



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 15 October 2021

Language: English

Classification: Public

Public redacted version of
Decision on the Prosecution application for the admission of prior statements
of witness W04648 and related documents

To be notified to:

Specialist Prosecutor

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Victims' Counsel

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TRIAL PANEL I (Panel) hereby renders this decision on the Prosecution application for the admission of prior statements of witness W04648 and related documents.

I. PROCEDURAL BACKGROUND

1. On 15 February 2021, the Specialist Prosecutor's Office (SPO) filed its list of witnesses pursuant to Rule 95(4)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).¹
2. On 25 August 2021, the Panel issued the "Decision on the submission and the admissibility of evidence" (Decision), in which it set out the principles governing the admission of non-oral evidence in the present case, and ordered the SPO to, *inter alia*, submit any applications under Rule 155(1) of the Rules by 13 September 2021.²
3. On 13 September 2021, the SPO filed a request for the admission of prior statements of witness W04648³ and related documents (Request).⁴
4. The Defence and Victims' Counsel did not file any response to the Request.

¹ KSC-BC-2020-05, F00082/A02, Specialist Prosecutor, *Witness list pursuant to Rule 95(4)(b)*, 16 February 2021, strictly confidential and *ex parte*. A confidential redacted version was filed on 17 February 2021, F00085/A02. With the leave of the Panel, the SPO filed an amended list of witnesses on 30 July 2021, F00161/A01 and F00161/A02.

² KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence*, 25 August 2021, public, para. 40.

³ KSC-BC-2020-05, F00200, Specialist Prosecutor, *Prosecution Application for the Admission of Prior Statements of witness W04648 under Rule 155(1)*, 13 September 2021, confidential, with Annex 1, confidential. A public redacted version of the main filing was filed on 15 September 2021, F00200/RED.

⁴ Annex 1 to Request, items 1-10.

II. SUBMISSIONS

5. The SPO submits that witness W04648 was [REDACTED]⁵ and that he died on [REDACTED], as confirmed by a death certificate annexed to the Request,⁶ as well as by [REDACTED].⁷

6. The SPO details that in the written statements submitted for admission the witness described: (i) how in early April 1999 [REDACTED], went to the village of [REDACTED]; (ii) that he learned that, subsequently, [REDACTED]; (iii) that people who had been detained with [REDACTED]; and (iv) his efforts to locate [REDACTED].⁸

7. The SPO avers that witness W04648's written statements from the period of 2002 until 2006⁹ fulfil the criteria set out in Rule 155(1) of the Rules since the witness is unavailable and the statements bear sufficient *indicia* of reliability.¹⁰ Regarding the *indicia* of reliability of the related documents,¹¹ the SPO avers that they were discussed in W04648's prior statements and/or are items which the witness voluntarily submitted in the course of providing the aforementioned statements, and consequently constitute an integral part thereof.¹² Lastly, the SPO indicates that [REDACTED] of the witness will be available for cross-examination by the Defence and that therefore the probative value of the submitted statements and related documents outweighs any prejudice that may arise.¹³

⁵ Request, para. 4.

⁶ Annex 1 to Request, item 10.

⁷ Request, para. 5.

⁸ Request, para. 4.

⁹ Annex 1 to Request, items 1-5.

¹⁰ Request, paras 2, 6.

¹¹ Annex 1 to Request, items 6-9.

¹² Request, para. 7.

¹³ Request, para. 8.

III. APPLICABLE LAW

8. The Panel notes Article 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 137-138, 141(1), and 155(1) and (4)-(5) of the Rules.

IV. ANALYSIS

A. LEGAL TEST

9. The Panel recalls that Rule 155(1) of the Rules provides the Panel with discretionary powers to admit the written evidence¹⁴ of unavailable persons, including statements by a deceased person, as long as the Panel is satisfied that: (i) such person is unavailable or unable to testify orally; and (ii) the material sought for admission is *prima facie* reliable.¹⁵ Pursuant to Rule 155(5) of the Rules, if the evidence goes to proof of the acts and conduct of the accused as charged in the indictment, this may be a factor against the admission of such evidence, in whole or in part. In addition to the requirements set out in Rule 155 of the Rules, the standard admissibility criteria provided for in Rules 137 and 138(1) of the Rules, namely relevance, authenticity and probative value, and the fact that any prejudicial effect does not outweigh the probative value of the written evidence, must be met.¹⁶

10. In assessing the *prima facie* reliability of the submitted evidence, the Panel considers that it is not obliged to consider factors beyond formal requirements. As

¹⁴ KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence*, 25 August 2021, para. 29, footnote 27, whereby the Panel recognised that "[t]he 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".

¹⁵ Decision, para. 32.

