



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: 13 December 2021

Language: English

Classification: Public

**Public redacted version of
Decision on the admission of evidence collected prior to the establishment of the
Specialist Chambers and other material**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

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Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material.

I. PROCEDURAL BACKGROUND

1. On 16 February 2021, the Specialist Prosecutor's Office (SPO) submitted, *inter alia*, its list of exhibits (SPO List of Exhibits) pursuant to Rule 95(4)(c) 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" (Admissibility Decision),² 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, by 13 September 2021, any applications for the admission of: (i) material collected prior to the establishment of the Specialist Chambers (SC) falling under Article 37 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law); and (ii) material not falling under Article 37 of the Law or Rules 153-155 of the Rules.³

3. On 13 September 2021, the SPO filed a request (Request)⁴ for the admission into evidence of: (i) material falling under Article 37 of the Law (Article 37 Material);⁵ and (ii) material not falling under Article 37 of the Law or Rules 153-155 of the Rules (Other Material).⁶

¹ KSC-BC-2020-05, F00082/A03, Specialist Prosecutor, *Exhibits list pursuant to Rule 95(4)(c)*, 16 February 2021, confidential. With the leave of the Panel, the SPO filed an amended list of exhibits on 30 July 2021, F00161/A03.

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

³ Admissibility Decision, paras 35, 43.

⁴ KSC-BC-2020-05, F00201, Specialist Prosecutor, *Prosecution Application for Admission of Material through the Bar Table*, 13 September 2021, confidential, with Annex 1, confidential. A public redacted version of the main filing was submitted on 15 September 2021, F00201/RED.

⁵ Annex 1 to Request, items 1-20.

⁶ Annex 1 to Request, items 21-185.

4. The Defence for Salih Mustafa (Defence and Accused, respectively) and Victims' Counsel did not file any responses to the Request.

5. On 2 November 2021, the SPO indicated that some of the items tendered into evidence by means of the Request were duplicates and that, in each such respective instance, only one of the duplicate items should be admitted into evidence (Amended Request).⁷

6. On 9 November 2021, pursuant to the Panel's order,⁸ the SPO submitted its proposed classification level for the items tendered in the (Amended) Request.⁹

II. SUBMISSIONS

7. With regard to the Article 37 Material, the SPO submits that it consists of evidence collected in criminal proceedings and investigations prior to the establishment of the SC, mainly by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Interim Administration Mission in Kosovo (UNMIK)/Kosovo State prosecutor and police authority, namely: (i) a statement given by the Accused [REDACTED]; (ii) documents relevant to the existence of an armed conflict which were admitted as exhibits in cases before the ICTY; and (iii) investigative material collected during UNMIK investigations.¹⁰ It avers that the material is relevant, has probative value, contains sufficient *indicia* of authenticity, and its admission would cause no undue prejudice to the Accused.¹¹ As regards the statement given by the Accused [REDACTED], the SPO avers that the Accused himself recalled having given that statement during his interview with the SPO.¹² As regards the documents relevant

⁷ KSC-BC-2020-05, Transcript of Hearing, 2 November 2021 (2 November 2021 Transcript), public, p. 1279, line 13 to p. 1280, line 7, p. 1353, lines 6-17.

⁸ KSC-BC-2020-05, Transcript of Hearing, 12 October 2021, public, p. 1098, lines 4-8.

⁹ KSC-BC-2020-05, F00248, Specialist Prosecutor, *Prosecution's proposed classification of documents tendered into evidence through KSC-BC-2020-05/F201*, 9 November 2021, public, with Annex 1, confidential.

¹⁰ Request, paras 1, 7-8; Annex 1 to Request, items 1-20.

¹¹ Request, paras 2, 6, 9-13, 15-19.

