



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: 17 December 2021

Language: English

Classification: Public

**Public redacted version of
Decision on items used with witnesses W03593, W04600, W01679, and W03594
during their in-court testimony**

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 items used with witnesses W03593, W04600, W01679, and W03594 during their in-court testimony.

I. PROCEDURAL BACKGROUND

1. On 25 August 2021, the Panel issued the “Decision on the submission and the admissibility of evidence”, in which it set out the principles governing the admission of non-oral evidence in the present case (Admissibility Decision).¹
2. On 26 August 2021, the Panel issued the “Decision on the conduct of the proceedings” (Conduct of Proceedings Decision), ordering, *inter alia*, the Parties and/or Victims’ Counsel, as the case may be, to submit, at the latest on the last working day of each calendar month, an application for the admission of any material used during their respective questioning of the witnesses whose testimony was completed within that month and which has not already been submitted to the Panel.²
3. On 30 September 2021, the Specialist Prosecutor’s Office (SPO) filed a request for the admission of items used during its examination of witnesses W03593 and W04600.³
4. On 6 October 2021, pursuant to the Panel’s order,⁴ the SPO filed a revised request for the admission of items used during its examination of witnesses W03593 and W04600 (First Request).⁵
5. The Defence for Salih Mustafa (Defence and Accused, respectively) and Victims’ Counsel did not respond to the First Request.

¹ KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence*, 25 August 2021, public.

² KSC-BC-2020-05, F00170, Trial Panel I, *Decision on the conduct of the proceedings*, 26 August 2021, public, para. 37.

³ KSC-BC-2020-05, F00223, Specialist Prosecutor, *Prosecution Request for Admission of Exhibits from the Direct Examinations of W03593 and W04600*, 30 September 2021, public, with Annex 1, confidential.

⁴ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021 (4 October 2021 Transcript), public, p. 852, line 14 to p. 854, line 21.

⁵ KSC-BC-2020-05, F00228, Specialist Prosecutor, *Prosecution Revised Request for Admission of Exhibits from the Direct Examinations of W03593 and W04600*, 6 October 2021, public, with Annex 1, confidential.

6. On 15 October 2021, pursuant to the Panel's order,⁶ the SPO submitted its proposed classification level for the items tendered in the First Request.⁷
7. On 28 October 2021, the SPO filed a request for the admission of items used during its examination of witnesses W01679 and W03594 (Second Request).⁸
8. The Defence and Victims' Counsel did not respond to the Second Request.

II. SUBMISSIONS

9. In the First Request, the SPO requests the admission of the items referred to in its Annex 1, including: (i) the portions of W03593's and W04600's prior statements that were referred to during their direct examinations; (ii) material shown to W03593 and W04600 during their direct examinations; and (iii) material marked by the two witnesses during their direct examinations.⁹ It submits that the documents are relevant, authentic, have probative value, and their admission would cause no undue prejudice to the Accused.¹⁰ The SPO further avers that, where specific drawings or photographs, that are part of larger packets or booklets, were shown to the two witnesses, the complete packets or booklets are tendered in their entirety, as admission of the packet or booklet in its entirety will provide the Panel with a more complete record and context, including information going to reliability and authenticity.¹¹

10. In the Second Request, the SPO requests the admission of the items referred to in its Annex 1, including: (i) the portions of W01679's and W03594's prior statements

⁶ KSC-BC-2020-05, Transcript of Hearing, 12 October 2021, public, p. 1097, line 22 to p. 1098, line 12.

⁷ KSC-BC-2020-05, F00238, Specialist Prosecutor, *Prosecution submissions on the classification of the exhibits tendered through W03593 and W04600*, 15 October 2021, public, with Annex 1, confidential.

⁸ KSC-BC-2020-05, F00242, Specialist Prosecutor, *Prosecution Request for Admission of Exhibits from the Direct Examinations of W01679 and W03594*, 28 October 2021, public, with Annex 1, confidential.

⁹ First Request, paras 2, 6-9. The Panel notes that only witness W04600 marked items during his direct examination by the SPO.

¹⁰ First Request, para. 3.

¹¹ First Request, paras 7-8.

that were referred to during their direct examinations; and (ii) material shown to the two witnesses during their examinations.¹² It submits that the documents are relevant, authentic, have probative value, and their admission would cause no undue prejudice to the Accused.¹³ The SPO further avers that, where specific photographs and/or drawings, that are part of larger packets or booklets, were shown to the two witnesses, the complete packets or booklets are tendered in their entirety, as admission of the packet or booklet in its entirety will provide the Panel with a more complete record and context, including information going to reliability and authenticity.¹⁴ Lastly, as regards W01679, the SPO also tenders into evidence the SPO Official Note of his 5 June 2019 interview, which was shown to the witness during his direct examination and contains at pages 6-8 the handwritten corrections made by the witness to his prior statement before the United Nations Interim Administration Mission in Kosovo during his SPO interview.¹⁵

III. APPLICABLE LAW

11. The Panel notes Article 21(4) and 40(2), (5), and 6(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 24(1) and 137-138 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

¹² Second Request, paras 1, 5-6, 9.

