



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-05  
**Specialist Prosecutor v. Salih Mustafa**

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 15 September 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of**

**'Prosecution Application for Admission of Material through the Bar Table',**

**KSC-BC-2020-05/F00201, dated 13 September 2021**

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## I. INTRODUCTION

1. Pursuant to Article 37 of the Law,<sup>1</sup> Rules 137-139 of the Rules,<sup>2</sup> and the Trial Panel's Decision,<sup>3</sup> the Specialist Prosecutor's Office ('SPO') hereby requests the admission of the items listed in Annex 1 to this Application ('Documents') from its Amended List of Exhibits.<sup>4</sup> The Documents include both materials falling under Article 37 of the Law and other materials, namely:

- (i) Books and newspaper articles;
- (ii) Military reports and other records relevant to the existence of an armed conflict;
- (iii) KLA documents, including communiques;
- (iv) Investigative materials collected during UNMIK investigations;
- (v) Maps;
- (vi) The Accused's interview with the SPO and relevant exhibits; and
- (vii) Materials seized from the Accused (personal items including items extracted from his mobile phone).

2. The Documents are relevant, have probative value, contain sufficient indicia of authenticity, and their admission would cause no undue prejudice to the Accused.<sup>5</sup>

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>3</sup> Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, Public, 25 August 2021 ('Decision'), paras 35, 43.

<sup>4</sup> Prosecution Notice of Amended Exhibits and Witnesses Lists, KSC-BC-2020-05/F00161, Public, 30 July 2021, Confidential Annex 3 ('Exhibit List').

<sup>5</sup> See Article 37 of the Law; and Rule 138. Admission of evidence does not require definitive proof of reliability or credibility of the evidence, but rather a showing of *prima facie* reliability on the basis of sufficient indicia, see ICTY, *Prosecutor v. Prlić et al.*, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, IT-04-74-AR73.16, 3 November 2009, paras 32-36; ICTY, *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, IT-05-88-AR73.2, 30 January 2008, para.22; IRMCT, *Prosecutor v Nzabonimpa et al.*, Decision on Augustin Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications), MICT-18-116-T, 29 April 2021, p.2.

3. Pursuant to Rule 82(3), this motion and its Annex 1 are filed as confidential in order to protect confidential information in this case. A public redacted version will be filed.

## II. SUBMISSIONS

4. The items listed in Annex 1 include materials falling under Article 37 of the Law,<sup>6</sup> as well as other materials.<sup>7</sup> In accordance with the Decision, while the admissibility of evidence 'shall' be decided by the Panel for Article 37 material,<sup>8</sup> the Panel has discretion to rule on the admissibility of other material, within the limits established by the Rules.<sup>9</sup>

5. The Panel enjoys a broad discretion regarding the process for admissibility of evidence,<sup>10</sup> including through a bar table motion. There is no statistical or numerical limit to the number of documents which may be tendered by way of a bar table, so long as the requisite clarity and specificity is provided when explaining each document's relevance to the case.<sup>11</sup> There is likewise no requirement that evidence produced other than in open court may only be admitted if corroborated, noting that a legal requirement for corroboration cannot be imposed when assessing admissibility or ultimately the standard of proof.<sup>12</sup> Whether evidence comes through a witness or via the bar table may be a factor to be considered when weighing the evidence at the end of trial.<sup>13</sup>

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<sup>6</sup> Annex 1, items 1-20.

<sup>7</sup> Annex 1, items 21-202.

<sup>8</sup> See Decision, para.12.

<sup>9</sup> See Decision, paras 11-15.

<sup>10</sup> Article 40(2) and (6)(h); Rule 138(1). See also Decision, para.11.

<sup>11</sup> IRMCT, *Prosecutor v. Turinabo et al.*, Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table (Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF), MICT-18-116-T, 15 January 2021, p.3; IRMCT, *Prosecutor v Stanišić and Simatović*, Decision on Prosecution Motion for Admission of Documents from the Bar Table (Expert Reports), MICT-15-96-T, 11 February 2019, para.7.

<sup>12</sup> Rule 139(3).