¹² Request, para. 9.

to the existence of an armed conflict, the SPO further submits that, while the Panel has taken judicial notice of a number of adjudicated facts concerning the existence of an armed conflict, these facts establish a rebuttable presumption and the existence of an armed conflict may therefore still be the subject of litigation at trial.¹³ Lastly, as regards one of the UNMIK investigative documents,¹⁴ the SPO submits that it has been included on the SPO list of exhibits and disclosed in Legal Workflow; however, the photograph contained therein is too dark to be meaningfully reviewed.¹⁵ Accordingly, the SPO requests that a better quality version of the photograph¹⁶ be added to the SPO List of Exhibits (Request for Amendment) and admitted in addition to the aforementioned document.¹⁷

8. With regard to the Other Material, the SPO submits that it consists of: (i) newspaper articles and books; (ii) United Nations High Commissioner for Refugees and Organisation for Security and Co-operation in Europe reports pertaining to the existence of an armed conflict; (iii) various Kosovo Liberation Army (KLA) documents pertaining to the existence of an armed conflict; (iv) the Accused's SPO interview; (v) maps of relevant areas of Kosovo; (vi) material found on items seized from the Accused; and (vii) photographs of the location of the former Zllash/Zlaš detention compound, showing its current status.¹⁸ It avers that the material is relevant, has probative value, contains sufficient *indicia* of authenticity, and its admission would cause no undue prejudice to the Accused.¹⁹ Specifically as regards the Accused's SPO interview, the SPO submits that it was conducted in full compliance with the

¹³ Request, para. 14, also referring to KSC-BC-2020-05, F00191, Trial Panel I, *Decision on judicial notice of adjudicated facts* (Decision on Adjudicated Facts), 7 September 2021, public.

¹⁴ [REDACTED].

¹⁵ Request, para. 20.

¹⁶ [REDACTED].

¹⁷ Request, paras 20, 41(i) and footnote 24.

¹⁸ Request, paras 1, 21; Annex 1 to Request, items 21-185.

¹⁹ Request, paras 2, 6, 22-40.

requirements set out in Rules 42-44 of the Rules and that the Accused's rights were duly respected during the interview.²⁰

III. APPLICABLE LAW

9. The Panel notes Article 21(4), 37, 38(3), and 40(2) and 6(h) of the Law and Rules 42-44, 118(2), and 137-139 of the Rules.

10. The Panel recalls that, pursuant to Article 40(6)(h) of the Law, the Panel may rule on the admissibility of evidence.²¹ It further recalls that Rule 138(1) of the Rules establishes four cumulative admissibility criteria that the Panel shall apply when assessing the admissibility of an evidentiary item (relevance, authenticity, probative value, and prejudicial effect).²² The aforementioned admissibility criteria are further explained below.

11. *Relevance*. Evidence is deemed to be relevant if it is connected, directly or indirectly, to the elements of the crime(s) or the mode(s) of liability pleaded in the indictment or other facts or circumstances material to the case.²³

12. *Authenticity*. Evidence is deemed to be authentic if it is what it professes to be in origin or authorship. Absolute proof of authenticity is not required for admissibility, but is a matter for the weight of the evidence to be given by the Panel in its deliberations.²⁴

13. *Probative value*. Evidence has probative value when it tends to prove or disprove an issue which is relevant to the case. Probative value is determined by two primary

²⁰ Request, para. 34.

²¹ Admissibility Decision, paras 13, 21.

²² Admissibility Decision, para. 13.

²³ See KSC-BC-2020-07, F00334, Trial Panel II, *Decision on the Prosecution Request for Admission of Items Through the Bar Table (Gucati and Haradinaj Bar Table Decision)*, 29 September 2021, public, para. 12 and the references contained therein.

