



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** **KSC-BC-2020-05**

**The Prosecutor v. Salih Mustafa**

**Before:** **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 25 August 2021

**Language:** English

**Classification:** **Public**

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**Decision on the submission and the admissibility of evidence**

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**To be notified to:**

**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

**Victims' Counsel**

Anni Pues

**TRIAL PANEL I** (Panel) hereby renders this decision on the submission and the admissibility of evidence.

## I. PROCEDURAL BACKGROUND

1. On 2 June 2021, the Specialist Prosecutor's Office (SPO), the Defence for Salih Mustafa (Accused), Victims' Counsel, and the Witness Protection and Support Office (WPSO) filed submissions prior to the trial preparation conferences.<sup>1</sup>
2. On 9 and 10 June 2021, trial preparation conferences took place in the presence of the Parties, Victims' Counsel, and units of the Registry, as the case may be.<sup>2</sup>
3. On 18 June 2021, the Panel set the commencement of trial on 15 September 2021.<sup>3</sup>
4. On 12 July 2021, the Panel issued the "Decision on victims' procedural rights during trial" (Decision on Victims' Rights).<sup>4</sup>

## II. APPLICABLE LAW

5. The Panel notes Articles 37 and 40(2) and (6)(h) of Law No. 05/F-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 99(4), 100, 137-139,

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<sup>1</sup> KSC-BC-2020-05, F00130, Specialist Prosecutor, *Prosecution submissions pursuant to KSC-BC-2020-05/F00123* (SPO Submission), 2 June 2021, public, with Annexes 1-2, strictly confidential and *ex parte*; F00128, Defence, *Defence submission for trial preparation* (Defence Submission), 2 June 2021, public; F00129, Victims' Counsel, *Submission for trial preparation conference* (Victims' Submission), 2 June 2021, public; F00131, Registrar, *Registry submissions for trial preparation conferences*, 2 June 2021, public, with Annex 1, confidential, and Annex 2, strictly confidential and *ex parte*.

<sup>2</sup> KSC-BC-2020-05, Transcript of Hearing, 9 June 2021, public, pp. 205-251; Transcript of Hearing, 9 June 2021, confidential and *ex parte*, pp. 252-289; Transcript of Hearing, 10 June 2021, confidential and *ex parte*, pp. 290-300; F00123, Trial Panel I, *Decision setting the dates for trial preparation conferences and requesting submissions* (Decision on Trial Preparation Conferences), 20 May 2021, public, with Annexes 1-2, strictly confidential and *ex parte*.

<sup>3</sup> KSC-BC-2020-05, F00138, Trial Panel I, *Decision setting the date for the commencement of the trial and related matters*, 18 June 2021, public.

<sup>4</sup> KSC-BC-2020-05, F00152, Trial Panel I, *Decision on victims' procedural rights during trial*, 12 July 2021, public.

148(2), 149(4), and 153-155 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

### III. SUBMISSIONS

6. The SPO submits that it will request the prior statement of witness W04648 to be admitted under Rule 155 of the Rules. The number of items to be admitted in relation to W04648 will be fewer than 15.<sup>5</sup>

7. The SPO further submits that, for the purpose of the fair and expeditious conduct of the proceedings, it intends to submit evidence in writing through a “bar table” motion during the trial proceedings, provided that it complies with the requirement under Rules 137 and 138 of the Rules.<sup>6</sup> It proposes that, for each document, or group of documents (where applicable), the application shall set out a short description of the relevance, authenticity, and probative value of the document(s) concerned.<sup>7</sup>

8. Lastly, the SPO submits that with regard to decisions on admissibility of non-oral evidence, the approach whereby the admissibility of evidence is ruled upon at the time the evidence is submitted, or soon thereafter, is more “appropriate” to the Specialist Chambers (SC) framework, and is “preferable for ensuring the fairness and expeditiousness of the proceedings”.<sup>8</sup> It alleges that the SC framework envisages decisions on admissibility, which must be made on an item-by-item basis and on an ongoing basis throughout the trial, thus improving the efficiency and fairness of trial proceedings.<sup>9</sup> In the view of the SPO, this approach enhances greater clarity as to whether the requisite standard of admission has been met by the submitting Party, thereby avoiding the need for the Party to continue throughout trial to seek to provide

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<sup>5</sup> SPO Submission, para. 26.

<sup>6</sup> SPO Submission, para. 48.