<sup>13</sup> IRMCT, *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution Motion for Judicial Notice of Authenticity and Admission of Documents from the Bar Table (Mladić Notebooks & Audio Files),

6. All of the Documents are relevant and probative of the crimes alleged in the Indictment. Furthermore, they all contain sufficient indicia of authenticity to warrant admission.<sup>14</sup> Admission of the Documents would not result in unfair prejudice to the Accused.

#### A. ARTICLE 37 MATERIAL

7. The first category of items listed in Annex 1 ('Article 37 Material') consists of evidence collected in criminal proceedings and investigations prior to the establishment of the Specialist Chambers by, mainly, the ICTY and the UNMIK/Kosovo State prosecutor and police authority.

8. These items include:

- i. A statement given by the Accused [REDACTED].<sup>15</sup>
- ii. Documents relevant to the existence of an armed conflict which were admitted as exhibits in cases before the ICTY;<sup>16</sup> and
- iii. Investigative materials collected during UNMIK investigations.<sup>17</sup>

- i. The Accused's statement before the [REDACTED]

9. The statement of the Accused [REDACTED] is an official record of the [REDACTED]. The case file number is specified in the document together with the names of [REDACTED], and other participants in the hearing.<sup>18</sup> The Accused himself recalled having given that statement during his suspect interview with the SPO.<sup>19</sup>

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MICT-15-96-T, 11 February 2019, para.7; ICTY, *Prosecutor v. Hadžić*, Decision on Prosecution Bar Table Motion, IT-04-75-T, 28 November 2013, para.8.

<sup>14</sup> For each item, Annex 1 provides the English and Albanian ERN, description and date, a summary of relevance and probative value, and indicia of authenticity.

<sup>15</sup> Annex 1, item 1.

<sup>16</sup> Annex 1, items 2-14.

<sup>17</sup> Annex 1, items 15-20.

<sup>18</sup> Annex 1, Item 1.

<sup>19</sup> See Interview of Salih MUSTAFA with the SPO, [REDACTED], pp.6-8.

10. The statement is relevant to a broad range of issues in the case, as it provides details on the nature of the BIA unit and the role of the Accused in the unit. The statement is highly probative as it comes from the Accused himself.

11. Admission of this statement from the bar table will cause no undue prejudice to the Accused, who is familiar with its content. The authenticity of the statement is apparent on its face.

ii. Documents relevant to the existence of an armed conflict<sup>20</sup>

12. The Article 37 documents relevant to the existence of an armed conflict are exhibits that were used in trials before the ICTY. They bear exhibit numbers of the *Milutinović and Đorđević* trials, indicating that they were admitted into evidence in those cases and therefore considered authentic and reliable by ICTY chambers for purposes of admission. Furthermore, their authenticity is evidenced by stamps, seals, reference numbers, and signatures present in the documents. For instance, IT-05-87.1 P00446 is a KLA report on the statements of commanders of different KLA Operative Zones. The report bears a reference number and a date on the first page, and a KLA seal and signature of the issuing officer on the last page.<sup>21</sup>

13. These documents demonstrate the existence of an armed conflict between the KLA and forces of the Federal Republic of Yugoslavia and Republic of Serbia. They provide information about fighting between the two sides and/or the level of organization of the parties to the conflict.

14. While the Panel has recently agreed to take notice of a number of adjudicated facts concerning the existence of an armed conflict,<sup>22</sup> these facts establish a rebuttable presumption, and the existence of an armed conflict may therefore still be the subject of litigation at trial.

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<sup>20</sup> Annex 1, Items 2 to 14.

<sup>21</sup> Annex 1, Item 12, IT-05-87.1 P00446, pp.1, 5.

<sup>22</sup> See Decision on judicial notice of adjudicated facts, KSC-BC-2020-05/F00191

15. Admission of these documents through the bar table will not be unduly prejudicial to the Accused. They pertain to a contextual element, their content is self-explanatory, they are relevant and probative. Their authenticity was previously accepted in trials before the ICTY, and is evident from the appearance of the documents, including stamps and other information contained in the documents themselves.

iii. UNMIK Investigative Documents<sup>23</sup>

16. The UNMIK Investigative Documents include a collection of aerial photographs taken pursuant to a request of the investigator in charge of the investigation of the [REDACTED]. These are official UNMIK documents with grid references of the photographed locations and names of the officials involved in the investigation and the aerial mission.