²⁴ See *Gucati and Haradinaj Bar Table Decision*, para. 13 and the references contained therein.

factors: (i) the *prima facie* reliability of the tendered evidence; and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case. Evidence is likely to influence the determination of a particular issue in dispute when it may assist the Panel in: (i) reaching a conclusion about a fact or a circumstance material to the case; and/or (ii) assessing the reliability of other evidence in the case. As with authenticity, definite proof of reliability is not required at the admissibility stage; rather it is an issue that will again be assessed in greater depth in the course of determining the weight to be attached to the evidence after its admission.²⁵

14. *Prejudice*. Evidence may be excluded at any stage of the proceedings if its probative value is outweighed by its prejudicial effect. Prejudicial effect should not be confused with any negative impact on the Defence case; rather the admission of the item in question must adversely impact the fairness or expeditiousness of the proceedings.²⁶

IV. ANALYSIS

A. REQUEST FOR AMENDMENT

15. As regards the Request for Amendment, the Panel recalls that, pursuant to Rule 118(2) of the Rules, timely notice shall be given for any such request. In this regard, the Panel notes that: (i) the fact that the photograph contained in [REDACTED] is too dark to be meaningfully reviewed should have become apparent to the SPO at the latest at the time of the item's disclosure in Legal Workflow; and (ii) the SPO did not indicate when the better-quality version of the photograph, subject to the Request for Amendment, came into its possession. However, the Panel also pays due regard to the fact that the submitted better-

²⁵ See *Gucati and Haradinaj* Bar Table Decision, para. 14 and the references contained therein.

²⁶ See *Gucati and Haradinaj* Bar Table Decision, para. 15 and the references contained therein.

quality version of the photograph might be of assistance to the Parties, Victims' Counsel, and the Panel in their assessment of [REDACTED]. The Panel further notes that the photograph subject to the Request for Amendment was previously disclosed to the Defence, albeit in a lower-quality format, as part of [REDACTED], and that the Request for Amendment is not opposed by the Defence. In light of the foregoing, the Panel finds that the SPO has shown good cause for the requested amendment of the SPO List of Exhibits and that such amendment does not affect the Accused's ability to adequately prepare his defence.²⁷ The Panel therefore grants the Request for Amendment.

B. AMENDED REQUEST

1. Article 37 Material

16. As regards the statement given by the Accused [REDACTED] (Statement),²⁸ the Panel notes that it is relevant to the charges in the present case as it pertains to the Accused's position as commander of the BIA unit in the period relating to the charges and therefore may be relevant to establishing his involvement, if any, in the crimes charged. Furthermore, the Statement appears to be authentic, as it constitutes [REDACTED] and indicates, among others, the date when it was taken and the names of the individuals involved in the process. The Panel therefore finds that the Statement has clear probative value and, moreover, pertains to core matters in the present case. As to whether its probative value may be outweighed by its prejudicial effect, the Panel notes that the Statement was provided by the Accused [REDACTED] in his capacity as a witness and not as a suspect. Therefore, at that time, the Accused was not entitled to the rights of suspects during an investigation. Nevertheless, the Panel notes that the Accused was informed of the

²⁷ See Article 21(4)(c) of the Law.

²⁸ Annex 1 to Request, item 1.

privilege against self-incrimination, by being instructed that [REDACTED].²⁹ Furthermore, the Panel notes that the Defence did not oppose the Statement's admission into evidence. In these circumstances, considering, in particular: (i) the Statement's clear probative value; and (ii) the fact that, when giving his Statement, the Accused was, in his capacity as a witness, informed of the privilege against self-incrimination, thereby minimizing any potential prejudicial effect, the Panel finds that the Statement's probative value is not outweighed by its prejudicial effect. In light of the foregoing, the Panel considers it appropriate to admit the Statement into evidence.

17. As regards the documents relevant to the existence of an armed conflict, which were admitted as exhibits before the ICTY (ICTY Documents),³⁰ the Panel is satisfied that they are relevant to the charges in the present case as they pertain to the existence of an armed conflict and the organisation of the KLA during or in the period leading up to the timeframe of the charges and therefore may be relevant to proof of the existence of a non-international armed conflict involving the KLA as an armed group and the nexus requirement of the war crimes charged in the present case. Moreover, the ICTY Documents bear *indicia* of reliability such as stamps, seals, and/or signatures and therefore appear to be authentic, and have clear probative value. In addition, the Panel is satisfied that no undue prejudice is caused to the Accused by their admission. Lastly, while the Panel has taken notice of a number of adjudicated facts relating to the existence of an armed conflict during the period of the charges,³¹ it also recalls that the Defence may still present evidence and challenge the accuracy of those facts.³² In these circumstances, and

²⁹ [REDACTED], p. 1.