<sup>7</sup> SPO Submission, para. 49.

<sup>8</sup> SPO Submission, para. 45 and footnote 27.

<sup>9</sup> SPO Submission, para. 46.

further support for the admissibility of the submitted items.<sup>10</sup> Moreover, the SPO avers that the admissibility assessment can be best made at the point of submission.<sup>11</sup> Lastly, it is alleged that ruling on admissibility upfront renders the universe of relevant material clearer and, where items have been declared inadmissible, the Parties need not spend time addressing them in their final submissions.<sup>12</sup>

9. The Defence submits that when admissibility issues arise in relation to non-oral evidence, they should be decided at trial, and the Parties should be given the opportunity to raise objections.<sup>13</sup> Victims' Counsel expressed a preference that for reasons of clarity, admissibility issues in relation to non-oral evidence are decided at trial.<sup>14</sup>

#### IV. ANALYSIS

10. At the outset, the Panel clarifies that the present decision concerns non-oral evidence, i.e. evidence that is not introduced through a witness in court. The Panel gives herewith directions making it clear for both Parties and Victims' Counsel, as the case may be, under which circumstances the evidence they submit is or is not part of the evidence that the Panel would consider for its deliberation and decision on the innocence or guilt of the Accused in its final judgment.

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<sup>10</sup> SPO Submission, para. 46.

<sup>11</sup> SPO Submission, para. 46.

<sup>12</sup> SPO Submission, para. 46.

<sup>13</sup> Defence Submission, para. 40.

<sup>14</sup> Victims' Submission, para. 10.

## A. GENERAL PRINCIPLE

11. According to Article 40(2) of the Law, having heard the Parties,<sup>15</sup> the Panel is vested with the discretionary power to organise fair and expeditious proceedings in the way it sees fit.<sup>16</sup> Notably, Article 40(6)(h) of the Law gives the Panel discretion (“may, as necessary”) to rule on the admissibility of evidence. These provisions of the Law do not impose a duty on the Panel to render an item-by-item ruling on the admissibility of evidence when submitted during the trial or at any other stage of the proceedings.

12. Conversely, Article 37(1), second sentence, of the Law stipulates that the admissibility of evidence collected prior to the establishment of the SC “shall” be decided by the Panel pursuant to international standards on the collection of evidence and Article 22 of the Constitution of the Republic of Kosovo. In the view of the Panel, this provision contains an exception to its discretionary power to rule on admissibility, as set forth in Article 40(6)(h) of the Law. Contrary to what the SPO alleges,<sup>17</sup> this exception, which concerns specific type of evidence, cannot form the basis of a general rule of formal, item-by-item admission of all evidence submitted at trial.

13. The same reading is deduced from the Rules, which shall be consistent with the Law.<sup>18</sup> Rule 138(1) of the Rules establishes standard admissibility criteria that the Panel shall apply when assessing the admissibility of an evidentiary item (relevance, authenticity, probative value and prejudicial effect). Importantly, it also stipulates that “unless challenged or *proprio motu* excluded”, the evidence submitted to the Panel shall be admitted if the aforementioned criteria are met, without imposing on the Panel an obligation to issue an item-by-item decision in this regard. In fact, Rule 138(1)

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<sup>15</sup> Decision on Trial Preparation Conferences, para. 10, point 6.

<sup>16</sup> Decision on Trial Preparation Conferences, para. 8.

<sup>17</sup> SPO Submission, para. 46 and footnote 29.

<sup>18</sup> Article 19(3) of the Law. In the event of conflict between the Law and the Rules, the Law shall prevail, pursuant to Rule 4(2) of the Rules.

of the Rules goes as far as establishing a presumption that the evidence submitted is considered as admitted, if the standard Rule 138(1) admissibility criteria are met. Accordingly, it is clear from this provision that, as a general rule, the Panel is not duty-bound to render an item-by-item ruling on the admissibility of evidence when submitted during the trial or any other stage of the proceedings. This is however subject to a challenge presented by a Party or the Panel's general discretion to declare any item of evidence inadmissible *proprio motu*, in accordance with the criteria established in Rule 138(1) of the Rules, and without prejudice to the application of specific exclusionary rules, as mentioned below. In this context, it is worth underscoring that, under Rule 138(1) of the Rules the *proprio motu* powers of the Panel, firmly rooted in Article 40(6)(h) of the Law, are not to be used to confirm the admissibility of a piece of evidence but only to *exclude* a piece of evidence from the evidentiary record, as warranted by the specific circumstances at hand. This interpretation is further in harmony with the exclusionary rules set forth in Rules 138(2)-(3) and 148(2) of the Rules which describe specific situations in which evidence is considered as inadmissible, making admissibility rulings in these instances mandatory.