17. The documents are relevant to all charges in the Indictment, as they provide an aerial overview of the locations of the alleged crimes and of other locations, such as [REDACTED], that are also relevant to the charges in the case.

18. Admission of these documents through the bar table will not unduly prejudice the Accused, as they are self-explanatory photographs of areas with which the Accused is familiar. The photographs contain grid references that allow for easy identification and confirmation of the locations depicted.

19. Another document in this category is an UNMIK Ante Mortem Investigation Report on the disappearance of [REDACTED]. The evidence shows that [REDACTED] was detained in Zllash/Zlaš and held back together with [REDACTED] when the other prisoners were released. With respect to its authenticity, in addition to bearing the UNMIK logo, the document bears case reference numbers as well as the name of the officer assigned to the case.

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<sup>23</sup> Annex 1, Items 15-20.

20. This Ante Mortem Investigation Report is already part of the SPO Exhibit List and has been disclosed in Legal Workflow with ERN [REDACTED]. However, the photograph in that Report is too dark to be meaningfully reviewed. Accordingly, the SPO seeks leave of the Panel to substitute a better quality (and colour) version of the photograph, ERN [REDACTED], and requests that both the Report and the clearer version of the photograph be admitted.<sup>24</sup>

#### B. OTHER RELEVANT AND PROBATIVE MATERIALS

21. The second category of items listed in Annex 1 ('Other Relevant and Probative Materials') consists of materials that do not fall within Article 37 of the Law or under Rules 153-155 of the Rules.<sup>25</sup> These items include:

- (i) Newspaper articles and books;
- (ii) UNHCR and OSCE reports pertaining to the existence of an armed conflict;
- (iii) Various KLA documents pertaining to the existence of an armed conflict;
- (iv) The Accused's interview with the SPO;
- (v) Maps of relevant areas of Kosovo;
- (vi) Materials found on items seized from the Accused; and
- (vii) Photographs of the location of the Zllash detention compound, showing its current status.

- (i) Newspaper article and books<sup>26</sup>

22. The newspaper article published on 16 June 1999 in the Irish Times is relevant and probative as it provides a contemporaneous account of the Accused's role in

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<sup>24</sup> While the report [REDACTED] contains a clearer photograph, it only contains the first two pages of the report, with [REDACTED] being the complete version. For this reason, the SPO is not seeking to replace the old document with the new one, but seeks to have both reports admitted in evidence. [REDACTED] will be disclosed to the Defence in LWF together with the filing of this application.

<sup>25</sup> Decision, KSC-BC-2020-05/F00169, para.43.

<sup>26</sup> Annex 1, Items 21-34.

1999.<sup>27</sup> It is based on an interview conducted with the Accused, who speaks, *inter alia*, about the role of the BIA unit.

23. The article is an open source document indicating the author, the date, and the name of the newspaper where it was published; its authenticity as a public source document is therefore verifiable. Moreover, statements of the Accused should be presumptively admissible as the Accused is present and therefore has the information and means to contest the weight of the evidence and can do so directly, through other evidence, or through argument of counsel. For these reasons, its admission through the bar table will assist the Panel in assessing the case and will cause no undue prejudice to the Accused.

24. The SPO is also tendering excerpts from book entitled "Ushtria Çlirimtare e Kosovës - Zona Operative e Llapit", by Skender ZHITIA, published by the KLA War Veterans Organization in Prishtinë/Pristina in 2008.<sup>28</sup> The book provides an overview of the KLA since its very beginnings until June 1999. It is relevant to the structure and level of organisation of the KLA, as well as to the existence of an armed conflict at the times relevant to the Indictment. The book is based on extensive interviews of members of the KLA and participants to the conflict, including the Accused himself,<sup>29</sup> as well as on original KLA documentation from the period. The book was also used during the SPO interview with the Accused, who confirmed the accuracy of a number of excerpts which were read out to him,<sup>30</sup> and thus its admission would enhance the clarity of the evidence given by the Accused.