¹⁶ Articles 21(4)(c), 21(4)(f) and 40(2) of the Law. Similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1325, Trial Chamber VI, [*Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0039*](#), 19 May 2016, para. 8; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-1413, Trial Chamber X, [*Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68\(2\)\(c\) of the Rules*](#), 14 April 2021, para. 6.

such, the internal consistency of the statements or potential inconsistencies with other evidence do not need to be evaluated at the current stage of the proceeding. As reflected in Rule 155(1)(b) of the Rules, the Panel is instead tasked to assess formal criteria, such as the circumstances in which the evidence was made, recorded and maintained.¹⁷

B. W04648'S PRIOR STATEMENTS AND RELATED DOCUMENTS

11. With regard to the requirement of unavailability/inability of the witness to testify orally, the Panel notes that the SPO has submitted W04648's death certificate,¹⁸ and that the Defence has not challenged the witness's unavailability. The Panel thus considers that the witness is unavailable within the meaning of Rule 155(1)(a) of the Rules.

12. With regard to the *prima facie* reliability of W04648's prior statements, Rule 155(1)(b) of the Rules requires the Panel to assess the circumstances in which the evidence was made, recorded, and maintained. Having reviewed the prior statements of W04648, the Panel notes that they were all taken within the framework of an [REDACTED].¹⁹ Furthermore, the statements referred to under items 1 and 3-5 of Annex 1 to the Request are contained in [REDACTED], as well as the signature and/or the personal details of the witness.²⁰ As regards items 2, and 6-10 of Annex 1 to the Request, the Panel notes that they contain the witness's personal details and/or signature,²¹ the date and time where the statement was taken,²² details relating to the

¹⁷ Similarly, ICC, *The Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-744 OA8, Appeals Chamber, [*Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)"*](#), 1 November 2016, paras 3, 103-104.

¹⁸ Request, para. 5; Annex 1 to Request, item 10.

¹⁹ Annex 1 to Request.

²⁰ Annex 1 to Request, items 1, 3, 4, 5.

²¹ Annex 1 to Request, items 2, 6, 7, 8, 9, 10.

²² Annex 1 to Request, items 2, 6, 7, 9.

investigators taking the statement,²³ and/or the indication of the warnings given to the witness.²⁴ Regarding the *prima facie* reliability of the related documents, the Panel finds that they were discussed in witness W04648's prior statements and/or are items which the witness voluntarily submitted in the course of providing the aforementioned statements, and consequently constitute an integral part thereof. The Panel furthermore considers that such evidence has been elicited with the safeguards of criminal proceedings, namely it was given voluntarily and freely, and was taken by duly empowered investigators. In light of the above, the Panel finds that W04648's prior statements and related documents are *prima facie* reliable.

13. Turning to the requirement set out in Rule 155(5) of the Rules, the Panel notes that, upon review, the evidence contained in witness W04648's prior statements does not go to proof of the acts and conduct of the accused as charged in the (confirmed) indictment.

14. In assessing whether to admit such evidence, the Panel shall also assess the requirements under Rule 138(1) of the Rules, namely relevance, authenticity and probative value. With regard to authenticity, the Panel considers that its findings on the reliability of the statements and related documents sought for admission apply equally to this requirement, which is fulfilled accordingly. With regard to the relevance and probative value, the Panel considers the statements and related documents sought for admission to be relevant for its understanding of the alleged events at the Zllash/Zlaš detention compound between approximately 1 April 1999 and around the end of April 1999, [REDACTED]. The Panel also considers that the evidence submitted is relevant for the evaluation of the credibility [REDACTED].²⁵

²³ Annex 1 to Request, items 2, 7.

²⁴ Annex 1 to Request, item 7.

²⁵ Annex 1 to Request, items 1, 2, 4-5, 8-9.

15. Lastly, the Panel must assess whether the probative value of any submitted evidence is not outweighed by its prejudicial effect to the accused. In this respect, the Panel notes that the Defence did not oppose the Request. Furthermore, the Panel considers that, while W04648's in-court examination will be materially impossible, [REDACTED] will be available for cross-examination by the Defence on issues raised by Witness W04648 in his prior statements.²⁶ As such, any prejudice to the rights of the accused will be minimal. In light of the foregoing, the Panel finds that the probative value of the submitted evidence outweighs any prejudice to the rights of the accused. Finally, the Chamber underlines that, in order to protect the right to a fair trial of the accused, in accordance with Article 21 of the Law, "a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. Therefore, prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such".²⁷

V. DISPOSITION

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

- a. **GRANTS** the Request;
- b. **ADMITS** into evidence the prior statements of W04648 and related documents (items 1-10) listed in Annex 1 to the Request and any translation thereof;
- c. **ORDERS** the Registrar to assign exhibit numbers to the aforementioned items, for sole purpose of maintaining an accurate record of the proceedings pursuant to Article 40(5) of the Law and Rule 24(1) of the Rules;

²⁶ Request, para. 8.

²⁷ ICC, Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, , ICC-01/04-02/06-2666-Red, [Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'](#), 30 March 2021, paras 16, 630.

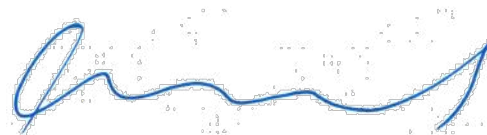
- d. **ORDERS** the Registrar to classify the prior statements and related documents as confidential; and
- e. **ORDERS** the Parties and Victims' Counsel to always refer to evidence through their ERN numbers.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 15 October 2021
At The Hague, the Netherlands.