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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:	5 July 2023
Filing Party:	Specialist Defence Counsel
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of Defence Request for Certification to Appeal the "Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules"

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I. INTRODUCTION

1. Pursuant to the Trial Panel ("Panel")'s "Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules", Article 45(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rule 77 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 this Request seeking certification to appeal the "Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules".[1]

2. In the Impugned Decision, the Panel granted the "Prosecution application for the admission of TW4-02's evidence pursuant to Rule 153" and the "Prosecution application for the admission of TW4-04's evidence pursuant to Rule 153", admitting the proposed evidence of TW4-02 and TW4-04 in writing and their associated exhibits under Rule 153 of the Rules *in lieu* of their oral testimony.[2] Moreover, the Panel found that the impossibility for the Defence to examine TW4-02 and TW4-04 "does not adversely affect the Accused's position and overall right to examine the witnesses against him", as the Defence has cross-examined other witnesses whose evidence was considered cumulative and corroborative of the proposed evidence of TW4-02 and TW4-04.[3]

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[1] KSC-BC-2020-04, F00556, Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, 23 June 2023 (confidential) ("Impugned Decision"), paras. 53, 54(g). All further references to filings in this Request concern Case No. KSC-BC-2020-04 unless otherwise indicated.

[2] Impugned Decision, paras. 40, 51; F00513, Prosecution application for the admission of TW4-02's evidence pursuant to Rule 153 with confidential Annex 1, 17 May 2023 (confidential) ("Request Concerning TW4-02"); F00546, Prosecution application for the admission of TW4-04's evidence pursuant to Rule 153 with confidential Annex 1, 14 June 2023 (confidential) ("Request Concerning TW4-04").

[3] Impugned Decision, paras. 34, 45.

3. The Defence submits that in the Impugned Decision, the Panel committed a number of errors, which violate the rights of the Accused and warrant appellate consideration.

4. The Defence proposes the following issues for certification:

(i) *Whether the Panel erred in interpreting and applying the requirement concerning the "acts and conduct of the Accused" restrictively and inconsistently with Article 6 of the ECHR;*[4]

(ii) *Whether the Panel erred by failing to consider and apply the correct test for accepting interferences with Article 6 of the ECHR only when required for a legitimate aim and when the impugned measure is strictly necessary and the least restrictive;*[5] *and*

(iii) *Whether the Panel erred by depriving the Accused of the opportunity to confront TW4-02 and TW4-04 and, by doing so, violated his right to examine witnesses against him.*[6]

II. PROCEDURAL BACKGROUND

5. On 24 February 2023, the Panel issued the "Decision on the conduct of the proceedings", in which it ordered the Specialist Prosecutor's Office ("SPO") to file any applications under Rule 153 of the Rules by 20 March 2023.[7]

6. On 17 May 2023, the SPO sought the admission into evidence of the transcripts of TW4-02's interviews with the SPO in [REDACTED] and [REDACTED] as

[4] Impugned Decision, paras. 20, 32, 43.
[5] Impugned Decision, paras. 34, 39, 45, 49.
[6] Impugned Decision, paras. 34, 39, 45, 49.
[7] F00434, Decision on the Conduct of the Proceedings, 24 February 2023 (confidential), para. 67.

well as the associated exhibits used during the two interviews, *in lieu* of his oral testimony under Rule 153 of the Rules.[8]

7. On 25 May 2023, the Defence responded to the Request Concerning TW4-02, requesting the Panel to reject it and call TW4-02 to testify live as scheduled.[9]

8. On 5 June 2023, the SPO replied to the Defence response to the Request Concerning TW4-02.[10]

9. On 14 June 2023, the SPO sought the admission into evidence 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, *in lieu* of his oral testimony under Rule 153 of the Rules.[11]

10. On 19 June 2023, the Defence responded to the Request Concerning TW4-04, requesting the Panel to reject it and call TW4-04 to testify live as scheduled.[12]

11. On 23 June 2023, the Panel issued the Impugned Decision.

III. APPLICABLE LAW

12. Article 45(2) of the KSC Law and Rule 77 of the Rules provide that the party seeking certification for interlocutory appeal must demonstrate the existence of an issue that would: (i) significantly affect the fair and expeditious conduct of

[8] Request Concerning TW4-02, paras. 1, 20, n. 3.
[9] F00523, Defence Response to the Prosecution Application for the Admission of TW4-02's Evidence Pursuant to Rule 153, 25 May 2023 (confidential) ("Defence Response to Request Concerning TW4-02"), paras. 2, 39.
[10] F00532, Prosecution Reply to KSC-BC-2020-04/F00523, 5 June 2023 (confidential).
[11] Request Concerning TW4-04, paras. 1, 29.
[12] F00550, Defence Response to the Prosecution Application for the Admission of TW4-04's Evidence Pursuant to Rule 153, 19 June 2023 (confidential) ("Defence Response to Request Concerning TW4-04"), paras. 2, 48.

the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial; and for which (ii) the immediate resolution by a Court of Appeals Panel may materially advance the proceedings.