14. Rule 139 of the Rules, on the other hand, concerns the Panel's *assessment* of evidence for the purposes of judgment, *i.e.* after the presentation of evidence is concluded. Rule 139(1) of the Rules dictates that inadmissible evidence may not be considered by the Panel for the judgment. *A contrario*, evidence that has not been specifically excluded as inadmissible may be considered by the Panel for the determination on the innocence or guilt of the Accused. No duty to render item-by-item admissibility rulings can be deduced from this rule either.

15. All of the above provisions demonstrate that the legal framework of the SC does not establish a duty for the Panel to make item-by-item admissibility rulings on evidence submitted during trial, unless the Law and/or the Rules specifically instruct

the Panel to do so, as further developed below. The legal framework also does not establish a general and automatic right for the Parties to receive a ruling from the Panel on each and every piece of evidence they submit, neither at the moment of submission nor at any other stage of the proceedings, unless otherwise provided in the legal framework of the SC.

16. The Panel notes that the SPO suggests the adoption of the item-by-item “admission model” on the basis that it is more “appropriate to the [SC] framework” and “preferable” to ensure fairness and expeditiousness of the proceedings.<sup>19</sup> The Panel understands from this wording that for the SPO this issue is more a question of choice, not a question of law.

17. The Panel also notes the SPO’s argument that an item-by-item assessment during trial provides clarity as to whether the standard of admission has been met. It also notes the Defence’s and SPO’s argument that the admissibility assessment can be best made at trial, or, respectively, the point of submission.<sup>20</sup>

18. As regards the argument of providing clarity on whether the admissibility standard has been met by the submitting Party, the Panel wishes to underscore that the Parties<sup>21</sup> bear the full responsibility for the selection and presentation of the evidence submitted in support of their arguments. Crucially, during this process it is the duty of the Parties to ensure that each and every piece of evidence they submit meets the standard Rule 138(1) admissibility criteria. They are also responsible for furnishing further support to the admissibility of evidence, should questions or concerns arise during trial. The Panel’s interference is only foreseen if disputes must be resolved or if specific legal provisions require the Panel to issue a ruling on admissibility of evidence. Other than that, it is not the responsibility of the Panel to

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<sup>19</sup> SPO Submission, para. 45.

<sup>20</sup> SPO Submission, para. 46. Defence Submission, para. 40; Victims’ Submission, para 10.

<sup>21</sup> The reference to “Party” in this decision also includes Victims’ Counsel who may present evidence, as ordered by the Panel, unless otherwise stated. *See* Decision on Victims’ Rights, para. 35.

guide and advise upfront the Parties and, before the entirety of the evidence has been heard, to make preliminary rulings on individual evidentiary items.

19. As regards the argument of the best timing of admissibility rulings, the Panel recalls that, as explained above, unless the Panel is required by a specific legal provision to enter item-by-item rulings, the evidence will be considered in principle as admissible without further confirmation from the Panel. This approach does not prevent the Parties from challenging and discussing any objections to a piece of evidence during trial, for example by questioning a witness on the objections raised or submitting observations in writing. In this respect, the Panel clarifies that the Parties' challenges resting on exclusionary rules will be entertained by the Panel upfront during trial; the same applies if the Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item during trial. What the Parties cannot expect is the Panel to automatically render a ruling on each piece of evidence during trial, as a matter of course, including on generic challenges concerning the standard Rule 138(1) admissibility criteria. Rather, such discussion will take place at the end of the proceedings, when assessing the evidence in light of the entire body of evidence before the Panel. In this regard, the Panel is of the view that the relevance and probative value of a given piece of evidence is assessed more accurately after having received all evidence presented at trial in order to conduct such assessments in light of the entire body of evidence before the Panel. This is also in line with the Panel's duty, in accordance with Rule 139(2) of the Rules, to conduct a holistic evaluation and weighing of all the evidence taken as a whole. Furthermore, the requirement for a reasoned judgment enables the Parties to verify precisely how the Panel evaluated the evidence and addressed the objections raised, and allows appellate review as appropriate.

