04839's prior statements and since W04839 has discussed and explained each exhibit in his prior testimony, the Panel finds that they are admissible under Rule 155 together with W04839's prior statements.

60. Thirdly, the Panel notes that the Defence relies upon findings from other courts to support its arguments regarding the reliability of this evidence.⁹⁷ As noted above, the Panel reiterates that the determinations made by other courts concerning evidence do not bind this Panel. The Panel will make its own determination regarding the admissibility of all items offered for admission.

61. 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 in Kleçkë/Klečka, and Shalë (Sedllarë)/Sedlare) and *prima facie* authentic and probative.

62. Subject to what has been said above in respect of one aspect of the witness's Proposed Evidence (*supra*, para. 57), the Panel is further satisfied that the probative value of the Proposed Evidence is not outweighed by its prejudicial effect.

⁹⁵ Response, para. 48.

⁹⁶ First Rule 155 Decision, para. 17. See also, ICC, *The Prosecutor v Ruto and Sang*, Decision on Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, paras 33 and 134; ICC, Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029, paras 23 and 35; ICC, Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205, para. 7; ICC, Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Red, para. 9.

⁹⁷ Response, paras 52-57.

63. Accordingly, the Panel finds that W04839'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 Selimi. The SPO is directed to prepare and tender a version of those documents from which the impugned section is redacted.

V. CLASSIFICATION

64. 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, 8 January 2024.

VI. DISPOSITION

65. 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: SPOE00078774-00078791, pp. SPOE00078774-00078782; SITF00010859-00010877 RED2, pp. SITF00010875-00010877 RED2; 083812-083822 ET RED, pp. 083812-083816, p. 083817, pp. 083818-083819, p. 083820; 050966-051004 RED, pp. 050966-050984; SITF00009503-00009529 RED; SITF00009653-00009681 RED; SITF00009811-00009829 RED; SITF00009866-00009902 RED; SITF00009537-00009566 RED; SITF00009578-00009648 RED; SITF00009649-00009652 RED; SITF00009919-00009958 RED, pp. SITF00009919-00009934; SITF00009959-00009995 RED, pp. SITF00009959-00009977; SITF00009996-00010122 RED, pp. SITF00009996-00010037; SITF00010123-00010161, pp. SITF00010123-00010139; SITF00009578-00009648 RED, pp. SITF00009609-610; SITF00009653-00009681 RED, p. SITF00009679; SPOE00248557-00248597; SPOE00069097-SPOE00069102-ET; SPOE00248675-00248697; SPOE00248721-00248727; SITF00009811-

00009829, pp. SITF0009827-SITF0009828; SITF00009866-00009902 RED, pp. SITF00009879-STIF0009898, pp. SITF00009899-STIF0009902; SITF00009537-00009566 RED, pp. SITF00009545-46, pp. SITF00009547-48, pp. SITF00009549-50, pp. SITF00009551-52, pp. SITF00009553-54, pp. SITF00009555-56, pp. SITF00009557-58, pp. SITF00009559-60, pp. SITF00009561-62, pp. SITF00009563-64, pp. SITF00009565-66; SITF00009578-00009648 RED, p. SITF00009590, p. SITF00009592, p. SITF00009594, p. SITF00009599, p. SITF00009601, p. SITF00009603, p. SITF00009605, p. SITF00009607, p. SITF00009612, p. SITF00009617, p. SITF00009619, p. SITF00009621, p. SITF00009623, p. SITF00009625, p. SITF00009627, pp. SITF00009629-30, pp. SITF00009631-32, pp. SITF00009633-34, pp. SITF00009635-36, pp. SITF00009637-38, pp. SITF00009639-40, pp. SITF00009641-42, pp. SITF00009643-44, pp. SITF00009645-46, pp. SITF00009647-48; SPOE00248786-00248789, pp. SPOE00248788-89; SPOE00248774-00248777, pp. SPOE00248776-77; SITF00009935-SITF00009936-ET, p. SITF00009936, p. SITF00009935; SITF00009937-SITF00009937-ET.

- c) **ADMITS**, 051032-051055 RED and 050951-050965 RED under the conditions set out above in paragraph 63;
- d) **INSTRUCTS** the Registry to assign exhibit numbers to the aforementioned items;
- e) **ORDERS** the SPO to disclose the audio- and video-recordings of interviews of witnesses' subject to the present application, where such recordings exist and are in possession of the SPO; and
- f) **REQUESTS** the Defence to file a public redacted version of the Response by Thursday, 4 January 2024.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 15 December 2023

At The Hague, the Netherlands.