13. Article 46(4) of the KSC Law provides that "[w]hen the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard."

14. As established in early KSC appellate jurisprudence, in relation to an error of law, "[a] party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law."[13]

15. Article 46(5) of the KSC provides that "[i]n reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation

[13] KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 12.

of the evidence is wholly erroneous."[14] In addition, the factual error must have "caused a miscarriage of justice" by affecting the outcome of the decision.[15]

IV. SUBMISSIONS

A. The Issues Are Appealable

16. The Defence submits that the proposed issues are sufficiently concrete, precise, and arise directly from the Impugned Decision.

17. All issues concern the Accused's fundamental rights, and in order to give full effect to his right to a fair trial, including his right to examine witnesses against him, and afford him an effective remedy that can ensure that these proceedings are conducted in a fair manner, certification to appeal the proposed issues must be granted.

(i) *Whether the Panel erred in interpreting and applying the requirement concerning the "acts and conduct of the Accused" restrictively and inconsistently with Article 6 of the ECHR.*[16]

18. The Defence submits that the Panel erred in interpreting the requirement concerning the "acts and conduct of the Accused" in Rule 153(1) of the Rules as referring "exclusively to the personal actions and omissions of the Accused, thus not encompassing the actions and omissions of others which are attributable to the accused under the modes of liability charged by the SPO".[17] This overly restrictive interpretation is inconsistent with the Accused's right to a fair trial.

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[14] *See also* KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 13.
[15] KSC-BC-2020-07, IA001, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 13.
[16] Impugned Decision, paras. 20, 32, 43.
[17] Impugned Decision, para. 32. *See also* Impugned Decision, paras. 20, 43.

19. Cross-examination is a fundamental right of the Accused under Article 6(3)(d) of the ECHR, Article 14(3)(e) of the International Covenant on Civil and Political Rights, Article 21(4)(f) of the KSC Law, and Article 31(4) of the Kosovo Constitution. The right to cross-examine becomes undisputed when a statement goes to proof of the acts and conduct of the accused as charged in the indictment and, respectively, such evidence may not be admitted if cross-examination is not permitted. The interpretation of the notion "acts and conduct of the accused" is therefore crucial in this respect. The Defence submits that the Panel erred in its aforesaid assessment as it failed to acknowledge the manner in which the SPO relies on the testimony of TW4-02 and TW4-04 to demonstrate the alleged conduct of the Accused. The interpretation proposed by the Defence is consistent with the case law of other international criminal tribunals. As stressed in the *Galić* Appeals Decision, "[t]he 'conduct' of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that state of mind is not admissible under Rule 92*bis*. In order to establish that state of mind, however, the prosecution may rely upon the acts and conduct of others which have been proved by Rule 92*bis* statements. An easy example would be proof […] of the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population. Such knowledge may be inferred from evidence of such a pattern of attacks (proved by Rule 92*bis* statements) that he must have known that his own acts (proved by oral evidence) fitted into that pattern."[18]

20. Importantly, as the Appeals Chamber in *Galić* further acknowledged, "[w]here the evidence is so pivotal to the prosecution case, and whether the person

[18] ICTY, *Prosecutor v. Stanislav Galić,* Case No. IT-98-28-AR73.2, Decision on Interlocutory Appeal Concerning Rule *92bis(c),* 7 June 2002, para. 16.

whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form. An easy example of where the exercise of that discretion would lead to the rejection of a written statement would be where the acts and conduct of a person other than the accused described in the written statement occurred in the presence of the accused."[19]

