

**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:** 29 February 2024

**Filing Party:** Specialist Defence Counsel

**Original Language:** English

**Classification:** Public

**THE SPECIALIST PROSECUTOR**  
**v.**  
**PJETËR SHALA**

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**Public Redacted Version of Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations**

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## I. INTRODUCTION

1. Pursuant to Rules 127(1) and 141(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files this motion requesting the Panel to find a breach of the Prosecution’s disclosure obligations and seeking leave to reopen its case in order to call W02540, [REDACTED], to testify live. In addition, the Defence requests the Panel to suspend the deadline for the Prosecution, Defence, and Victims’ Counsel to file their respective Final Trial Briefs and Impact Statement.

## II. PROCEDURAL BACKGROUND

2. On 24 November 2023, following the late disclosure of certain material by the Prosecution, the Defence requested the Trial Panel to direct the Prosecution to continue reviewing items in its possession to ensure that the Accused’s right to a fair trial is respected.<sup>1</sup>
3. On 27 November 2023, the Panel found that, at that point, it was not necessary to direct the Prosecution to review the material in evidence in its possession.<sup>2</sup> The Panel stated that the Prosecution was aware of its disclosure obligations and that the Panel had no reason to believe that the Prosecution was not acting diligently.<sup>3</sup>
4. On 15 January 2024, the Defence closed its case.<sup>4</sup>

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<sup>1</sup> Email from the Defence to Trial Panel I, 24 November 2023, at 14:33.

<sup>2</sup> T. 27 November 2023 p. 3674, lines 1-7.

<sup>3</sup> T. 27 November 2023 p. 3674, lines 8-10.

<sup>4</sup> KSC-BC-2020-04, F00772, Defence Notice of Closing of its Case Pursuant to Rule 131 of the Rules, 15 January 2024. All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

5. On 9 February 2024, the Panel closed the evidentiary proceedings in the case and ordered the Prosecution, Defence, and Victims' Counsel to file their respective Final Trial Briefs and Impact Statement by 25 March 2024.<sup>5</sup>
6. On 20 February 2024, the Prosecution disclosed Disclosure Package 213, which contains two items, under Rule 102(3) of the Rules.<sup>6</sup> One item, ERN 119105-119105, was described by the Prosecution as "a photograph of [REDACTED] on the day of the [REDACTED], which shows witness [REDACTED] on the right-hand side".<sup>7</sup> The [REDACTED] of the photograph is W02540.
7. On the same date, the Defence requested the Prosecution, *inter partes*, to disclose the identity of W02540 and all relevant documents in the Prosecution's possession concerning the witness.<sup>8</sup>
8. On 21 February 2024, the Prosecution disclosed Disclosure Package 214, which contains 10 items relating to W02540, under Rule 102(3) of the Rules.<sup>9</sup> Among these items, four items are the transcripts of the Prosecution interview with W02540 dated [REDACTED],<sup>10</sup> and two items are the witness statement of W02540 given to the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") dated [REDACTED].<sup>11</sup>

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<sup>5</sup> F00795, Decision on the Defence motion for a crime site visit, closing the evidentiary proceedings and giving directions on final briefs, request for reparations and closing statements, 9 February 2024 (confidential), paras 23, 36, 52(b) and (g).

<sup>6</sup> Email from the Prosecution to the Defence, 20 February 2024, at 14:46.

<sup>7</sup> Email from the Prosecution to the Defence, 20 February 2024, at 14:46.

<sup>8</sup> Email from the Defence to the Prosecution, 20 February 2024, at 16:09.

<sup>9</sup> Email from the Prosecution to the Defence, 21 February 2024, at 15:05.

<sup>10</sup> ERN 069539-TR-ET Part 1 Revised 1 RED; ERN 069539-TR-ET Part 2 Revised 1; ERN 069539-TR-ET Part 3 Revised 1; ERN 069539-TR-ET Part 4 Revised 1.

<sup>11</sup> ERN U002-6101-U002-6106-ET RED; ERN U002-6107-U002-6112 RED.

9. On 22 February 2024, the Defence requested the Prosecution, *inter partes*, to disclose the Albanian translation of the items in Disclosure Package 214, should the Prosecution be in possession of them.<sup>12</sup>
10. On the same date, under Rule 102(3) of the Rules, the Prosecution disclosed Disclosure Package 215, which contains six items that are the Albanian translations of items in Disclosure Package 214.<sup>13</sup>
11. On 26 February 2024, the Defence requested the Prosecution, *inter partes*, to disclose or assist in identifying from the materials already disclosed, screenshots or photos shown to W02540.<sup>14</sup> The Defence noted that it had been unable to locate some associated exhibits of the Prosecution interview with W04250 dated [REDACTED].<sup>15</sup>
12. On the same date, the Prosecution responded to the Defence, *inter partes*, and identified the images already available to the Defence and stated that it would disclose to the Defence the relevant still images to further assist the Defence review.<sup>16</sup> Under Rule 102(3) of the Rules, the Prosecution disclosed Disclosure Package 216, which contains one item with five photographs shown to W02540.<sup>17</sup>

### III. APPLICABLE LAW

13. Rule 102(3) of the Rules provides that:

The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law,<sup>18</sup> provide detailed notice to the Defence of any material and evidence in his or

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<sup>12</sup> Email from the Defence to the Prosecution, 22 February 2024, at 12:13.