³⁰ Annex 1 to Request, items 2-14.

³¹ Decision on Adjudicated Facts, paras 12, 15(b).

³² Decision on Adjudicated Facts, para. 14.

in the interest of expeditiousness of the proceedings, the Panel considers it appropriate to admit the ICTY Documents into evidence.

18. As regards the investigative material collected during UNMIK investigations (UNMIK Material), the Panel notes that it includes: (i) a collection of aerial photographs of the location of the alleged crimes and related locations taken pursuant to a request of the investigator in charge of the investigation into [REDACTED]; (ii) an UNMIK Ante Mortem Investigation Report concerning an individual allegedly detained in Zllash/Zlaš who was still missing on 3 September 2004; and (iii) the photograph subject to the Request for Amendment.³³

As such, the Panel is satisfied that the UNMIK Material is relevant to the charges in the present case. Likewise, the Panel considers that the UNMIK Material, comprising official UNMIK documents and containing grid references of the photographed locations and the names of the officials involved in the investigation and the aerial mission, as applicable, appears to be authentic and has clear probative value. Lastly, the Panel is satisfied that no undue prejudice is caused to the Accused by the items' admission into evidence. In these circumstances, the Panel considers it appropriate to admit the UNMIK Material into evidence.

19. The Panel further notes that, in addition to the Article 37 Material tendered by the SPO as such, items 67 and 68 listed in Annex 1 to the Request also constitute material collected prior to the establishment of the SC falling under Article 37 of the Law. Therefore, the Panel will rule on the admissibility of the aforementioned items in accordance with paragraphs 23 and 36 of the Admissibility Decision. In this respect, the Panel notes that the aforementioned two items are relevant to the charges in the present case as they contain photographs of the alleged Zllash/Zlaš detention site and [REDACTED], respectively. Moreover, the two documents bear

³³ Request, paras 16-17, 19-20 and footnote 24; Annex 1 to Request, items 15-20.

indicia of reliability such as the case number, the date when the photographs were taken, and/or [REDACTED], and have clear probative value. In addition, the Panel is satisfied that no undue prejudice is caused to the Accused by their admission. In these circumstances, the Panel considers it appropriate to admit into evidence items 67 and 68 listed in Annex 1 to the Request.

2. Other Material

(a) Accused's SPO interview

20. At the outset, the Panel recalls that it will refrain, in general, from rendering discrete item-by-item admissibility rulings of evidence submitted during trial, unless, *inter alia*, the Panel is compelled to do so by specific legal provisions.³⁴ In this respect, Rule 138(2) of the Rules provides an exclusionary rule for evidence obtained by means of a violation of, among others, the Law or the Rules. The Panel further notes that the Accused's SPO interview³⁵ was taken at a time when the SPO had grounds to believe that he had committed a crime within the jurisdiction of the SC and that the Law and the Rules provide certain safeguards for the rights of suspects during an investigation. In these circumstances, the Panel will conduct an enquiry under Rule 138(2) of the Rules with respect to the Accused's SPO interview.

21. The Panel further recalls that, when conducting such a Rule 138(2) enquiry, the Panel applies a two prong test.³⁶ At first, the evidence must have been obtained

³⁴ Admissibility Decision, para. 21.

³⁵ Annex 1 to Request, items 76-84. The Panel notes that item 76 constitutes an SPO Official Note pertaining to the Accused's SPO interview, containing certain details pertaining to the interview process, as well as a sketch drawn by the Accused during the interview. As such, the Panel considers that the SPO Official Note constitutes an integral part of the interview itself and understands the term "Accused's SPO interview" to also comprise the aforementioned SPO Official Note. *Similarly*, Admissibility Decision, footnote 27.