21. TW4-02 provides information on Xhemshit Krasniqi, a member of the alleged JCE presented in the Indictment who allegedly held a role in [REDACTED].[20] TW4-02 states that he has extensive knowledge surrounding the [REDACTED] which is evidence that goes to the acts and conduct of the Accused. Importantly, TW4-02 who describes being detained at Kukës states that he does not know who the Accused is.[21] This is clear evidence related to the acts and conduct of the Accused, as it goes directly to the presence of the Accused at Kukës which is a crucial issue in this trial. Moreover, TW4-02's account provides important information related to [REDACTED] and describes various [REDACTED], before and after his detention. TW4-02's period of arrest and detention is different to that of other [REDACTED] while TW4-02's testimony appears to confirm a central allegation of the Defence concerning the poor quality of the evidence by central Prosecution witness TW4-01 given the serious

[19] ICTY, *Prosecutor v. Stanislav Galić,* Case No. IT-98-28-AR73.2, Decision on Interlocutory Appeal Concerning Rule *92bis(c),* 7 June 2002, para. 13; *Prosecutor v. Brđanin & Talić,* Case No. IT-99-36-T, Decision on the Admission of Rule 92*bis* Statements, 1 May 2002, para. 14.
[20] ERN SITF00374903-00374904 RED4, Redacted version of Information regarding a person named [REDACTED]. Person is identified as [TW4-02], mentioned by witness [REDACTED], dated [REDACTED], p. 2; 060664-TR-ET Part 3, SPO Interview of [TW4-02], dated [REDACTED], p. 18, lines 4-12; 060664-TR-ET Part 2, SPO Interview of [TW4-02], dated [REDACTED], p. 3; 060664-TR-ET Part 3, SPO Interview of [TW4-02], dated [REDACTED], p. 19.
[21] ERN 060664-TR-ET Part 5 RED4, SPO Interview of [TW4-02], dated [REDACTED], p. 13, lines 21-22.

discrepancies between the account given by TW4-01 and the proposed evidence of TW4-02.[22]

(ii) Whether the Panel erred in law by failing to consider and apply the correct test for accepting interferences with Article 6 of the ECHR only when required for a legitimate aim and when the impugned measure is strictly necessary and the least restrictive[23]

22. The Panel erred by interpreting the right to examine witnesses inconsistently with Article 6 of the ECHR, which requires rigorous justification of any proposed restriction of the right.

23. Pursuant to Article 6(3)(d) of the ECHR, 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. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[24]

24. Moreover, the ECtHR has repeatedly held that, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement *in lieu* of live evidence must be a measure of last resort.[25] The

[22] ERN 060664-TR-ET Part 5 RED4, Interview of [TW4-02], dated [REDACTED], p. 2, l. 21- p. 3, l. 6; SITF00374903-00374904 RED4, Redacted version of Information regarding a person named [REDACTED]. Person is identified as [TW4-02], mentioned by witness [REDACTED], dated [REDACTED], p. 2.
[23] Impugned Decision, paras. 34, 39, 45, 49.
[24] *Al-Khawaja and Tahery v.the United Kingdom* [GC], nos. 26766/05 and 22228/06, 15 December 2011, para. 118; *Hu¨mmer v. Germany*, no. 26171/07, 19 July 2012, para. 38; *Lucà v. Italy*, no. 33354/96, 27 February 2001, para. 39; *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, 31 October 2001, para. 57.
[25] *Al-Khawaja and Tahery v.the United Kingdom* [GC], para. 125; *Seton v. the United Kingdom*, no. 55287/10, 31 March 2016, para. 58; *Dimović and Others v. Serbia*, no. 7203/12, 11 December 2018, para. 54.

ECtHR has found that admitting as evidence statements of absent witnesses results in a potential disadvantage for the accused, who should have an effective opportunity to challenge the evidence against him.[26] In particular, the accused should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings.[27] In this case, as the Defence has previously submitted, the proposed evidence of TW4-02 and TW4-04 contains many inconsistencies and contradictions and TW4-02 also has a long criminal record, which render their evidence unreliable.[28] The Accused should be given the opportunity to test the truthfulness and reliability of their evidence, by having them testify in his presence.

25. The Panel has failed to justify the limitation of the right of the Accused to confront witnesses against him as guaranteed by Article 6 of the ECHR. It has not sought or made a finding that the limitation to the rights of the Accused was justified by the SPO as strictly necessary. It has failed to consider applying the least restrictive measure but simply deprived the Accused's right to examine TW4-02 and TW4-04, including not addressing at all why the Defence should be deprived of every opportunity to cross-examine them.