<sup>13</sup> Email from the Prosecution to the Defence, 22 February 2024, at 15:32.

<sup>14</sup> Email from the Defence to the Prosecution, 26 February 2024, at 13:52.

<sup>15</sup> Email from the Defence to the Prosecution, 26 February 2024, at 13:52. ERN 069539-TR-ET Part 1 Revised 1 RED; ERN 069539-TR-ET Part 2 Revised 1; ERN 069539-TR-ET Part 3 Revised 1; ERN 069539-TR-ET Part 4 Revised 1.

<sup>16</sup> Email from the Prosecution to the Defence, 26 February 2024, at 15:12.

<sup>17</sup> Email from the Prosecution to the Defence, 26 February 2024, at 16:57.

<sup>18</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office.

her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation [...]. Such material and evidence shall be disclosed without delay.

14. Rule 103 of the Rules provides that:

Subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence.

15. Rule 110 of the Rules provides that "[t]he Panel may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence."

16. Rule 112 of the Rules provides that:

If either Party discovers additional evidentiary material or information that should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose such evidence or information to the opposing Party and Panel. The Specialist Prosecutor shall disclose to the Defence any exculpatory information referred to in Rule 103 notwithstanding the closing of the case pursuant to Rule 136 and any subsequent appeal.

17. Rule 127(1) of the Rules provides that "[e]ach Party is entitled to present evidence relevant to the case".

18. Rule 141(1) of the Rules provides that "[t]he testimony of a witness at trial shall be given in person, except to the extent provided under Rule 100".

#### IV. SUBMISSIONS

##### A. The Prosecution's Violation of its Disclosure Obligations

19. Throughout these proceedings, the Prosecution has continuously provided late disclosures.<sup>19</sup> On 20 July 2022, the Pre-Trial Judge found that the delay in the Prosecution's disclosures was "significant" and encouraged the Prosecution to "put in place control mechanisms within the Office that will ensure that evidence is processed and disclosed in a timely manner".<sup>20</sup> On 27 November 2023, following another late disclosure of certain items by the Prosecution, the Panel found that, at that point, it was not necessary to direct the Prosecution to continue reviewing the material in evidence in its possession which was relevant to this case as the Prosecution was aware of its disclosure obligations, and the Panel had no reason to believe at that point that the Prosecution was not acting diligently.<sup>21</sup>
20. It appears that the Prosecution has not heeded the Pre-Trial Judge's suggestion and has not been acting diligently, contrary to the Panel's finding. The Prosecution has continued to violate its disclosure obligations by disclosing the identity of W02540 and items relating to him to the Defence only last week. The items relating to W02540 are *prima facie* relevant to the testimony of TW4-01, and thus, should have been disclosed at a much earlier stage of these proceedings. The Defence received these late disclosures only after the closing of the evidentiary proceedings by the Panel. It only discovered last week that W02540 had been interviewed by the Office of the Prosecutor of the ICTY and the SPO. Further, these items were never listed in the Prosecution's Rule 102(3) notice. The Defence notes that the ICTY witness statement of W02540 is dated

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<sup>19</sup> On 14 April 2022, the Pre-Trial Judge ordered the Prosecution to complete all pre-trial disclosure obligations by 27 May 2022, with the exception of material subject to any request regarding protective measures or otherwise requiring judicial authorisation; see T. 14 April 2022, pp. 298, 299.

<sup>20</sup> F00234, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 20 July 2022 (confidential), paras 30, 36.

<sup>21</sup> T. 27 November 2023 p. 3674, lines 8-10.

[REDACTED], and his interview with the Prosecution is dated [REDACTED].<sup>22</sup>

This suggests that the Prosecution has been in possession of W02540's evidence for years, thereby breaching its continuing disclosure obligations under Rule 112 of the Rules.

