

Case No.: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Date: 22 June 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

**Public Redacted Version of the Defence Response to the
Prosecution Application for the Admission of TW4-04's Evidence
Pursuant to Rule 153**

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I. INTRODUCTION

1. Pursuant to the Trial Panel (“Panel”)’s Order dated 12 June 2023 and Rules 138(1) and 153 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) hereby files its Response to the “Prosecution application for the admission of TW4-04’s evidence pursuant to Rule 153”.¹
2. The Defence requests the Panel to reject the Application and the admission into evidence of the proposed evidence of Prosecution witness TW4-04 as listed in Annex 1 to the Application and order the Specialist Prosecutor’s Office (“SPO”) to call TW4-04 to testify live via video-conference as previously envisaged.²
3. The proposed evidence of TW4-04 is unreliable. TW4-04 should testify live before the Panel to ensure the right of the Accused to confront witnesses against him and provide the Panel with adequate opportunity to assess his credibility.

II. PROCEDURAL BACKGROUND

4. On 31 January 2022, the SPO filed its list of witnesses pursuant to Rule 95(4)(b) of the Rules, indicating that the testimony of TW4-04 will be heard live in court.³
5. On 13 February 2023, the SPO requested the Panel to authorise TW4-04, TW4-10, and TW4-11 to testify via video-conference link.⁴

¹ KSC-BC-2020-04, F00540, Order on the filing of the Rule 153 request concerning witness TW4-04 and shortening time limits, 12 June 2023 (“Order”), paras. 6(b), 8; KSC-BC-2020-04, F00546, Prosecution application for the admission of TW4-04’s evidence pursuant to Rule 153 with confidential Annex 1, 14 June 2023 (confidential) (“Application”). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Order, para. 7.

³ F00136, A02, ANNEX 2 to Submission of Confidential Redacted Versions of Pre-Trial Brief, with witness and exhibit lists, 31 January 2022 (confidential), p. 1.

⁴ F00425CONFRED, Confidential Redacted Version of ‘Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11’, 13 February 2023 (confidential), paras. 1, 16.

6. On 24 February 2023, the Panel issued the “Decision on the conduct of the proceedings”, in which it ordered the SPO to submit any applications under Rule 153 of the Rules by 20 March 2023.⁵
7. On the same date, the Defence responded to the SPO request for the three witnesses to testify via video-conference link.⁶
8. On 6 March 2023, the SPO replied to the Defence response.⁷
9. On 13 April 2023, the Panel issued the “Decision on the Specialist Prosecutor’s request for video-conference testimony for TW4-04, TW4-10 and TW4-11”, in which, *inter alia*, it authorised TW4-04 to testify via video-conference link.⁸
10. On 24 May 2023, the SPO informed the Panel, the Defence, and the Victim’s Counsel that it intended to reassess the most appropriate mode of testimony for TW4-04, including the possible submission of an application under Rule 153 of the Rules, after the testimony of TW4-01 had been concluded.⁹
11. Between 30 May and 5 June 2023, TW4-01 testified live before the Panel.¹⁰
12. On 9 June 2023, the SPO informed the Panel, the Defence, and Victim’s Counsel that, upon review of TW4-01’s testimony, it intended to request admission of

⁵ F00434, Decision on the conduct of the proceedings, 24 February 2023 (confidential), para. 67.

⁶ F00437, Defence Response to the “Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11”, 24 February 2023 (confidential).

⁷ F00443, Prosecution reply to Defence Response to the ‘Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11’, 6 March 2023 (confidential).

⁸ F00482CONFRED, Confidential redacted version of Decision on the Specialist Prosecutor’s request for video-conference testimony for TW4-04, TW4-10 and TW4-11, 13 April 2023 (confidential), paras. 21, 23(a).

⁹ F00521, Prosecution submission of updated order of appearance of witnesses, 24 May 2023, para. 4.

