

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
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Public Redacted Version of ‘Joint Defence Response to ‘Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153’’

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I. INTRODUCTION

1. Evidence admitted through Rule 153 of the Rules¹ is **untested** evidence. It is admitted directly into the record of the case, without the safeguard of cross-examination by the adverse party. The Trial Panel is deprived of the advantages of live testimony, where “not only is the testimony given under oath and under the Chamber’s oversight, it enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications.”² The public is similarly deprived of hearing this evidence live, which necessarily impacts the transparency and publicity of these proceedings.

2. As such, Rule 153 is an exceptional procedure. It is another exception to the starting principle that accusations against an accused should be made by *viva voce* witnesses who are available for cross-examination,³ and who can attest to the reliability, relevance, and probative value of the evidence being presented.⁴ It is also an exception to the principle that the proceedings should be conducted in public.⁵

3. The SPO’s recitation of the applicable law correctly acknowledges that the decision to admit evidence under Rule 153 is discretionary, and rests with the Trial Panel. However, the SPO goes on to conclude that “[p]ut simply, where prior written evidence is relevant to proof of matters other than the acts and conduct of the Accused as charged and otherwise satisfies the general requirements for admissibility of

¹ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

² ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-685, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, para. 33.

³ ECtHR, *A.M. v. Italy*, 37019/97, Second Section, Judgment, 14 December 1999, para. 25.

⁴ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, p. 4, citing *Prosecutor v. Prlić et al.*, IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on conduct of Trial Proceedings, 28 April 2006, Guideline II(j).

⁵ Article 21(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

evidence, it is in the interests of justice and expeditious proceedings that such evidence be admitted.”⁶ This is because, according to the SPO, the admission of Rule 153 material expedites proceedings, thereby “preserving the rights of the Accused”.⁷

4. The SPO position fails to consider the impact of Rule 153 admission on the orality and publicity of the proceedings, or the complete circumvention of the right of the accused “to examine, or have examined, the witnesses against him or her”.⁸ Nor does the SPO consider the impact of the admission of untested Rule 153 evidence on the **size of the evidential record**. The Defence teams have been consistent in their collective concern about the volume of written evidence the SPO is seeking to introduce in this case, and the risks of creating an unmanageable trial record.⁹ The Trial Panel shares these concerns,¹⁰ which apply equally to the SPO’s Rule 153 Request. There will necessarily be a point at which the volume of untested evidence admitted will create an unmanageable trial record, which undermines any gains in the name of efficiency, or rights of the accused. Particularly considering that this untested Rule 153 evidence is of reduced weight.¹¹

5. For these reasons it cannot be, as the SPO suggests, a forgone conclusion that if the evidence does not address the acts and conduct of the accused, and otherwise meets the admissibility requirements, it should be admitted under Rule 153. The text

⁶ KSC-BC-2020-06/F01658, Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153, 7 July 2023 (“SPO Request”), 7 July 2023, para. 11.

⁷ SPO Request, para. 14.

⁸ KSC Law, Article 21(4)(f).

⁹ KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, pp. 1926-1934; KSC-BC-2020-06/F01308, Joint Defence Response to ‘Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W01236, W04337, and W03165 pursuant to Rule 154’, 20 February 2023, para. 1.

¹⁰ KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023 (“Rule 154 Decision”), paras. 29-31, 81.

¹¹ ICTY, *Prosecutor v. Martić*, IT-95-11-T, Judgement, 12 June 2007, para. 27; *Prosecutor v. Delić*, IT-04-83-T, Judgement, 15 September 2008, para. 36: “As regards evidence in statements and transcripts admitted without cross-examination, the Trial Chamber recalls that “the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement.”

of Rule 153 itself sets out a list of factors which may influence the admission of this material, which is framed in non-exhaustive terms. The practice of other international criminal courts also demonstrates that a multitude of other factors should be weighed by the finder of fact when deciding to adopt the - still exceptional - procedure of admitting untested evidence directly into the record, and out of the public eye. These other factors are discussed below, in relation to the evidence which the Defence submits is not properly admissible under Rule 153.