(iii) Whether the Panel erred by depriving the Accused of the opportunity to confront TW4-02 and TW4-04 and, by doing so, violated his right to examine witnesses against him.[29]

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[26] *Al-Khawaja and Tahery v.the United Kingdom* [GC], para. 127; *Seton v. the United Kingdom*, no. 55287/10, 31 March 2016, para. 58; *Dimović and Others v. Serbia*, no. 7203/12, 11 December 2018, para. 54.
[27] *Al-Khawaja and Tahery v.the United Kingdom* [GC], para. 127; *Seton v. the United Kingdom*, no. 55287/10, 31 March 2016, para. 58; *Dimović and Others v. Serbia*, no. 7203/12, 11 December 2018, para. 54.
[28] Defence Response to Request Concerning TW4-02, paras. 33-35, 37; Defence Response to Request Concerning TW4-04, paras. 39-42, 44, 46.
[29] Impugned Decision, paras. 34, 39, 45, 49.

26. The Panel erred by finding that depriving the Defence of the opportunity to confront TW4-02 and TW4-04 is not prejudicial to the Accused's right to examine witnesses against him as the Defence can examine other witnesses.[30] As the Defence has previously submitted, the proposed evidence of TW4-02 and TW4-04 is neither cumulative nor corroborative of the evidence of other witnesses.[31] The Panel failed to address these submissions. Having the opportunity to confront the two witnesses is essential to allow the Defence to explore the contradictions and inconsistencies among their various prior statements, the accuracy and plausibility of the information provided, including on central issues in this case, as well as their demeanour and credibility.[32] TW4-02 and TW4-04 provide information going beyond or contradicting that of other witnesses who have testified live in this trial as well as each other's evidence.[33] TW4-02 and TW4-04 are the only [REDACTED] witnesses in this case who were allegedly [REDACTED] from the other witnesses, making their testimony crucial for the case.[34] They provide information on the identity and presence of other alleged detainees [REDACTED]as well as information on additional [REDACTED] who were allegedly involved with the detentions.[35] It is unfair and plainly wrong to assume that the Defence suffers no prejudice because it can examine other witnesses. Moreover, as the Panel issued the Impugned Decision depriving the Defence the opportunity to confront TW4-02 and TW4-04 after the other

[30] Impugned Decision, paras. 34, 45.
[31] Defence Response to Request Concerning TW4-02, paras. 25-27; Defence Response to Request Concerning TW4-04, paras. 31-33.
[32] Defence Response to Request Concerning TW4-02, para. 37; Defence Response to Request Concerning TW4-04, para. 46.
[33] Defence Response to Request Concerning TW4-02, paras. 25-27, 29-31; Defence Response to Request Concerning TW4-04, paras. 31-37, 40-42.
[34] Defence Response to Request Concerning TW4-02, para. 30; Defence Response to Request Concerning TW4-04, paras. 32, 35.
[35] Defence Response to Request Concerning TW4-02, para. 30; Defence Response to Request Concerning TW4-04, paras. 32, 35, 37.

witnesses were heard, including, notably, TW4-01, TW4-10, and TW4-11, there is no redress for the Defence.[36]

27. It is unfair and plainly wrong to assume that the Defence suffers no prejudice because it can examine other witnesses. Moreover, as the Panel issued the Impugned Decision depriving the Defence the opportunity to confront TW4-02 and TW4-04 after these witnesses were heard, including, notably, TW4-01, TW4-10, and TW4-11, there is no redress for the Defence.[37]

28. Article 6 of the ECHR guarantees the right of the Accused to have witnesses against him called to give oral evidence and be subjected to cross-examination. The Defence has had no opportunity to confront the witnesses at an earlier stage of the proceedings. The Panel did not provide solid justification for the restriction of this right. The Panel did not consider the possibility of introducing the evidence in a less restrictive manner for the Defence. The Defence is completely deprived of every possibility to challenge the credibility of the two witnesses. The European Court of Human Rights ("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.[38] Moreover, the ECtHR has held that an accused has the right to adversarial proceedings and to equality of arms.[39] All the evidence must normally be produced at a public hearing in the presence of the accused; there

[36] Impugned Decision, paras. 34, 45.
[37] Impugned Decision, paras. 34, 45.
[38] *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.
[39] ECtHR, *Dowsett v. The United Kingdom*, no. 39482/98, 24 September 2003, paras. 41, 43; *Kornev and Karpenko v. Ukraine*, no. 17444/04, 21 October 2010, para. 54; *Ali v. Romania*, no. 20307/02, 9 November 2010, paras. 98, 101.

are exceptions to this principle, but they must not infringe the rights of the Defence.[40]