¹⁰ T. 30 May 2023; T. 31 May 2023; T. 2 June 2023; T. 5 June 2023; T. 6 June 2023.

the written statements of TW4-04 under Rule 153 of the Rules, *in lieu* of his oral testimony.¹¹

13. On 12 June 2023, the Panel issued the Order, in which it ordered the SPO to file the application to admit TW4-04's evidence under Rule 153 of the Rules by 14 June 2023 and the Defence and Victim's Counsel to respond, if they so wish, by 19 June 2023.¹²
14. On 14 June 2023, through the Application, the SPO sought the admission into evidence *in lieu* of oral testimony under Rule 153 of the Rules of the transcripts of TW4-04's interviews with the SPO in [REDACTED] and [REDACTED], the associated exhibits used during the [REDACTED] interview, his prior testimony in proceedings in Kosovo, his prior statements given to EULEX, as well as a EULEX photo board identification report.¹³

III. APPLICABLE LAW

15. Rule 153 of the Rules provides that:
 - (1) Subject to Rule 155, the Panel may admit *in lieu* of oral testimony the written statement of a witness, or a transcript of evidence provided by a witness in proceedings before the Specialist Chambers, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment.
 - (a) Factors militating for the admission of a written statement or transcript *in lieu* of oral testimony include, but are not limited to circumstances in which the evidence in question:
 - (i) is of a cumulative nature, in that other witnesses have given or will give oral testimony on similar facts;
 - (ii) is corroborated by evidence which the Accused could effectively confront, including through cross-examination;
 - (iii) relates to relevant historical, political or military background;
 - (iv) consists of a general or statistical analysis relating to the composition of the population in the places to which the indictment relates;
 - (v) concerns the impact of crimes on victims;
 - (vi) relates to the character of the Accused;

¹¹ F00539, Notification of dates and mode of testimony of witnesses for the fourth evidentiary block, 9 June 2023 (with confidential Annex), para. 2.

¹² Order, paras. 6(a), 6(b), 8.

¹³ Application, paras. 1, 29; Annex 1 to Application.

- (vii) relates to factors to be taken into account in determining sentence;
or
 - (viii) has been given by the witness in the presence of the Parties who have had the opportunity to examine or cross-examine him or her.
- (b) Factors militating against the admission of a written statement or transcript *in lieu* of oral testimony include instances whereby:
- (i) a Party or, where applicable, Victims' Counsel objects to the admission of the witness's evidence in written form and, demonstrates that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value;
 - (ii) the evidence contained therein is incriminatory in character or pertains to an issue central to the Specialist Prosecutor's case;
 - (iii) there are any other factors that make it appropriate for the witness to appear for cross-examination; or
 - (iv) there is an overriding public interest in the evidence in question being presented orally.
- (2) The statement shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, as well as, where applicable, the Specialist Prosecutor or the Judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. If, in exceptional circumstances, the person has not signed the record, the reasons thereof shall be noted.
- (3) After hearing the Parties, the Panel shall decide whether to request the witness to appear for cross-examination. It may decide, providing reasons, that the requirements of a fair and expeditious trial exceptionally warrant the admission of the statement or transcript, in whole or in part, without cross-examination. If the Panel decides to require the witness to appear for cross-examination, Rule 154 shall apply.

16. In addition to the requirements set out in Rule 153 of the Rules, for a written statement or transcript of evidence provided by a witness to be admitted *in lieu* of his or her oral testimony, it must meet the four cumulative requirements of Rule 138(1) of the Rules; namely, it must be relevant, authentic, probative, and its probative value must not be outweighed by its prejudicial effect.¹⁴

IV. SUBMISSIONS

17. The Defence objects to the admission of the proposed evidence of TW4-04 under Rule 153 of the Rules *in lieu* of his oral testimony.

¹⁴ F00461, Decision on the Submission and Admissibility of Non-Oral evidence, 17 March 2023, paras. 32, 33, 38.