6. The Defence teams have different positions on two proposed Rule 153 witnesses. Notwithstanding these differences, and following the Trial Panel's encouragement of a joint filing, these submissions outline the positions of all Defence teams on each of the witnesses.¹²

II. PROCEDURAL BACKGROUND

7. The SPO first identified the specific modes of testimony for its witnesses, in an updated list of witnesses filed on 2 September 2022.¹³ This list included 51 witnesses whose evidence was proposed for admission through Rule 153. While this number has fluctuated in the period since, there are currently 70 witnesses whose evidence is proposed for admission through Rule 153.¹⁴

8. On 25 January 2023, the Trial Panel issued the 'Order on the Conduct of Proceedings', in which it instructed the parties to:¹⁵

conduct *inter partes* discussions with a view to identifying witnesses whose evidence could be tendered, by agreement, pursuant to Rules 153, 154 or 155. Where the Parties and participants agree on the admission of a witness's evidence pursuant to Rule 153,

¹² *Ibid.*, para. 7.

¹³ KSC-BC-2020-06/F00948/A02, Annex 2 - Prosecution submission of revised witness list, 2 September 2022.

¹⁴ See KSC-BC-2020-06/F01594/A02, Annex 2 - Confidential Redacted Version of 'Amended List of Witnesses', 9 June 2023.

¹⁵ KSC-BC-2020-06/F01226/A01, Annex 1 - Order on the Conduct of Proceedings, 25 January 2023 ('Order on the Conduct of Proceedings'), para. 39.

the Parties and participants are encouraged to reach an agreement as to whether they wish the Trial Panel to request the witness to appear for cross-examination.

9. The parties were also instructed to report to the Trial Panel on: (i) areas of agreement; and (ii) the basis and nature of any dispute.¹⁶

10. On 10 March 2023, the SPO provided the Defence with a list of 62 witnesses that they intended to tender through Rule 153. The SPO asked the Defence to confirm by 3 April whether they agreed with the evidence of these witnesses being tendered through Rule 153, and whether they wished the witnesses to appear for cross-examination.

11. On 17 March 2023, the Defence responded to the SPO's proposal, confirming it was amenable to attempting to reach agreement regarding admission of witnesses through this Rule. However, the Defence made a number of suggestions to improve the process, requesting the SPO divide the witnesses into more manageable groups of 10, and provide additional information in relation to the witnesses, including the written statements or transcripts proposed to be tendered for each witness, a description of the relevance of the evidence to the SPO's case and an indication of the factors in Rule 153 that may be applicable.

12. On 28 March 2023, the SPO confirmed that it would propose groups of approximately 10 witnesses for consideration on a rolling basis.

13. On 16 May 2023, the SPO provided a list of 10 witnesses proposed for admission pursuant to Rule 153, and requested the Defence respond by 1 June.

¹⁶ Order on the Conduct of Proceedings, para. 40.

14. On 1 June 2023, the Defence for Mr Thaçi provided the SPO with its preliminary submissions on the first 10 witnesses proposed. Also on 1 June 2023, the remaining defence teams jointly advised the SPO of their position on the proposed Rule 153 witnesses. The positions taken by the Defence overlapped in large part, with differences in position for only three of the ten witnesses.

15. On 7 July 2023, the Trial Panel issued a decision granting an SPO request for a variation of the word limit to file a formal Rule 153 motion, and granting a commensurate extension to the Defence.¹⁷

III. SUBMISSIONS

A. W01237

16. The Defence does not object to the admission of W01237's proposed evidence¹⁸ through Rule 153, provided that an OSCE Missing Person form relating to the disappearance of [REDACTED],¹⁹ is also admitted. The SPO has no objection to admission of this document.²⁰

17. The OSCE form contains an interview of W01237, and an interview of [REDACTED]. Both interviews address Jah Bushati's disappearance, and his alleged detention in Jabllanicë/Jablanica, being a detention site listed in the Indictment.²¹ The OSCE form is of particular relevance, having been completed shortly after the alleged

¹⁷ KSC-BC-2020-06/F01651, Decision on Specialist Prosecutor's Request for Extension of Word Limit to File Rule 153 Motion, 7 July 2023.