21. Moreover, although the Prosecution has disclosed the relevant items under Rule 102(3) of the Rules, it is evident that these items should have been disclosed under Rule 103 of the Rules. The evidence of W02540 is clearly exculpatory as it "affect[s] the credibility or reliability of the Specialist Prosecutor's evidence", specifically the credibility and reliability of the central Prosecution Witness TW4-01.<sup>23</sup>
22. The Appeals Chamber of the International Criminal Tribunal for Rwanda held that "[t]he Prosecution's obligation to disclose exculpatory material is essential to a fair trial" and "the Prosecution must actively review the material in its possession for exculpatory material and, at the very least, inform the accused of its existence".<sup>24</sup> The Prosecution's lack of due diligence in its compliance with its disclosure obligations has obstructed the proceedings and is contrary to the interests of justice.<sup>25</sup>
23. The Prosecution has failed to conduct timely a full review of all material in its possession with due diligence. The Prosecution's unjustified late disclosure of important exculpatory material has violated its disclosure obligations and deprived the Accused of the possibility to use this material to challenge the evidence of TW4-01 on time prior to his testimony, present an important

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<sup>22</sup> ERN U002-6101-U002-6106-ET RED; ERN U002-6107-U002-6112 RED; ERN 069539-TR-ET Part 1 Revised 1 RED; ERN 069539-TR-ET Part 2 Revised 1; ERN 069539-TR-ET Part 3 Revised 1; ERN 069539-TR-ET Part 4 Revised 1.

<sup>23</sup> Rule 103 of the Rules.

<sup>24</sup> ICTR, *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras 9, 10.

<sup>25</sup> ICTR, *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. 24 May 2006 pp. 35, 36.

witness to the Panel, which would have allowed a better assessment of TW4-01's credibility, and further investigate the information recently disclosed to further its case.

24. W02540 was [REDACTED], who [REDACTED].<sup>26</sup> His evidence provides information on this event, including the number and location of the detainees found in [REDACTED].<sup>27</sup>
25. W02540's evidence contradicts the testimony of central Prosecution witness TW4-01. Many discrepancies arise between W02540's evidence and TW4-01's testimony in relation to TW4-01's [REDACTED]. For example, in relation to the date of [REDACTED] and the number of [REDACTED] involved, TW4-01 testified that he had been [REDACTED].<sup>28</sup> In contrast, in his witness statement to the Office of the Prosecutor of the ICTY in [REDACTED], W2540 stated that he had [REDACTED].<sup>29</sup> In addition, in his [REDACTED] interview with the Prosecution, he stated that by the end of the operation, his unit consisted of only [REDACTED] persons.<sup>30</sup>
26. Regarding the number of detainees, when confronted with his prior statement in [REDACTED] in which he had stated that there were [REDACTED], TW4-01 testified that he did not [REDACTED].<sup>31</sup> However, W02540 stated that [REDACTED].<sup>32</sup>

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<sup>26</sup> ERN 069539-TR-ET Part 1 Revised 1 RED, pp. 13, 19, 20.

<sup>27</sup> ERN 069539-TR-ET Part 1 Revised 1 RED, pp. 6, 23, 31-34, 50; ERN 069539-TR-ET Part 3 Revised 1, p. 4.

<sup>28</sup> T. 31 May 2023 p. 1540; T. 2 June 2023, p. 1697; T. 5 June 2023 p. 1734.

<sup>29</sup> ERN U002-6101-U002-6106-ET RED, pp. 2, 3.

<sup>30</sup> ERN 069539-TR-ET Part 1 Revised 1 RED, p. 58.

<sup>31</sup> T. 2 June 2023 pp. 1697, 1698.

<sup>32</sup> ERN U002-6101-U002-6106-ET RED, p. 4.



27. In relation to the room in which TW4-01 was allegedly held, he testified that he had been [REDACTED].<sup>33</sup> In both [REDACTED] and [REDACTED], W02540 stated that [REDACTED].<sup>34</sup>
28. Regarding [REDACTED], TW4-01 [REDACTED], in which he stated that he had seen [REDACTED].<sup>35</sup> In contrast, W2540 did not [REDACTED].<sup>36</sup>
29. The late disclosure of items relating to W02540 has caused serious prejudice to the Defence. Had the Prosecution disclosed to the Defence the identity and evidence of W02540 in a timely manner, the Defence would have called him to testify live and ensured that this exculpatory evidence was presented to the Panel in the course of the presentation of its case. In addition, W02540's evidence would have informed the Defence cross-examination of Prosecution witnesses, in particular, central Prosecution witness TW4-01, and the direct examination of Defence witnesses for eliciting further information. The prejudice suffered by the Defence from this disclosure violation has resulted in real and tangible unfairness, which merits immediate redress. The only effective remedy is a to allow the Defence to reopen its case and call W02540 to testify live. Failure to do so will render the prejudice caused to the Defence irreparable. The remedy requested must be granted to avoid a miscarriage of justice.

#### B. Request to Reopen the Defence Case and Call W02540 to Testify Live

30. The Defence seeks to reopen its case for the purpose of calling W02540 to testify live.

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<sup>33</sup> T. 31 May 2023 p. 1541.

<sup>34</sup> ERN U002-6101-U002-6106-ET RED, pp. 4, 5; ERN 069539-TR-ET Part 1 Revised 1 RED, pp. 22, 23, 50.