A. The Application is Out-of-Time

18. The Application is untimely. When it filed its initial Witness List on 31 January 2022, the SPO indicated that the testimony of TW4-04 would be heard live in court.¹⁵ On 13 February 2023, the SPO requested the Panel to authorise TW4-04 to testify via video-conference link and its request was granted by the Panel on 13 April 2023.¹⁶ It is only on 24 May 2023 that the SPO gave notice of its intention to re-assess the mode of the testimony of TW4-04, an assessment that it finds “more appropriate” to make only after the testimony of TW4-01 has been heard.¹⁷
19. The Defence notes that the SPO has failed to comply with the deadline set out by the Panel to submit any applications under Rule 153 of the Rules by 20 March 2023.¹⁸ It had ample time since filing its initial Witness List to adjust the anticipated mode of testimony of TW4-02.¹⁹
20. There is no justification for the delay and the resulting undue prejudice caused to the Defence by the last-minute change in the mode of testimony of an important Prosecution witness, especially after the SPO has requested and was granted leave to facilitate the witness’s testimony via video-conference link.²⁰

¹⁵ F00136, A02, ANNEX 2 to Submission of Confidential Redacted Versions of Pre-Trial Brief, with witness and exhibit lists, 31 January 2022 (confidential), p. 1.

¹⁶ F00425CONFRED, Confidential Redacted Version of ‘Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11’, 13 February 2023 (confidential), paras. 1, 16; F00482CONFRED, Confidential redacted version of Decision on the Specialist Prosecutor’s request for video-conference testimony for TW4-04, TW4-10 and TW4-11, 13 April 2023 (confidential), paras. 21, 23(a).

¹⁷ F00521, Prosecution submission of updated order of appearance of witnesses, 24 May 2023, para. 4.

¹⁸ F00434, Decision on the conduct of the proceedings, 24 February 2023 (confidential), para. 67.

¹⁹ F00136, A02, ANNEX 2 to Submission of Confidential Redacted Versions of Pre-Trial Brief, with witness and exhibit lists, 31 January 2022 (confidential), p. 1.

²⁰ F00425CONFRED, Confidential Redacted Version of ‘Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11’, 13 February 2023 (confidential), paras. 1, 16; F00482CONFRED, Confidential redacted version of Decision on the Specialist Prosecutor’s request for

21. The SPO's purported justification for the change of its position, namely that it "no longer deems it necessary to call TW4-04 as a live witness, as his evidence has become cumulative and corroborative in nature", fails to justify the interference with the Accused's right to confront witnesses against him and is inconsistent with the Panel's explicit preference for hearing witnesses live.²¹ In addition, the SPO fails to demonstrate that the reason purporting to justify their changed position was not known to them in advance or could not have been foreseen when the SPO initially presented the mode of testimony of its anticipated witnesses. The SPO entirely fails to specify what evidence was elicited from other witnesses that could not have been foreseen and had the unanticipated result that TW4-04's evidence became—as it claims—cumulative and corroborative at the present stage. As stated in Rule 141(1) of the Rules, the general principle is that the testimony of a witness shall be given in person. The SPO entirely fails to justify that any exception to the general rule, particularly at the present stage of the proceedings, is required.

B. Right of the Accused to Confront Witnesses Against Him

22. The European Court of Human Rights ("ECtHR") has repeatedly held that "Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument".²² The ECtHR has consistently found that "an important element of fair criminal proceedings is the possibility for the accused to be confronted with a witness in the presence

video-conference testimony for TW4-04, TW4-10 and TW4-11, 13 April 2023 (confidential), paras. 21, 23(a).

²¹ Application, para. 5; F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, para. 30.

²² ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, 15 December 2011, para. 118; *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015, para. 103; *Dan v. The Republic of Moldova (No. 2)*, no. 57575/14, 10 November 2020, para. 50; *P.K. v. Finland*, no. 37442/97, 9 July 2002, para. 1.

of the judge who will ultimately decide the case. This principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused".²³

23. The ECtHR has also held that the appearance of key witnesses before the trial court is of crucial importance to enable it to make an effective assessment of the witnesses' demeanour and reliability of their deposition.²⁴ Notably, the ECtHR has held that a trial court's careful examination of key witnesses and the opportunity to contest their evidence at trial "can scarcely be regarded as a proper substitute for a personal observation of the leading witnesses giving oral evidence".²⁵ The ECtHR has repeatedly found a violation of the right to a fair trial where a relatively large number of prosecution witnesses, whose statements had been taken at the pre-trial stage, did not attend the trial and had their statements instead read out at the hearings.²⁶ Strasbourg case law requires that it be convincingly shown that there are good reasons for the non-attendance of witnesses, that the courts make a reasonable effort to secure their attendance, or that there are sufficient counterbalancing factors permitting a fair and proper assessment of the reliability of those statements.²⁷
24. The SPO's purported justification is not an acceptable limitation of the Accused's right to confront Prosecution witnesses against him. Since the start of the trial, the SPO has extensively tried to admit the evidence of witnesses