¹⁸ See Annex 1 to SPO Request.

¹⁹ See KSC-BC-2020-06/F00456, Confidential Redacted Version of 'Eleventh request for protective measures', KSC-BC-2020-06/F00456, 3 September 2021, para. 12: [REDACTED] ("OSCE form").

²⁰ SPO Request, para. 29.

²¹ KSC-BC-2020-06/F00999/A01, Amended Indictment.

events in [REDACTED], and captures different views about Jah Bushati's whereabouts, providing the following summary: [REDACTED]²²

18. The OSCE form would have been put to W01237 during [REDACTED] cross-examination had [REDACTED] testified live, and is intrinsically linked to [REDACTED] proposed evidence. The OSCE form is *prima facie* authentic and reliable; it bears the logo of the OSCE and is similar on its face to other OSCE missing person forms. Its probative value is not outweighed by any prejudice. The SPO has no objection to its admission, and the incident referenced therein is discussed throughout W01237's proposed evidence.

19. On this basis, should the Trial Panel exercise its discretion to admit W01237's proposed evidence under Rule 153, the Defence seeks the admission of the OSCE form as an associated exhibit pursuant to the same rule. Alternatively, the Defence requests the Trial Panel to admit this item as an exhibit tendered by the Defence through the bar table, pursuant to Rule 138.

B. W04594

20. The Defence does not object to admission of the evidence of W04594's proposed evidence²³ through Rule 153.

C. W04592

21. The Veseli, Krasniqi and Selimi Defence teams do not object to the admission of W04592's proposed evidence pursuant to Rule 153.²⁴ The Thaçi Defence elects to

²² SPOE00298511-00298515, p. SPOE00298514.

²³ SPO Request, fn. 7.

²⁴ SPO Request, fn. 8.

exercise Mr Thaçi's statutory right to examine or have examined the witnesses against him,²⁵ and cross-examine W04592.

22. The SPO presents W04592 as a retired surgeon "who worked in a field hospital in Irznić/Irznik from June until August 1998", which came under the authority of the KLA Dukjagini Operational Zone. The SPO asserts that W04592 can testify that "[o]n occasion, KLA members came to the hospital and requested that certain alleged collaborators not be treated", citing to an ICTY witness interview conducted in 2005.²⁶ However, immediately after having made this statement to the ICTY investigators, W04592 then clarified that [REDACTED].²⁷

23. Later, in an SPO witness interview, W04592 is asked about his earlier statement concerning the treatment of collaborators. He describes the person who attempted to interfere with his treatment of alleged collaborators as likely to have been a "self-proclaimed village commander", who he distinguished from the actual KLA commanders.²⁸ W04592 confirms again that once he asked Haradinaj and Zemaj to intervene, that this worked, and "my intervention was successful and no one ever came back".²⁹

24. The Thaçi Defence wishes to explore this aspect of W04592's testimony during cross-examination, in particular his testimony regarding the practice for treatment of injured persons, supported by zone commanders such as Ramush Haradinaj and Tahir Zemaj. This is unique testimony. Tahir Zemaj is deceased, and [REDACTED]. The Thaçi Defence wishes to explore these matters, in particular as they relate to ongoing Defence investigations. W04592's evidence should be heard live.

²⁵ KSC Law, Article 21(4)(f).

²⁶ SPO Request, para. 46.

²⁷ U009-0932-U009-0937, para. 10.

²⁸ 091693-TR-ET Part 2, pp. 23-24.

²⁹ 091693-TR-ET Part 2, pp. 21.

25. A similar procedure for the admission of untested evidence was adopted at the ICTY, under Rule 92*bis* of the ICTY Rules. The ICTY Trial Chambers held that while “in the context of Rule 92*bis* the right to cross-examine a witness is not an absolute right”, the rule “**does not** place a specific burden on the party seeking cross-examination to make any particular showing of the necessity of such cross-examination”.³⁰ Regardless, such a showing can be easily made in this case. W04592 has a unique perspective, stemming from his knowledge of the practices of the KLA, and the attitude of specific named commanders to the medical treatment of those in their zone.