20. Lastly, the SPO argues that its proposal for item-by-item admissibility assessments during trial best ensures the fairness and expeditiousness of the



proceedings. The Panel sees no merit in this argument. Rendering preliminary decisions on the standard Rule 138(1) admissibility criteria of each and every evidentiary item throughout trial cannot be said to contribute to the expeditious conduct of the proceedings and the right of the Accused to be tried without undue delay, considering the amount of time invested in related litigation and discussions. Further, the Panel does not find convincing the argument that an item-by-item admissibility assessment ensures fair proceedings, as the SPO seems to suggest, since the Parties can challenge and discuss any objections to a piece of evidence during trial.

21. In light of the foregoing, the Panel will refrain, in general, from rendering discrete item-by-item admissibility rulings of evidence submitted during trial, unless: (i) the evidence is challenged and the Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item; (ii) the Panel exercises its discretion to rule *proprio motu* on the admissibility of individual evidentiary items with a view to excluding them; or (iii) the Panel is compelled to do so by specific legal provisions, as further discussed below under Section B. When deliberating the judgment, the Panel will consider the standard Rule 138 admissibility criteria as part of its deliberations on the guilt or innocence of the Accused and on the basis of a holistic evaluation of all items of evidence that are part of the evidentiary record in the present case,<sup>22</sup> though it may not necessarily discuss these aspects for every item in the judgment itself. That being said, the Panel will now proceed to explain in which circumstances discrete admissibility rulings shall be rendered.

#### B. RULINGS ON ADMISSIBILITY

22. Notwithstanding the above general principle, the Panel is required to render discrete decisions on admissibility separately, prior to the Panel's assessment of

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<sup>22</sup> Rules 137(2) and 139(2) of the Rules.

evidence for the purposes of judgment, if specific exclusionary rules or those establishing certain preconditions or procedural requisites for the introduction of evidence apply. In so doing, the Panel considers the standard Rule 138(1) admissibility criteria and/or the specific preconditions or requisites set forth in the applicable law, as the case may be. Evidence declared inadmissible shall not be considered by the Panel for the purposes of judgment, pursuant to Rule 139(1) of the Rules.

### **1. Evidence Collected Prior to the Establishment of the SC and Expert Reports**

23. Article 37(1) of the Law instructs the Panel to decide on the admissibility of evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the SC prior to their establishment by any national or international law enforcement or criminal investigation authority or agency, including the Kosovo State Prosecutor, any police authority in Kosovo, the International Criminal Tribunal for the former Yugoslavia, the European Union Rule of Law Mission in Kosovo or by the Special Investigative Task Force. Article 37(3) of the Law contains certain types of evidence that *may* be considered by the Panel as admissible if certain conditions are met.

24. Rule 149(4) of the Rules provides that, if certain preconditions are fulfilled, as set forth in Rule 149(2)(b) and (c) of the Rules, the Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert.

### **2. Exclusionary Rules**

25. Rule 138(2) of the Rules provides an exclusionary rule for evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law. When conducting an enquiry under Rule 138(2) of the Rules, the Panel

applies a two-prong test.<sup>23</sup> At first, the evidence must have been obtained by either a violation of the Law or the Rules, or standards of international human rights law. Only if such a violation is established in the affirmative will the Panel proceed to consider the two alternative conditions: (i) the violation casts substantial doubt on the reliability of the evidence; or (ii) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings. In addition, Rule 138(3) of the Rules contains a further exclusionary rule according to which evidence obtained under torture or any other inhumane or degrading treatment is inadmissible and shall be excluded.

26. In cases of alleged sexual violence, Rule 148(2) of the Rules provides an exclusionary rule for evidence of prior or subsequent sexual conduct of the victims. Such evidence shall not be admitted.

### 3. Written Statements and Transcripts in Lieu of Testimony

27. Rule 141(1), first sentence, of the Rules enshrines the principle of orality according to which the testimony of a witness shall be given in person, unless otherwise provided. This means 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 giving evidence does so under oath and under the observation and general oversight of the Panel.<sup>24</sup> It allows the witness's evidence to be fully tested by questioning, with the Panel being able to assess its accuracy and reliability.

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<sup>23</sup> Similarly, ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Appeals Chamber, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#) (Bemba et al. Appeals Judgment), 8 March 2018, public, para. 280.