²³ ECtHR, *Chernika v. Ukraine*, no. 53791/11, 12 March 2020, para. 47; *Dan v. The Republic of Moldova* (No. 2), no. 57575/14, 10 November 2020, para. 51; *P.K. v. Finland*, no. 37442/97, 9 July 2002, para. 1.

²⁴ ECtHR, *Melnikov v. Russia*, no. 23610/03, 14 January 2010, paras. 79-81.

²⁵ ECtHR, *Karpenko v. Russia*, no. 5605/04, 12 March 2012, para. 69.

²⁶ See, for instance, ECtHR, *Asadbeyli and others v. Azerbaijan*, nos. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, 11 December 2012, para. 134; *J.B. v. The Czech Republic*, no. 44438/06, 21 July 2011, paras. 56-58; *Sadak and Others v. Turkey* (No. 1), nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, paras. 64-68; *Lucà v. Italy*, no. 33354/96, 27 February 2001, para. 39; *Delta v. France*, no. 11444/85, 19 December 1990, paras. 36, 37.

²⁷ *Ibid.*

who were scheduled to testify live in writing (W04379, TW4-01, TW4-02, and TW4-04) or via video-conference link instead of live in court (TW4-04, TW4-10, and TW4-11).²⁸ The SPO fails entirely to substantiate the reasons prompting such late re-assessment of the mode of testimony for TW4-04 or indeed why, it needed to wait to see how the evidence of TW4-01 unfolded. Out of a total of seventeen Prosecution witnesses, five are deceased or unavailable and the SPO proposes to present the evidence of two more pursuant to Rule 153 of the Rules.²⁹

25. The present Application must be considered along all other procedural decisions made by the SPO regarding the presentation of its witnesses and associated evidence. The admission of the proposed evidence of TW4-04 under Rule 153 of the Rules will constitute an interference with the right of the Accused to confront witnesses against him and seriously prejudice the fairness of the trial and the rights of the Accused. Given the number of witnesses that are already unavailable and cannot testify live, the interests of justice militate in favor of allowing the Accused to confront all available witnesses live, including TW4-04. While the SPO is entitled to decide how it will present its case, it does not have absolute discretion in this respect particularly where its decisions entail an interference with the rights of the Accused. Given that the SPO's purported manner of proceeding limits the right of the Accused to confront witnesses against him, the Panel must proceed with the utmost

²⁸ Application, paras. 1, 29; F00513, Prosecution application for the admission of TW4-02's evidence pursuant to Rule 153 with confidential Annex 1, 17 May 2023 (confidential); F00427, Confidential Redacted Version of 'Prosecution notification concerning W04379', 16 February 2023 (confidential), para. 3; F00463, Prosecution motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-6, 20 March 2023 (confidential), para. 1; F00465, Prosecution motion for admission of evidence of TW4-01 pursuant to Rule 154 with confidential Annexes 1 and 2, 20 March 2023 (confidential); F00425CONFRED, Confidential Redacted Version of 'Prosecution request for video-conference testimony for TW4-04, TW4-10, and TW4-11', 13 February 2023 (confidential).

²⁹ F00539, A01, ANNEX 1 to Notification of dates and mode of testimony of witnesses for the fourth evidentiary block, 9 June 2023 (confidential).

caution and require rigorous justification of the purported interference. The SPO has clearly failed to justify the proposed limitation of the right of the Accused to confront witnesses against him.

C. The Proposed Evidence Fails to Meet the Requirements of Rules 153 and 138(1) of the Rules

26. The proposed evidence of TW4-04 cannot be admitted under Rule 153 of the Rules as it relates in effect to the alleged acts and conduct of the Accused and directly concerns fundamental aspects of the SPO's case against the Accused, including numerous issues subject to dispute. Furthermore, the proposed evidence is neither cumulative nor corroborative to that of other witnesses who have testified in this trial.