26. The SPO justifies its request for the admission of W04592’s evidence through Rule 153 on the basis of purported corroboration by other witnesses whom the accused will be able to confront through cross-examination. The SPO cites to four witnesses, [REDACTED], W04448, and [REDACTED].³¹ Three of these witnesses have not yet testified. Justifying admission of evidence on the future appearance of an SPO witness entails a level of risk, particularly given the likelihood that the SPO witness list will continue to reduce given the current pace of the proceedings. In the event that each of these four witnesses are called, they are potentially able to testify about events in the relevant period in Jabllanicë/Jablanica. However, **none** can provide evidence which can corroborate W04592’s testimony about the operation of the hospital in Irznić/Irznjāq from June until August 1998, which came under the authority of the KLA Dukjagini Operational Zone, or his discussions with and attitudes of the KLA commanders with whom W04592 directly interacted.

³⁰ ICTY, *Prosecutor v Lukic & Lukic*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008, para. 24; ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution’s Rule 92 *bis* motion, 4 July 2006, para. 11; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, First decision on Prosecution’s motion for admission of witness statements and prior testimony pursuant to Rule 92 *bis*, 12 June 2003, para. 14.

³¹ SPO Request, para. 54.

27. Moreover, while the SPO summary of W04592's evidence is deeply selective, it is clear that the SPO is putting W04592 forward as a witness who can testify about a central issue in this case: the KLA's attitude towards, treatment of, and alleged policy of targeting alleged collaborators. W04592's proposed evidence goes to the centre of the SPO case, and should therefore be subject to cross-examination, and presented in a manner consistent with public and transparent proceedings. Relevant to the issue of whether a witness shall be called for cross-examination, is "whether the statement touches upon the very essence of the prosecution case against the accused".³² According to the SPO, W04592's evidence undoubtedly does. It should be heard live, in public, and tested through Defence cross-examination.

D. W04872

28. W04872's evidence adds nothing of value to the trial record, and will unnecessarily add to its volume. The Trial Panel has accepted nine adjudicated facts regarding Nenad Remistar, the individual to whom W04872's evidence pertains.³³ W04872's evidence does not advance the SPO's case beyond that which has already been accepted by the Trial Panel by way of adjudicated facts. The SPO's request for admission of W04872's evidence through Rule 153 should be denied.

E. W04871

29. The Defence does not object to admission of W04871's proposed evidence³⁴ through Rule 153.

³² ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 *bis*, 7 July 2005, para. 5.

³³ KSC-BC-2020-06/F01354, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023, Annex 2, Facts 311, 314, 323-329.

³⁴ SPO Request, fn. 10.

F. W04673

30. The Veseli, Krasniqi and Selimi Defence teams do not object to the admission of W04673's proposed evidence pursuant to Rule 153. The substance and interpretation of W04673's proposed evidence is the subject of a dispute as between the SPO and the Thaçi Defence,³⁵ which cannot be resolved through its admission under Rule 153. The situation should now be clarified through the examination of W04673. Importantly, the dispute between the SPO and the Thaçi Defence relates to live issues directly relevant to the charges in the case,³⁶ and to the credibility of other evidence which has now been heard by the Trial Panel.³⁷ As such, the Thaçi Defence elects to exercise Mr Thaçi's statutory right "to examine, or have examined, the witnesses against him",³⁸ and cross-examine W04673.

31. The Thaçi Defence indicated that it would not oppose the Rule 153 admission of W04673's proposed evidence, if the SPO agreed not to challenge the credibility of W04673's testimony that [REDACTED], and that W04673 does not believe that the KLA killed him. The SPO accuses the Thaçi Defence of misrepresenting W04673's evidence, on the basis that W04673 "has **not** provided evidence that the KLA was **not** responsible for his killing".³⁹

32. W04673 was interviewed on [REDACTED]. The record of interview notes: [REDACTED].⁴⁰

³⁵ SPO Request, para. 78.