³⁶ Admissibility Decision, para. 25.

by either a violation of the Law or the Rules, or standards of international human rights law.³⁷ Only if such a violation is established in the affirmative will the Panel proceed to consider the two alternative conditions set out under Rule 138(2)(a)-(b) of the Rules.³⁸

22. With regard to the first prong of the test, the Panel will assess whether the Accused's SPO interview was obtained in violation of Article 38(3) of the Law and Rules 42-44 of the Rules. In this respect, the Panel observes that, in accordance with Article 38(3)(a)-(b) of the Law and Rule 43(2) of the Rules, at the commencement of his SPO interview, the Accused was informed in a language he speaks and understands, *inter alia*, that: (i) there were grounds to believe that he committed a crime within the jurisdiction of the SC;³⁹ (ii) he had the right to remain silent, without such silence being considered in the determination of his guilt or innocence;⁴⁰ and (iii) his questioning was being recorded and any statement made by him may be used in evidence.⁴¹ Furthermore, the Accused himself: (i) confirmed that he understood both his rights and obligations, including that the record of his interview may be used in criminal proceedings before the SC;⁴² (ii) confirmed that his statement was given voluntarily and that he was not given any promises or guarantees in return;⁴³ and (iii) indicated that he did not have any objections to the manner by which his statement was taken.⁴⁴ Moreover, in accordance with Article 38(3)(c)-(d) of the Law, during his questioning, the Accused was assisted by: (i) an interpreter whose Albanian language the Accused confirmed that he

³⁷ Admissibility Decision, para. 25.

³⁸ Admissibility Decision, para. 25.

³⁹ [REDACTED], Part 1, p. 3, lines 3-7.

⁴⁰ [REDACTED], Part 1, p. 3, lines 11-13.

⁴¹ [REDACTED], Part 1, p. 3, lines 13-15.

⁴² [REDACTED], Part 1, p. 3, line 25 to p. 4, line 2; [REDACTED], Part 8, p. 32, lines 1-5.

⁴³ [REDACTED], Part 8, p. 32, lines 6-11.

⁴⁴ [REDACTED], Part 8, p. 32, lines 12-14.

understood;⁴⁵ and (ii) Specialist Counsel of his own choosing.⁴⁶ Also, the Accused's SPO interview was video-recorded⁴⁷ and subsequently transcribed in accordance with the requirements of Rule 44 of the Rules, including by providing the Accused, at the conclusion of the questioning, with the opportunity to clarify, supplement or amend anything he said during the interview.⁴⁸ In light of the aforementioned, the Panel finds that the Accused's rights as a suspect at the time of his SPO interview were duly respected. As no violation of the Law and the Rules has been established, the first prong of the test under Rule 138(2) of the Rules has not been met and the Panel does not need to proceed to consider the two alternative conditions set out in Rule 138(2)(a)-(b) of the Rules with respect to the Accused's SPO interview.

23. In light of the foregoing, the Accused's SPO interview is available for consideration by the Panel for the purpose of its deliberations and judgment.

(b) Remainder of the Other Material

24. As regards the remainder of the Other Material,⁴⁹ the Panel does not consider it necessary to exclude any such material, with the exception of certain duplicate items.⁵⁰ Therefore, in accordance with the Admissibility Decision, the Panel dispenses with rendering a discrete item-by-item ruling. As explained in the

⁴⁵ [REDACTED], Part 1, p. 2, line 24 to p. 3, line 1.

⁴⁶ [REDACTED], Part 1, p. 3, lines 16-19.

⁴⁷ [REDACTED], Parts 1-8.

⁴⁸ [REDACTED], Part 8, p. 31, lines 18-21.

⁴⁹ Annex 1 to Request, items 21-66, 69-75, 85-137, 139-185. The Panel notes that Annex 1 to the Request does not contain any item 138.