25. The SPO is also tendering excerpts from a book entitled "State Informative Agency "Kosova Press": The War Archive - Second volume (01 March - 10 April 1999), published in Prishtinë/Pristina in 2016. The publication has been prepared by Berat LUZHA, who led the Information Directorate of the Kosovo Liberation Army in 1999.

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<sup>27</sup> Annex 1, Item 21.

<sup>28</sup> Annex 1, Items 22-31.

<sup>29</sup> SPO Interview with Salih MUSTAFA, [REDACTED], pp.1-2.

<sup>30</sup> See SPO Interview with Salih MUSTAFA, [REDACTED].



It comprises information published contemporaneously by the KLA General Staff press agencies, “Kosovapress” and “Radio Free Kosovo”, including communiques and political declarations.<sup>31</sup>

26. The excerpts the SPO seeks to tender from the bar table were taken directly from these books, which are available to the public. The authenticity of the excerpts offered by the SPO can thus be readily verified. For these reasons, the admission of these excerpts through the bar table will cause no undue prejudice to the Accused.

(ii) Reports of international organisations<sup>32</sup>

27. This category includes reports generated by the United Nations High Commissioner for Refugees (‘UNHCR’)<sup>33</sup> and the Organisation for Security and Co-operation in Europe (‘OSCE’), which are relevant to the existence of an armed conflict during the period relevant to the charges in the indictment.<sup>34</sup> They are authentic and probative. The information contained therein was gathered and published by UNHCR and OSCE, two reputable international organisations with a presence on the ground during the Kosovo conflict. The reports are also open source, and the information contained therein is easily accessible and verifiable. For these reasons, their admission through the bar table will cause no undue prejudice to the Accused.

28. Another report is the List of Missing Persons in Kosovo, dated 23 April 2008, and authored by the Working Group on Persons Who Are Unaccounted for in Connection with Events in Kosovo, that worked under the auspices of the International Committee of the Red Cross.<sup>35</sup>

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<sup>31</sup> Annex 1, Items 32-34. LUZHA, in the foreword to Volume 1 (SPOE00053504-00054088, at SPOE00053557), states that the book is based on a review of various archival material, including, inter alia, the website of the press agency ([www.kosovapress.com](http://www.kosovapress.com)) and the published archive of “Radio Free Kosovo”.

<sup>32</sup> Annex 1, Items 35-41.

<sup>33</sup> Annex 1, Items 36-37.

<sup>34</sup> Annex 1, Items 38-41.

<sup>35</sup> Annex 1, Item 35.

29. This report is relevant because, [REDACTED]. [REDACTED]. This document will, together with the testimony of witnesses and other documentary evidence, contribute to establishing this fact. The authenticity of the document is established by its provenance, and the report contains information about the methodology that generated the list. Its admission will cause no undue prejudice to the Accused.

(iii) KLA documents<sup>36</sup>

30. Under this heading, Annex 1 contains a number of contemporaneous KLA documents, including orders, regulations, and communiques, which are relevant to the existence of an armed conflict at the times relevant to the Indictment, and to the level of organisation of the KLA as a party to that conflict.

31. The documents bear headers, signatures, and stamps or seals which attest to their authenticity. Further, the documents are consistent and therefore are mutually authenticating,<sup>37</sup> and their content indicates that they are official KLA documents. Their content is easily intelligible without the aid of a witness. Finally, as a former member of the KLA, the Accused is familiar with these documents, many of which are specific to the Llap Operational Zone, where the Accused operated. For these reasons, they can be admitted through the bar table without any undue prejudice to the Accused.

(iv) Maps

32. The SPO requests the admission of a number of maps through the bar table.<sup>38</sup> These maps feature Kosovo as well as the Prishtinë/Pristina area and will assist the Panel in the assessment of the evidence that will be presented at trial. The maps are

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<sup>36</sup> Annex 1, Items 42-66.