³⁶ SPO Request, para. 71: "W04673's evidence is thus relevant to the charged crimes in the indictment", citing: *inter alia*, [REDACTED].

³⁷ KSC-BC-2020-06, Transcript of Hearing [REDACTED].

³⁸ KSC Law, Article 21(4)(f).

³⁹ SPO Request, para. 78.

⁴⁰ 1D00008, SITF00240121-00240127 RED, p. SITF00240125.

33. In [REDACTED] testimony before the [REDACTED] in [REDACTED], W04673 is asked [REDACTED]. [REDACTED] testified [REDACTED].⁴¹

34. Having accused the Thaçi Defence of misrepresenting this evidence on the basis that W04673 “has **not** provided evidence that the KLA was **not** responsible for [REDACTED]”, the SPO continues to assert that this evidence is still appropriate for admission without further examination or clarification. The SPO then makes the extraordinary statement that: “it is not what one witness may believe, or not believe, that delineates the confines of the SPO’s case or dictates the future findings of the Panel”.⁴² The Trial Panel and the parties must first be given a chance to clarify **what W04673 believes**. The fact that the Trial Panel may ultimately come to a different conclusion, cannot be a justification for deliberately admitting disputed evidence directly into the record of the case, over Defence objections.

35. The position has been further muddied by [REDACTED]’s cross-examination, which contributes to the state of uncertainty over the responsibility for the death of [REDACTED], who is [REDACTED]. As such, [REDACTED]’s own credibility is now linked to W04673’s evidence,⁴³ being a further factor militating in favour of clarification on [REDACTED] part. Again, Rule 153 does not place an explicit burden on the party seeking cross examination to make any particular showing of the necessity of such cross-examination.⁴⁴ Regardless, in the case of W04673, this burden is manifestly met.

⁴¹ SPOE00122496-00122509 RED, p. SPOE00122505.

⁴² SPO Request, para. 78.

⁴³ See, e.g., KSC-BC-2020-06, Transcript of Hearing [REDACTED].

⁴⁴ ICTY, *Prosecutor v Lukic & Lukic*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis, 22 August 2008, para. 24; ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution’s Rule 92 bis motion, 4 July 2006, para. 11; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, First decision on Prosecution’s motion for admission of witness statements and prior testimony pursuant to Rule 92 bis, 12 June 2003, para. 14.

G. W04362

36. The Defence objects to the admission of W04362's evidence⁴⁵ pursuant to Rule 153 and elects to exercise its right to cross-examine W04362.

37. The evidence proposed to be tendered through W04362 is a unique source of information concerning charged murder victim [REDACTED] and should therefore be heard live. W04362 is the only witness who can provide evidence of [REDACTED]'s whereabouts on the day of his alleged disappearance, which could not be corroborated or effectively confronted through the cross-examination of any other related witnesses. On the day of [REDACTED]'s alleged abduction, [REDACTED] and W04362 travelled alone, with the inevitable result that significant evidence regarding W04362's [REDACTED] cannot be corroborated. Whilst the SPO supports its allegations regarding [REDACTED]'s arrest and transfer to [REDACTED] with W04584's SPO interview and an excerpt of The Kosovo Memory Book,⁴⁶ neither represents sufficient corroboration to the evidence provided by W04362. W04584 was out of Kosovo between [REDACTED]⁴⁷ and hence could not have had any direct knowledge of the circumstances of [REDACTED]'s disappearance. Similarly, the Kosovo Memory book appears to be based on information received from individuals who did not have personal knowledge about the events leading to [REDACTED]'s disappearance.⁴⁸ Accordingly, W04362's evidence is unique and it should not be admitted pursuant to Rule 153.

⁴⁵ 065559-TR Parts 1-3; 065560-065563; SITF00180469-00180502, pp. SITF00180475-SITF00180476, SITF00180482-SITF00180483.