⁵⁰ See 2 November 2021 Transcript, p. 1279, lines 13-22, referring to Annex 1 to Request, where the Panel identified the following items as duplicates: 87, 100, 131, and 148; 86 and 130; 88 and 132; 89 and 133; 90 and 136; 91 and 137; 95 and 141; 97 and 144; 98 and 145; 99 and 146; 101 and 149; 102 and 151; 103 and 153; 106 and 154; 110 and 155; 118 and 156; 121 and 159; 122 and 160; and 140 and 157, respectively. Accordingly, and as per the Amended Request, in each respective instance, the Panel will only consider one of the duplicate items for the purpose of its deliberations and judgment.

Admissibility Decision, 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, though it may not necessarily discuss these aspects for every item in the judgment itself.⁵¹ Accordingly, all such material is available for consideration by the Panel in the judgment.⁵²

C. SUBSEQUENT UNREDACTED OR LESSER REDACTED VERSIONS

25. In accordance with paragraph 37 of the Admissibility Decision, any subsequent unredacted or lesser redacted versions of the items admitted or deferred to the deliberations stage will automatically be considered as admitted or considered to be available as evidence to the Panel for the purpose of its deliberations and judgment, subject to any objections of the Parties and Victims' Counsel,⁵³ as set out below. For the purpose of maintaining an accurate record of the proceedings, should any unredacted or lesser redacted versions of the aforementioned items be disclosed in the future, the disclosing Party shall immediately inform the other Party, Victims' Counsel, the Panel, and the Registry's Court Management Unit (CMU) thereof. This will allow the Registrar to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the version admitted or considered as part of the evidence for the purpose of the Panel's deliberations and judgment pursuant to the present decision. Should the other Party or Victims' Counsel have any objections in relation to any such subsequent unredacted or lesser redacted versions, they shall inform the Panel thereof within five days of the notification of their disclosure.

⁵¹ Admissibility Decision, paras 21, 45.

⁵² See Admissibility Decision, para. 45.

⁵³ See Admissibility Decision, para. 47.

V. DISPOSITION

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

- a. **GRANTS** the Request for Amendment;
- b. **AUTHORISES** the SPO to add item [REDACTED] to the SPO List of Exhibits;
- c. **ORDERS** the SPO to file an amended list of exhibits by **Friday, 17 December 2021**;
- d. **GRANTS** the Amended Request;
- e. **ADMITS** into evidence the Article 37 material (items 1-20 and 67-68 listed in Annex 1 to the Request), including, as applicable, both the English and the Albanian version of every such item;
- f. **ORDERS** the Registrar to assign exhibit numbers to items 1-99, 101-129, 134-135, 139-140, 142-143, 147, 150, 152, 158, and 161-185 listed in Annex 1 to the Request, for the 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;
- g. **ORDERS** the Registrar to classify as confidential items 1, 15-20, 67-68, 76-99, 101-129, 134-135, 139-140, 142-143, 147, 150, 152, 158, and 161-181 listed in Annex 1 to the Request;
- h. **ORDERS** the Registrar to classify as public items 2-14, 21-66, 69-75, and 182-185 listed in Annex 1 to the Request;
- i. **ORDERS** the disclosing Party to immediately inform the other Party, Victims' Counsel, the Panel, and the CMU should any subsequent unredacted or lesser redacted versions of the aforementioned items be disclosed and **ORDERS** the Registrar to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the respective exhibit number(s) assigned pursuant to this decision;

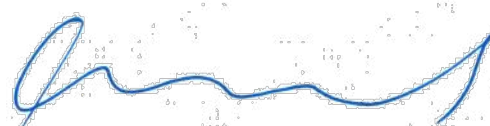
- j. **ORDERS** the non-disclosing Party and Victims' Counsel to file any objections to any such subsequent unredacted or lesser redacted versions within five days of notification of their disclosure; and
- k. **ORDERS** the Parties and Victims' Counsel to always refer to evidence through their ERN numbers.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 13 December 2021
At The Hague, the Netherlands