<sup>37</sup> For instance, U001-0399-U001-0400-ET is a 12 April 1999 Llap Zone document signed by Commander Adem SHEHU. SHEHU appears as the commander also in other documents of Brigade 153 from the same period, *see e.g.* U000-4204-U000-4204-ET. The fact that Adem SHEHU was Commander of Brigade 153 in that period was also stated by several SPO witnesses, *see e.g.* SPO Interview with [REDACTED], pp.13, 18-19.

<sup>38</sup> Annex, Items 67-75.

open source materials and issued by various institutes and organisations specified in the maps themselves. Their admission will cause no undue prejudice to the Accused.

(v) The Accused's interview with the SPO

33. The SPO also seeks to tender in evidence the transcript of the Accused's interview with the SPO, conducted on [REDACTED].<sup>39</sup> The interview is highly relevant and probative as it relates, *inter alia*, to the Accused's role as the leader of the BIA Unit, the unit's structure and location, and the Accused's whereabouts during the times relevant to the Indictment.

34. The interview was conducted in full compliance with the requirements set forth in Rules 42-44, all the rights of the Accused were duly respected during the interview,<sup>40</sup> and its admission will cause no undue prejudice to him.

(vi) Photographs and other items seized from the Accused

35. The materials are items that were retrieved from the Accused's wallet,<sup>41</sup> a USB,<sup>42</sup> and mobile telephone,<sup>43</sup> all of which were seized directly from the Accused pursuant to lawful orders following his arrest.

36. Items taken from the Accused's wallet include KLA badges, a photograph of the Accused in camouflage uniform and a red beret, and the Accused's KLA Veterans Association card.<sup>44</sup>

37. The materials retrieved from the USB include contemporaneous photos of the Accused in KLA military uniform, sporting both a red and black beret, together with other KLA members.<sup>45</sup> Both the materials seized from the Accused's wallet and from

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<sup>39</sup> Annex 1, Items 87-95.

<sup>40</sup> See Interview of Salih MUSTAFA with the SPO, [REDACTED], pp.2-4.

<sup>41</sup> Annex 1, Item 85.

<sup>42</sup> Annex 1, Items 86-173.

<sup>43</sup> Annex 1, Items 174-181.

<sup>44</sup> [REDACTED].

<sup>45</sup> Annex 1, Items 86-173. See also [REDACTED].

the USB drive are relevant to, and highly probative of, the Accused's membership in the KLA and they corroborate descriptions of the Accused provided by certain SPO witnesses.

38. The SPO also tenders into evidence [REDACTED].<sup>46</sup> [REDACTED].

39. All these materials were seized directly from the Accused. The search was duly authorised by the Pre-Trial Judge,<sup>47</sup> and the Accused is familiar with items which were found on him. For these reasons, no undue prejudice will result from the admission of these items from the bar table.

(vii) Photographs taken by the SPO team<sup>48</sup>

40. Finally, the SPO seeks to tender a small number of photographs of what remains today of the Zllash/Zlaš detention compound. These photographs were taken by an SPO team [REDACTED].<sup>49</sup> The photographs are relevant because they depict the area in which the crimes in the Indictment are alleged to have taken place. Their admission from the bar table will cause no prejudice to the Accused.

### III. RELIEF REQUESTED

41. For the foregoing reasons, the SPO requests the Trial Panel to:

- i. Authorise addition to the Exhibit List of document ERN [REDACTED], for the reasons specified in paragraph 20 of this application; and
- ii. Admit the items listed in Annex 1 into evidence.

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<sup>46</sup> Annex 1, Items 174-181. *See also* [REDACTED].

<sup>47</sup> Decision authorizing search and seizure, KSC-BC-2020-05/F00010.

<sup>48</sup> Annex 1, Items 182-185.

<sup>49</sup> Official Note of the visit of the Prosecution Team in Zllash and other locations in the Llap region, [REDACTED].

**Word count: 3,312**



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**Jack Smith**  
**Specialist Prosecutor**

Wednesday, 15 September 2021  
At The Hague, the Netherlands.