<sup>24</sup> Similarly, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Appeals Chamber, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), 3 May 2011, public, para. 76.

Nevertheless, in-court testimony is not the exclusive mode by which the Panel may receive witness testimony.

28. Rule 100(1) of the Rules allows for the taking of depositions upon decision of the Pre-Trial Judge which may be used at trial without the person testifying orally before the Panel. Such evidence is preserved under the supervision of the Pre-Trial Judge with full respect to the rights of the opposing Party.<sup>25</sup> Upon transmission of the case file to the Trial Panel, the admissibility of Rule 100 material is governed by Rule 138 of the Rules, as clarified in Rule 99(4) of the Rules.

29. Rules 153-155 of the Rules are tools to expedite and streamline the proceedings.<sup>26</sup> They allow for the introduction of written statements or transcripts replacing or complementing the oral testimony of a witness, provided that certain preconditions or procedural requisites are met.<sup>27</sup> While Rules 153 and 155 of the Rules allow the introduction of statements/transcripts of witnesses who are not present before the Panel, Rule 154 of the Rules allows the introduction of said material when a witness is present before the Panel. The former is a full exception to the principle of orality, while the latter only limits such principle. Evidence that is testimonial in nature is inadmissible when not elicited orally or when the preconditions for the introduction of written statements/transcripts under Rules 153-155 of the Rules are not met.<sup>28</sup>

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<sup>25</sup> See in particular Rule 100(3)-(5) of the Rules.

<sup>26</sup> Similarly, ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-685, [Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules](#) (*Yekatom* Initial Rule 68 Guidance), 16 October 2020, public, para. 26.

<sup>27</sup> The Panel understands that the term “written statement” and “transcript” also includes annexes or other documents associated with the written statement/transcript, which are used or explained by the witness and which, as such, are an integral part of the testimony itself, *see similarly*, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-596-Red, Trial Chamber IX, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, public, para. 10.

<sup>28</sup> Similarly, ICC, [Bemba et al. Appeals Judgment](#), para. 581; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-631, Trial Chamber V, [Initial Directions on the Conduct of Proceedings](#) (*Yekatom* Initial Directions) 26 August 2020, public, para. 56.

30. Rule 153 of the Rules provides the Panel with discretionary powers to 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 SC, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment. A set of non-exhaustive factors set forth in Rule 153(2) and (3) of the Rules, militating in favour and against admission, guide the Panel when deciding on the admissibility of such evidence. Moreover, Rule 153(2) of the Rules contains procedural requisites that aim at strengthening the probative value of the material introduced under Rule 153 of the Rules.

31. Rule 154 of the Rules provides the Panel with discretionary powers to admit the written statement of a witness or transcript of evidence given by a witness in proceedings before the SC that goes to proof of the acts and conduct of the Accused as charged in the indictment, if the following procedural requisites are met: (i) the witness is present in court; (ii) the witness is available for cross-examination by the other Party and questioning by the Panel; and (iii) the witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined. The admitted written statement/transcript complements the oral testimony of the witness. The non-calling Party has the opportunity to test the entirety of the witness's testimony, both in relation to the in-court testimony and the written statement/transcript.<sup>29</sup> Upon application of the calling Party, the Panel will issue rulings ahead of the relevant in-court testimony. However, in principle, the Panel will make its final determination only when the witness appears before the Panel and attests to the accuracy of his or her prior declaration sought to be introduced.<sup>30</sup>

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<sup>29</sup> Similarly, ICC, [Yekatom Initial Rule 68 Guidance](#), para. 30.

<sup>30</sup> Similarly, ICC, [Yekatom Initial Directions](#), para. 58.

32. Lastly, Rule 155(1) of the Rules provides the Panel with discretionary powers to admit evidence in the form of a written statement, any other record written or otherwise expressed of what a person has said or transcript of a statement by a person who has died or who can no longer be traced with reasonable diligence, or who is by reason of physical or mental impairment or other compelling reason unable to testify orally, if the Panel is satisfied: (i) of the person's unavailability or inability to testify orally; and (ii) that the statement, the record or the transcript is *prima facie* reliable, having regard to the circumstances in which it was made, recorded, and maintained. Rule 155(2) of the Rules allows the admission of evidence in the form of a written statement, any other *prima facie* reliable record or transcript of a statement by a person, if the Panel is satisfied that: (i) the witness has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect; (ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion, as further described in Rule 155(3)(a) of the Rules; (iii) where appropriate, reasonable efforts have been made to secure the attendance of the witness as a witness under Rules 100 or 121 of the Rules or, if in attendance, to receive from the witness all material facts known to that witness; (iv) the proposed evidence or evidence to the same effect cannot be otherwise obtained; and (v) it is in the interests of justice, as further described in Rule 155(3)(b) of the Rules.