<sup>35</sup> T. 2 June 2023 p. 1710; T. 31 May 2023 p. 1542.

<sup>36</sup> ERN U002-6101-U002-6106-ET RED, p. 4; ERN 069539-TR-ET Part 1 Revised 1 RED, p. 34.

31. The Appeals Chamber of the ICTY found that:

the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could not have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion [...] to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.<sup>37</sup>

32. In addition, the ICTY Appeals Chamber held that, in making this determination, the Trial Chamber should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.<sup>38</sup>

33. Rule 141(1) of the Rules requires that a witness must give his or her testimony in person. Further, the Panel has highlighted that “witnesses must appear in open court, in person, and provide their evidence orally. The importance of in-court personal testimony is that the witness gives evidence under oath and under the observation and general oversight of the Panel. It allows the witness’s evidence to be fully tested by questioning, with the Panel being able to assess its accuracy and reliability”.<sup>39</sup>

34. W02540’s anticipated testimony is important for the Panel’s proper evaluation of the credibility of TW4-01, because it clearly shows TW4-01’s tendency to exaggerate and give false descriptions of the events he experienced and that at

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<sup>37</sup> ICTY, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21A, Appeal Judgement, 20 February 2001, para. 283. See also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber’s Decision to Reopen to Prosecution Case, 1 July 2010, para. 23.

<sup>38</sup> ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber’s Decision to Reopen to Prosecution Case, 1 July 2010, para. 23.

<sup>39</sup> F00461, Decision on the submission and the admissibility of evidence, 17 March 2023, para. 30.

the very least, TW4-01's recollection and/or description of what had happened to him cannot be relied upon. W02540 would be able to give specific evidence relating to [REDACTED], which relates to a significant contested issue in the case. His anticipated testimony would be relevant for the Panel's assessment of TW4-01's credibility and understanding of the [REDACTED] event.<sup>40</sup>

35. Moreover, the Defence submits that it is necessary to call W02540 to testify live. The discrepancies between his evidence and the testimony of TW4-01 in relation to the event leave ambiguity that necessitates calling him in person for examination so that additional questions may be asked. Having the opportunity to examine W02540 and receive his oral evidence is essential to allow the Parties and the Panel to explore the reliability of the information provided by TW4-01 and clarify certain issues pertaining to the two witnesses' evidence. Given that W02540 was never interviewed in the context of this case, he may also provide additional information relevant to the case which are not present in his ICTY witness statement or previous interview with the Prosecution.
36. The expected testimony of W02540 constitutes fresh evidence for the purposes of reopening the Defence case. It could not have been presented at the time of the Defence case nor obtained before the closing of the Defence case. The Defence only became aware of the importance of W02540 and that he had been interviewed by the Office of the Prosecutor of the ICTY and Prosecution last week. The Defence acted quickly and diligently, through *inter partes* requests to the Prosecution, after discovering the item ERN 119105-119105 in Disclosure Package 213. The Defence could not have appreciated the importance and

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<sup>40</sup> See F00703, Decision on the Defence Requests to Admit the Evidence of W03881 Pursuant to Rule 153 of the Rules (F00656) or alternatively, to summons witness W03381 pursuant to Rule 121(3) of the Rules (F00657), 1 November 2023 (confidential), para. 18.

could not have obtained the evidence of W02540 before receiving the Prosecution's disclosures.

37. A reopening of the Defence case to call W02540 to testify live would not unnecessarily delay the proceedings as the request is limited to one witness. Calling W02540 would only take a few days, resulting in minimal delay. The time required for hearing W2540 would therefore be very limited. In any event, the requested reopening of the Defence case and introduction of W02540's anticipated testimony will not cause any prejudice or unreasonably delay. The anticipated probative value of the testimony renders the re-opening of the case essential to ensure a fair trial.

#### V. CLASSIFICATION

38. Pursuant to Rule 82(3) of the Rules, this Motion is filed as confidential as it contains confidential information. The Defence will file a public redacted version of the Motion in due course.

#### VI. RELIEF REQUESTED

39. The Defence respectfully requests the Panel to grant the motion and acknowledge the serious breach of the Prosecution's disclosure obligations and allow the Defence to reopen its case to call W02540, [REDACTED], to testify live. In addition, the Defence requests to suspend the deadline for the Prosecution, Defence, and Victims' Counsel to file their respective Final Trial Briefs and Impact Statement.

**Word count: 3580**

Respectfully submitted,



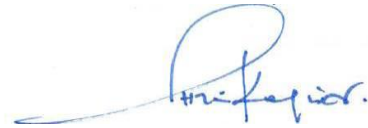
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**Jean-Louis Gilissen**  
**Specialist Defence Counsel**



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**Leto Cariolou**  
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Thursday, 29 February 2024  
The Hague, the Netherlands