(a) The proposed evidence concerns the acts and conduct of the Accused

27. The SPO argues that "[t]he expression 'acts and conduct of the Accused' encompasses exclusively those actions and omissions of the Accused which are described in the charges brought against him, or which are otherwise relied upon to establish his criminal responsibility. Such expression does not encompass the conduct of others which is attributable to the Accused under certain modes of liability".³⁰

28. However, as the Appeals Chamber at the International Criminal Court has found, "[t]estimony used to prove the accused's acts and conduct may indeed describe the acts and conduct of the accused directly, or it may, for example, describe the acts and conduct of individuals in an organisation that the accused was an integral member of, or of individuals over whom he or she had authority. Depending upon the nature of the allegations, the latter testimony

³⁰ Application, para. 7.

may still fall into the category of evidence that may be used, together with other evidence, to prove acts and conduct of the accused”.³¹

29. The SPO states that the proposed evidence of TW4-04 discusses “the existence of a KLA base at the Kukës Metal Factory”, “the existence of a detention centre at the Kukës Metal Factory”, “the identity of certain detainees”, “the involvement of Xhemshit KRASNIQI in TW4-04’s arrest” and “with detentions”, and “the presence of certain individuals amongst the prison staff and detainees”.³² This evidence clearly concerns facts on which the SPO relies to substantiate the alleged criminal responsibility of the Accused; including the use of Kukës Metal Factory as a detention facility by the Kosovo Liberation Army, the crimes committed and the alleged events therein, and the presence and conduct of a member in a Joint Criminal Enterprise. The SPO is relying on these elements to present the alleged criminal liability of the Accused as set out in the Indictment.
30. Contrary to what the SPO asserts, the proposed evidence goes to the acts and conduct of the Accused.³³ As such, it fails to meet the requirements under Rule 153(1) of the Rules. The admission of evidence that goes to prove the acts and conduct of the Accused in written form would cause undue prejudice.
- (b) The proposed evidence is neither cumulative nor corroborative

³¹ ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18 OA4, Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant of Rule 68(2)(b) of the Rules”, 13 May 2022, para. 54, referring to ICTR, Case No. ICTR-98-44-T, *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Decision on Prosecutor’s Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9.

³² Application, paras. 5, 8.

³³ Application, paras. 2, 8.

31. Contrary to what the SPO claims,³⁴ the proposed evidence of TW4-04 is not cumulative nor does it corroborate the evidence of other witnesses who have testified in this trial.
32. For instance, contrary to what the SPO argues, the evidence of TW4-04 is not corroborative of the evidence of TW4-01. The SPO states that TW4-04's evidence "corroborates TW4-01's account that on the night of [REDACTED]."³⁵ However, it was [REDACTED] who allegedly told TW4-04 after the war that it was [REDACTED].³⁶
33. The SPO also argues that TW4-04's evidence is cumulative and corroborative of the live testimony of TW4-11, yet when TW4-11 provided his testimony before the Panel, he notably does not even mention TW4-04 at all.³⁷

(c) The proposed evidence pertains to issues central to the Prosecution's case

34. Not only is the proposed evidence not cumulative in nature, but it contains information pertaining to issues central to the Prosecution's case which have not been presented by the SPO to date.
35. For example, during the testimony of TW4-01 before the Panel, the Prosecution stated that it is their position that TW4-04 and TW4-02—for whom a similar request under Rule 153 of the Rules is currently pending—were detained [REDACTED].³⁸ However, according to their respective statements, TW4-02

³⁴ Application, paras. 9-21.

³⁵ Application, para. 14.

³⁶ ERN SITF00013262-00013315 RED, p. 15; ERN SITF00015825-00015925 RED, p. 28; ERN SPOE00014669-00014751 RED, p. 29; ERN 064716-TR-ET Part 5 RED4, pp. 13, 14.

³⁷ Application, paras. 12, 13, 16, 18, 19, 20.