33. Whether to use the above modalities is, in principle, up to the calling Party. However, this choice is subject to judicial oversight. In particular, the Panel shall interfere with the calling Party's choice regarding its evidence presentation where potential prejudice arises to the rights of the Accused,<sup>31</sup> in particular the right to confront and examine in court a person making allegations against him or her, and in order to ensure that the proceedings are conducted in a fair and expeditious way,<sup>32</sup> in

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<sup>31</sup> Article 21(4)(c), (d), and (f) of the Law; Rule 138(1) of the Rules.

<sup>32</sup> Article 40(2) of the Law.

full respect of the principles of orality and publicity.<sup>33</sup> Lastly, a decision (not) admitting written statements/transcripts of a witness under Rules 153-155 of the Rules is made on a case-by-case basis, bearing the case-specific circumstances in mind.

### C. PROCEDURE FOR THE SUBMISSION OF EVIDENCE

34. The Panel adopts the following procedure for the submission of evidence that allows the Parties to properly prepare and the Panel to take necessary decisions in an orderly and expeditious fashion. Noting the inability of the Defence and Victims' Counsel at this stage to provide precise information as to the evidence they will eventually present,<sup>34</sup> further specific deadlines may be set later in the course of the proceedings. This procedure is equally applicable to the SPO and the Defence. It is recalled that Victims' Counsel may submit evidence in accordance with the Decision on Victims' Rights.<sup>35</sup> Moreover, the material concerned must have been disclosed to the opposing Party, Victims' Counsel, and the Panel. Lastly, the Parties and Victims' Counsel are reminded to be selective in their requests for admission of evidence, allowing the trial to be completed within a reasonable time.

#### **1. Material Collected Prior to the Establishment of the SC**

35. The Panel orders the SPO to submit an application for admission of material falling under Article 37 of the Law by Monday, 13 September 2021. In so doing, the SPO is ordered, as the case may be, to: (i) describe shortly the asserted relevance of each piece of material in relation to the factual allegation in question; (ii) suggest the

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<sup>33</sup> Article 21(2) of the Law.

<sup>34</sup> Defence Submission, paras 28-29; Victims' Submission, para. 9.

<sup>35</sup> Decision on Victims' Rights, paras 29-38.

asserted probative value of each piece of material; and (iii) provide information as to the authenticity of each piece of material, if available.<sup>36</sup>

36. Upon receipt of the application, the Defence may respond and present objections and/or challenges to individual evidentiary items, if any.<sup>37</sup> Victims' Counsel may submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.<sup>38</sup> Subsequently, the Panel will proceed to decide on the admission of the material concerned, as foreseen in Article 37 of the Law and Rule 138 of the Rules.

37. A decision on the admission of audio-visual material automatically also includes the admission of any associated translation(s)/transcript(s), which were duly disclosed. For reasons of clarity, the Parties are instructed to include both the original material and the corresponding translation(s)/transcript(s) in the application. Equally, when a redacted evidentiary item is admitted, any subsequent unredacted or lesser redacted version of this material is automatically considered as admitted, subject to any further objections.

38. As a general rule, lengthy material is admitted in its entirety in order to allow the Panel to assess the correct meaning and broader context of the portion relied upon by the Party, as the case may be. If the Panel intends to rely on portions of the material other than those proposed by the Parties, it will give notice to the Parties.<sup>39</sup> However, the Panel retains its discretion to admit only parts of the material if the volume or the specific nature of the evidence warrant such approach. The tendering Party is instructed to make submissions if the material in question is requested to be admitted in part.

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<sup>36</sup> Where appropriate, the information under points (i)-(iii) may be summarized for groups of documents.

<sup>37</sup> See Rules 76 and 138(1), second sentence, of the Rules.

<sup>38</sup> See Rule 76 of the Rules; Decision on Victims' Rights, para. 42.

<sup>39</sup> Similarly, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-498-AnxA, Trial Chamber I, [Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings](#), 4 May 2016, public, para. 47.