¹³ Second Request, para. 2.

¹⁴ Second Request, para. 6.

¹⁵ Second Request, para. 7.

IV. ANALYSIS

12. At the outset, the Panel notes that some of the items tendered into evidence by means of the First Request¹⁶ and the Second Request¹⁷ have already been tendered by the SPO in a previous request¹⁸ and are already considered as admitted¹⁹ or considered to be available as evidence to the Panel for the purpose of its deliberations and judgment.²⁰ The portions of the First Request and the Second Request pertaining to these items are therefore moot.

13. As regards the remaining items tendered by means of the First Request and the Second Request, the Panel does not consider it necessary to exercise its discretion with a view to excluding any of them. Accordingly, in accordance with the Admissibility Decision and the Conduct of Proceedings Decision, the Panel dispenses with rendering a discrete item-by-item ruling and considers all these items available to the Panel for the purpose of its deliberations for the judgment on the guilt or innocence of the Accused,²¹ with the following caveats.

14. As far as the prior statements of W03593, W04600, W01679, and W03594 are concerned,²² the Panel recalls that, in accordance with the principle of orality, only those portions discussed with the witnesses during their in-court testimony will be considered.²³ Furthermore, in accordance with paragraph 37 of the

¹⁶ Annex 1 to First Request, items 1, 5, 10, 15-18.

¹⁷ Annex 1 to Second Request, items 5-6.

¹⁸ 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.

¹⁹ Annex 1 to First Request, items 1, 5, 15-18; Annex 1 to Second Request, items 5-6. See KSC-BC-2020-05, F00281/RED, Trial Panel I, *Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material* (Decision on Article 37 and Other Material), 13 December 2021, public, paras 18-19, 26(e)-(f).

²⁰ Annex 1 to First Request, item 10. See Decision on Article 37 and Other Material, paras 24, 26(f).

²¹ Admissibility Decision, para. 21; Conduct of Proceedings Decision, para. 37.

²² Annex 1 to First Request, items 2-4, 19-20; Annex 1 to Second Request, items 1-2, 4, 10-11, 13.

²³ See also 4 October 2021 Transcript, p. 852, line 14 to p. 854, line 21.

Admissibility Decision, the same applies to the corresponding portions of any audio-visual recordings of such prior statements, where available.

15. As far as the requests for admission of lengthy material are concerned, the Panel recalls that, as a general rule, such material shall be submitted for admission in its entirety, in order to allow the Panel to assess the correct meaning and broader context of the portion(s) relied upon by the Party, as the case may be.²⁴ Accordingly, with respect to items 8, 9, and 11²⁵ listed in Annex 1 to the First Request and items 3, 7, and 12 listed in Annex 1 to the Second Request, the Panel will consider these items in their entirety. However, with respect to item 6 listed in Annex 1 to the First Request, in the absence of an immediately apparent connection among the photographs contained therein, the Panel will only consider the photograph actually shown to W03593 ([REDACTED]).

16. As far as the items marked by W04600 during his direct examination are concerned, the original version, as well as the version marked by the witness,²⁶ both of which have been tendered by the SPO, will be considered.

17. In addition to the aforementioned items and/or portions thereof tendered by the SPO, the Panel will also *proprio motu* consider: (i) the portions of W03593's SPO interview²⁷ and of [REDACTED] used by the Panel/and or the Defence during their respective questioning of W03593, as reflected in the transcript and recorded by the Registry's Court Management Unit (CMU) for administrative purposes;²⁸ (ii) the portions of W04600's SPO interview²⁹ used by the Panel and the Defence

²⁴ Admissibility Decision, para. 38; Conduct of Proceedings Decision, para. 38.

²⁵ The Panel notes that items 12, 13, and 14 listed in Annex 1 to the First Request form part of item 11 listed therein.

²⁶ [REDACTED].

²⁷ [REDACTED], Parts 2-4 (including the corresponding Albanian version [REDACTED], Parts 2-4, and corresponding audio-video recording [REDACTED], Parts 2-4).

²⁸ KSC-BC-2020-05, Transcript of Hearing, 2 November 2021, public, p. 1281, lines 10-23.