³⁸ T. 6 June 2023 pp. 1898, 1900; F00513, Prosecution application for the admission of TW4-02's evidence pursuant to Rule 153 with confidential Annex 1, 17 May 2023 (confidential).

and TW4-04 were allegedly not detained [REDACTED].³⁹ TW4-02 stated that when he was at Kukës, TW4-04 was detained [REDACTED].⁴⁰ TW4-04 stated that he initially [REDACTED]; however, when TW4-02 was [REDACTED], TW4-04 was [REDACTED].⁴¹ TW4-04 and TW4-02 are the only Prosecution witnesses that were allegedly detained [REDACTED]. Given that the SPO has requested the admission of both of their evidence under Rule 153 of the Rules, should the applications be granted, it would mean that no witness allegedly detained [REDACTED] will testify live, including on the the identity and presence of detainees [REDACTED].

36. TW4-04 is the only witness who has provided evidence on an alleged formal release procedure and also stated that [REDACTED] was responsible for his release.⁴² During his interview with the SPO in [REDACTED], TW4-04 stated that [REDACTED] brought him to a court, where the judge, [REDACTED], issued a formal decision to release him.⁴³
37. TW4-04 has also stated that [REDACTED] was responsible for his detention by the KLA and that [REDACTED] was motivated by revenge.⁴⁴ Furthermore, TW4-04 has provided evidence on the relationship between [REDACTED] and Xhemshit Krasniqi, stating that they were both involved in [REDACTED].⁴⁵

³⁹ ERN SITF00374903-00374904 RED4, p. 2; ERN 060664-TR-ET Part 5 RED4, p. 1; ERN SITF00013262-00013315 RED, pp. 10, 11; ERN SITF00015825-00015925 RED, pp. 19, 31; ERN 064716-TR-ET Part 5 RED4, pp. 6, 11; ERN 064716-TR-ET Part 3 RED4, p. 14.

⁴⁰ ERN SITF00374903-00374904 RED4, p. 2; ERN 060664-TR-ET Part 5 RED4, p. 1.

⁴¹ ERN SITF00013262-00013315 RED, pp. 10, 11; ERN SITF00015825-00015925 RED, pp. 19, 31; ERN 064716-TR-ET Part 5 RED4, pp. 6, 11; ERN 064716-TR-ET Part 3 RED4, p. 14.

⁴² ERN 064716-TR-ET Part 1 RED3, pp. 16, 17; ERN 064716-TR-ET Part 4 RED3, pp. 16, 18; ERN SITF00013262-00013315 RED, p. 13; ERN SITF00015825-00015925 RED, p. 30; ERN SPOE00014669-00014751 RED, p. 37.

⁴³ ERN 064716-TR-ET Part 4 RED3, p. 19.

⁴⁴ ERN SITF00013262-00013315 RED, pp. 3, 9; ERN 064716-TR-ET Part 1 RED3, pp. 15-17.

⁴⁵ ERN 064716-TR-ET Part 2 RED3, p. 28.

38. TW4-04's evidence concerns a number of important and contentious issues in this case, which constitutes a factor militating against its admission *in lieu* of oral testimony under Rule 153(1)(b) of the Rules.
- (d) The proposed evidence is unreliable
39. Contrary to what the SPO asserts,⁴⁶ the proposed evidence of TW4-04 is unreliable and, thus, fails to meet the requirements under Rule 138(1) of the Rules.
40. The evidence of TW4-04 includes potential inconsistencies and contradictions on different issues central to the Prosecution's case. For instance, in its Application, the SPO states that "[a]round the end of May or beginning of June 1999, TW4-04 was transferred [...] to the Kukës Metal Factory, where he was held for approximately [REDACTED].⁴⁷ However, based on different accounts given by TW4-04, the number of days actually ranges from [REDACTED].⁴⁸
41. The SPO submits that "TW4-04 also states that during his detention at the KLA headquarters in Kukës he once heard shots".⁴⁹ While TW4-04 has stated this, he also claimed both in [REDACTED] and [REDACTED] that he heard shots being fired every night in Kukës.⁵⁰
42. The SPO states that "TW4-04 also learnt from other prisoners when going to the toilet that [REDACTED].⁵¹ While TW4-04 has stated this, in [REDACTED] he instead asserted that the new police officers/guards in Kukës were the ones

⁴⁶ Application, para. 21.

⁴⁷ Application, para. 12.