39. Mindful of the principle of orality, Article 37 of the Law does not apply to statements or material related to witnesses who are called to testify before the Panel.

## 2. Material Introduced Under Rules 153-155 of the Rules

40. The Panel orders the SPO to submit any applications under Rule 153 and 155(1) of the Rules by Monday, 13 September 2021. Upon receipt of any such application, the Defence may respond and present its objections, if any.<sup>40</sup> Victims' Counsel may respond and submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.<sup>41</sup> Subsequently, the Panel will proceed to decide on the admission of the written statement(s)/transcript(s).

41. As regards applications under Rule 154 of the Rules, the Panel orders the SPO to submit any applications for admission of the written statement(s)/transcript(s) in lieu of direct examination by Monday, 13 September 2021. Upon receipt of any such application, the Defence may respond, within five days, and present its objections, if any.<sup>42</sup> Victims' Counsel may submit, within five days, observations in this regard, if any, in accordance with the Decision on Victims' Rights.<sup>43</sup> Subsequently, the Panel will proceed to decide preliminarily on the admission of Rule 154 written statement(s)/transcript(s), pending the witness's in-court attestation.<sup>44</sup>

42. As regards applications under Rule 155(2) of the Rules, the Panel instructs the Parties to make any such application as soon as practicable. Upon receipt of any such application, the Defence may respond and present its objections, if any.<sup>45</sup> Victims' Counsel may respond and submit observations in this regard, if any, in accordance

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<sup>40</sup> See Rule 76 of the Rules.

<sup>41</sup> See Rule 76 of the Rules; Decision on Victims' Rights, para. 42.

<sup>42</sup> See Rules 9(5), 76 and 138(1), second sentence, of the Rules.

<sup>43</sup> See Rule 76 of the Rules; Decision on Victims' Rights, para. 42.

<sup>44</sup> See *supra* para. 31.

<sup>45</sup> See Rule 76 of the Rules.

with the Decision on Victims' Rights.<sup>46</sup> Subsequently, the Panel will proceed to decide on the admission of the written statement(s)/transcript(s) concerned.

### 3. Other Material

43. The Panel orders the SPO to submit applications for the admission of material that does not fall under any of the aforementioned categories by Monday, 13 September 2021. In the application, the SPO is ordered, as the case may be, to: (i) describe shortly the asserted relevance of each piece of material in relation to the factual allegation in question; (ii) suggest the asserted probative value of each piece of material; and (iii) provide information as to authenticity of each piece of material, if available.<sup>47</sup>

44. Upon receipt of the application, the Defence may respond and present objections and/or challenges to individual evidentiary items, if any.<sup>48</sup> Victims' Counsel may respond and submit observations in this regard, if any, in accordance with the Decision on Victims' Rights.<sup>49</sup>

45. Subsequently, the Panel will proceed pursuant to Rule 138(1) of the Rules, as summarised in paragraph 21 above, subject to exclusionary rules discussed in paragraphs 25-26 above. As a result, the Panel will, unless it excludes said material, consider all material included in the application as admitted, without rendering a discrete item-by-item ruling, as foreseen in Rule 138(1) of the Rules. This means that the material is available to the Panel to consider for the judgment.

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<sup>46</sup> See Rule 76 of the Rules; Decision on Victims' Rights, para. 42.

<sup>47</sup> Where appropriate, the information under points (i)-(iii) may be summarized for groups of documents.

<sup>48</sup> See Rules 76 and 138(1), second sentence, of the Rules.

<sup>49</sup> See Rule 76 of the Rules; Decision on Victims' Rights, para. 42.

46. With regard to material to be introduced through a witness, directions will be given by the Panel to the Parties in the decision on the conduct of the proceedings, in particular on the modalities of submission.

47. Lastly, the Panel's determinations set forth in paragraphs 37-38 equally apply to this material.

## V. DISPOSITION

48. For the above-mentioned reasons, the Panel hereby:

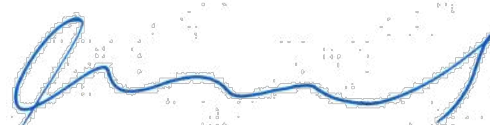
- a. **ADOPTS** the procedure on submission and admissibility of evidence, as set out in this decision; and
- b. **INSTRUCTS** the Parties and Victims' Counsel to comply with the deadlines set out above.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Wednesday, 25 August 2021

At The Hague, the Netherlands.