29. By depriving the Accused of his right to cross-examine TW4-02 and TW4-04, the Panel is depriving the Accused of the opportunity to obtain and challenge the testimony of two important Prosecution witnesses on critical issues and important actors in the case as set out in the Indictment. Specifically, both witnesses have provided information on the identity and presence of other alleged detainees in the [REDACTED] as well as additional [REDACTED] who were allegedly involved in the alleged detention regime.[41] Furthermore, in relation to TW4-02, the Defence was prepared to explore TW4-02's status as the only alleged detainee at the Kukës Metal Factory who was a [REDACTED] and the only [REDACTED] witness who was questioned by the [REDACTED], both before and during his alleged detention at the Kukës Metal Factory.[42] No other Prosecution witness is able to provide information on these issues. Similarly, for TW4-04, he would have been able to provide crucial clarification regarding his statement that [REDACTED] was brought to [REDACTED] on the [REDACTED], information which he allegedly received from [REDACTED].[43] However, during the live testimony of TW4-01, the [REDACTED], TW4-01 stated that [REDACTED] was brought to [REDACTED] that [REDACTED], before TW4-02 was allegedly detained .[44]

30. Furthermore, the deprivation of the Accused's right to cross-examine witnesses against him is compounded by the fact that that the Defence has only been permitted to cross-examine Prosecution witnesses in a limited manner. For

[40] ECtHR, *Kornev and Karpenko v. Ukraine*, para. 54.
[41] Defence Response to Request Concerning TW4-02, para. 30; Defence Response to Request Concerning TW4-04, paras. 32, 35, 37.
[42] Defence Response to Request Concerning TW4-02, paras. 31, 32.
[43] Defence Response to Request Concerning TW4-04, para. 32.
[44] T. 31 May 2023 p. 1523; T. 2 June 2023 pp. 1657, 1658.

instance, during the live testimony of TW4-08 on 27 March 2023, the Defence has been interrupted several times during its cross-examination and asked to abandon or rephrase its questions to the witness, or had its questions rephrased or added to by the Panel.[45] Similarly, during the live testimony of TW4-01 on 5 June 2023, the Defence was repeatedly interrupted by the Panel and requested to rephrase or not pursue certain lines of questioning.[46]

31. Contrary to what the Panel has found, the admission of the proposed evidence of TW4-02 and TW4-04 under Rule 153 of the Rules violates the right of the Accused to examine witnesses against him and causes undue prejudice to the fairness of the trial and the rights of the Accused.[47]

B. The Issues Significantly Affect the Fair Conduct of the Proceedings as Well as the Outcome of the Trial

32. The issues identified in paragraph 4 of this Request go to the core of the fundamental rights of a fair trial, and in particular, the Accused's right to examine witnesses against him as protected by and Article 21(4)(f) of the KSC Law, Article 31(4) of the Constitution of Kosovo, and Article 6(3)(d) of the ECHR. If the Defence is correct, the trial will proceed in breach of the guarantees provided for by the Kosovo domestic law, the KSC legal framework, and the ECHR. In light of the inherent prejudicial nature of the Impugned Decision, which deprives the Accused of his right to examine witnesses against him, the prejudice suffered will be irreparable.

33. In light of the above, the Impugned Decision constitutes an unlawful interference with the Accused's right to a fair trial guaranteed by Article 21 of the KSC Law, Article 31 of the Kosovo Constitution, and Article 6 of the ECHR.

[45] *See* T. 27 March 2023 pp. 700, 711, 715, 717, 718, 721, 729.
[46] *See* T. 5 June 2023 pp. 1751, 1763, 1788, 1795.
[47] Impugned Decision, paras. 23, 39.

The appealable issues directly impact on the fairness of the proceedings and the outcome of the trial.

C. An Immediate Resolution by an Appeals Panel Will Materially Advance the Proceedings

34. A prompt determination by an Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness. Appellate intervention at the present stage will ensure that the proceedings can proceed in a narrow and effective way that respects the rights of the Accused, including his right to examine witnesses against him. Failure to consider the proposed issues now will prevent an effective remedy in the form of allowing the Defence to cross-examine the two witnesses. If the Defence is right, the consequences of proceeding without determination of these issues on appeal would be irremediable.

V. CLASSIFICATION

35. Pursuant to Rules 82(3) and 82(4) of the Rules, the Request 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 Request in due course.

VI. RELIEF REQUESTED

36. The Defence respectfully requests the Panel to grant the Request and certify the proposed issues in paragraph 4 for appeal.

Word count: 4436

Respectfully submitted,

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Wednesday, 5 July 2023

The Hague, the Netherlands