⁴⁸ ERN 108826-TR-ET Part 1 RED, pp. 7, 10, 13; ERN 107743-107743, para. 2; ERN SITF00015825-00015925 RED, p. 30.

⁴⁹ Application, para. 14.

⁵⁰ ERN SPOE00014669-00014751 RED, p. 27; ERN 064716-TR-ET Part 5 RED4, p. 14.

⁵¹ Application, para. 15.

who told him that [REDACTED].⁵² Then, in [REDACTED], he stated that he did not know when he was at Kukës that [REDACTED], but only learnt about it afterwards.⁵³ Similarly, in [REDACTED], TW4-04 stated that he heard about [REDACTED] only afterwards when he was in Prizren.⁵⁴

43. Finally, in arguing that the proposed evidence of TW4-04 satisfies the procedural requirements in Rule 153(2) of the Rules, the SPO states that “[t]he SPO Interviews [in [REDACTED] and [REDACTED]] are *verbatim* transcripts generated from audio-video recordings of TW4-04’s interviews”.⁵⁵ The Defence has no access to these audio-video recordings and therefore cannot verify this allegation. In addition, in the transcripts of these two interviews, there are many excerpts where overlapping speakers prevented keeping a satisfactory record of what was stated.⁵⁶
44. The evident unreliability of the proposed evidence of TW4-04 is a factor militating against its admission under Rule 153(1)(b) of the Rules. In these circumstances, the admission of the proposed evidence would cause undue prejudice to the Accused. Given the inconsistencies and contradictions on different important matters in TW4-04’s evidence, the interests of justice require that TW4-04 be ordered to testify live when giving evidence to enable a proper assessment of his demeanour and credibility.
45. As shown above, the SPO has failed to demonstrate the existence of sufficient reasons that can justify the proposed limitation of the Accused’s right to confront TW4-04 live. The proposed evidence is not suitable for admission

⁵² ERN SITF00013262-00013315 RED, p. 15.

⁵³ ERN SITF00015825-00015925 RED, p. 27.

⁵⁴ ERN 064716-TR-ET Part 5 RED4, p. 13.

⁵⁵ Application, para. 22.

⁵⁶ ERN 064716-TR-ET Part 1 RED3, pp. 11, 26, 32; ERN 064716-TR-ET Part 3 RED4, pp. 14, 26; ERN 064716-TR-ET Part 4 RED3, p. 18; ERN 064716-TR-ET Part 5 RED4, pp. 11, 12, 30; ERN 108826-TR-ET Part 1 RED, p. 12.

under Rule 153 of the Rules, and its admission will further add to the prejudice caused to the rights of the Accused. The Application should be rejected to maintain the fairness of the proceedings.

46. Should the SPO be permitted to proceed in the manner it proposes, even if the witness is ultimately called for cross-examination, the Panel and the Accused will be deprived of the opportunity to observe the examination-in-chief of an important witness and the Accused will be left in a disadvantaged position when it comes to challenging the witness's evidence. He will not have the benefit of exploring possible contradictions and inconsistencies between prior statements and the witness's evidence in chief, the inconsistency between the witness's various accounts, the accuracy and plausibility of the information provided, as well as the witness's readiness, willingness, and manner of responding to questions from the SPO, the Victim's Counsel and, should no cross-examination be permitted, the Defence. Given that the evidence of TW4-04 concerns critical elements of the Prosecution's case TW4-04 must be called to testify so that his evidence can be fully tested at trial.

V. CLASSIFICATION


47. Pursuant to Rules 82(3) and 82(4) of the Rules, the Response is filed as confidential as it relates to a confidential filing and contains confidential information. The Defence will file a public redacted version of the Response in due course.

VI. RELIEF REQUESTED

48. The Defence respectfully requests the Panel to reject the Application and order the SPO to call TW4-04 to testify live via video-conference as previously envisaged.

Word count: 5003

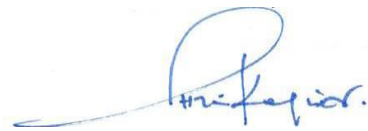
Respectfully submitted,



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Thursday, 22 June 2023

The Hague, the Netherlands