⁴⁶ See KSC-BC-2020-06/F01594/A03, Annex 3 – Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', 9 June 2023, [REDACTED].

⁴⁷ 072960-TR-ET Part 1, p. 9.

⁴⁸ The sources of the passage on [REDACTED], who both recently confirmed to the SPO that they did not know or remember the material events. See 106566-106566.

38. Further, the SPO seeks to tender through Rule 153 only one of two inconsistent statements given by W04362. W04362 provided statements to the [REDACTED] in [REDACTED] on [REDACTED] and to the SPO on [REDACTED]. Whilst the Defence does not dispute the authenticity of the [REDACTED] SPO Statement, the Defence wishes to explore the reliability of W04362's proposed evidence, which is materially inconsistent from the version of events recorded in the [REDACTED] Statement.⁴⁹ For instance, the Statement from [REDACTED] contains no mention of [REDACTED], includes the names of the persons that W04362 in [REDACTED] stated that he has never heard of (*i.e.* [REDACTED],⁵⁰ [REDACTED],⁵¹ [REDACTED]⁵²), and alleges that W04362 was [REDACTED] several times, which W04362 denied, claiming he has [REDACTED] to attest to it.⁵³ In the SPO interview, W04362 alleged that the [REDACTED] Statement was "made up and fabricated by somebody".⁵⁴ Where a witness has given two inconsistent statements, the SPO should not be permitted to use Rule 153 to jettison the statement it regards as less favourable and admit its preferred evidence. The Defence intends to cross-examine on the inconsistencies.

39. The evidence of W04362 is not largely corroborative of evidence of other witnesses, regarding the [REDACTED] detention site. Most of these witnesses have no personal knowledge about [REDACTED], nor of W04362,⁵⁵ and some of them can offer only hearsay evidence of the events that allegedly took place at the same location.⁵⁶ Moreover, the [REDACTED] SPO interview of W04362 suggests that W04362 does not recognise names commonly mentioned by the witnesses listed by the SPO, such as [REDACTED].⁵⁷

⁴⁹ U000-5210-U000-5211-ET Revised.

⁵⁰ 065559-TR-ET Part 2, p. 20.

⁵¹ 065559-TR-ET Part 2, p. 31.

⁵² 065559-TR-ET Part 2, p. 36.

⁵³ 065559-TR-ET Part 2, p. 33.

⁵⁴ 065559-TR-ET Part 2, p. 34.

⁵⁵ *See e.g.*, [REDACTED].

⁵⁶ *See e.g.*, [REDACTED].

⁵⁷ 065559-TR-ET Part 2, pp. 35-36.

40. Finally, the relatively limited scope of W04362's evidence does not support the SPO's application. Rather, the likely limited amount of time needed for W04362's examination in Court means that any saving of court-time achieved by the admission of this evidence pursuant to Rule 153, will be outweighed by the prejudice that would be caused to the Accused by the admission of this evidence without it being tested in cross-examination. For the above reasons, the evidence of W04362 should be heard live and tested through cross-examination.

IV. CONCLUSION & RELIEF SOUGHT

41. The emblematic feature of these proceedings, thus far, is the volume of evidence that has been heard in closed session, out of the public eye. The SPO filed this first Rule 153 Request with no reference to the rights of the accused being impacted by the untested admission of evidence, or the impact of written evidence on publicity and transparency. Instead, the SPO relied on the right of the accused to expediency, while simultaneously seeking to further expand the evidential record of the case. There is a need for further reflection of the standards which should be set for the admission of untested evidence through Rule 153.

42. As demonstrated herein, the Defence does not oppose the Rule 153 admission of a limited number of statements which do not concern the acts and conduct of the accused and where, in the view of the Defence, undue prejudice would not result. Where one or more Defence teams elect to cross-examine in order to explore identified lines of examination, in relation to central issues in the SPO case, the rights of the accused to defend themselves through a fair and public trial warrant the live evidence of these witnesses.

[Word count: 4,478 words]

Respectfully submitted on 20 July 2023,



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