²⁹ [REDACTED], Part 3, Revised, RED3 (including the corresponding Albanian version [REDACTED], Part 3, Revised, RED3, and corresponding audio-video recording [REDACTED], Part 3).

during their respective questioning of W04600, as reflected in the transcript and recorded by CMU for administrative purposes; (iii) the portions of W01679's SPO interview³⁰ and of documents [REDACTED] and [REDACTED] used by the Panel and/or the Defence during their respective questioning of W01679, as reflected in the transcript and recorded by CMU for administrative purposes; (iv) the portions of W03594's SPO interview³¹ used by the Panel and the Defence during their respective questioning of W03594, as reflected in the transcript and recorded by CMU for administrative purposes; and (v) the items marked by W03593 and W01679 during their questioning by the Panel.³²

18. Lastly, in accordance with paragraph 37 of the Admissibility Decision, any subsequent unredacted or lesser redacted versions of the items addressed in the present decision will automatically be considered by the Panel for the purpose of its deliberations and judgment, subject to any objections of the Parties and Victims' Counsel.³³ For the purpose of maintaining an accurate record of the proceedings, should any unredacted or lesser redacted versions of these items be disclosed in the future, the disclosing Party shall immediately inform the other Party, Victims' Counsel, the Panel, and CMU thereof. This will allow CMU to link in Legal Workflow any such subsequent unredacted or lesser redacted versions with the version considered 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.

³⁰ [REDACTED], Parts 1-3, Revised, RED3 (including the corresponding Albanian version [REDACTED], Parts 1-3, Revised, RED3, and corresponding audio-video recording [REDACTED], Parts 1-3).

³¹ [REDACTED], Parts 1-7, RED1 (including the corresponding Albanian version [REDACTED], Parts 1-7, Revised, RED1, and corresponding audio-video recording [REDACTED], Parts 1-7).

³² [REDACTED].

³³ Conduct of Proceedings Decision, para. 38.

V. CONSOLIDATED LIST OF ITEMS TO BE FILED ON THE CASE RECORD

19. For the purpose of maintaining an accurate record of the proceedings in accordance with Article 40(5) of the Law and Rule 24(1) of the Rules, within two weeks of the closing of the evidentiary proceedings in accordance with Rule 134 of the Rules, the Registrar shall file on the case record a consolidated list of all items considered as admitted or considered to be available as evidence to the Panel for the purpose of its deliberations and judgment, indicating, as applicable, the portions of each respective item used with the witnesses who testified in the present case.

VI. DISPOSITION

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

- a. **PARTLY GRANTS** the First Request and the Second Request;
- b. **ORDERS** the Registrar to assign exhibit numbers to: (i) items 2-4, 6-9, 11, and 19-20 listed in Annex 1 to the First Request; (ii) items 1-4 and 7-13 listed in Annex 1 to the Second Request; (iii) items [REDACTED], Part 3, Revised (including the corresponding Albanian version [REDACTED], Part 3, Revised, and corresponding audio-video recording [REDACTED], Part 3), [REDACTED], Part 4, Revised, RED3 (including the corresponding Albanian version [REDACTED], Part 4, Revised, and corresponding audio-video recording [REDACTED], Part 4), [REDACTED], Part 1, Revised, RED3 (including the corresponding Albanian version [REDACTED], Part 1, Revised, RED3, and corresponding audio-video recording [REDACTED], Part 1), [REDACTED], Part 7, RED1 (including the corresponding Albanian version [REDACTED], Part 7, Revised, RED1, and corresponding audio-video recording [REDACTED], Part 7), and [REDACTED]; and (iv) items [REDACTED], 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;

- c. **ORDERS** the Registrar to classify as confidential: (i) items 2-4, 6-9, 11, and 19-20 listed in Annex 1 to the First Request; (ii) items 1-4, 7-8, and 10-13 listed in Annex 1 to the Second Request; (iii) items [REDACTED], Part 3, Revised (including the corresponding Albanian version [REDACTED], Part 3, Revised, and corresponding audio-video recording [REDACTED], Part 3), [REDACTED], Part 4, Revised, RED3 (including the corresponding Albanian version [REDACTED], Part 4, Revised, and corresponding audio-video recording [REDACTED], Part 4), [REDACTED], Part 1, Revised, RED3 (including the corresponding Albanian version [REDACTED], Part 1, Revised, RED3, and corresponding audio-video recording [REDACTED], Part 1), [REDACTED], Part 7, RED1 (including the corresponding Albanian version [REDACTED], Part 7, Revised, RED1, and corresponding audio-video recording [REDACTED], Part 7), and [REDACTED]; and (iv) items [REDACTED];
- d. **ORDERS** the Registrar to classify as public: (i) item 9 listed in Annex 1 to the Second Request; and (ii) item [REDACTED];
- e. **ORDERS** the Registrar to reflect, in the field “General comments” on Legal Workflow, as applicable, the portions of each aforementioned item used with each respective witness by the Parties, Victims’ Counsel, and/or the Panel, as the case may be;
- f. **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;

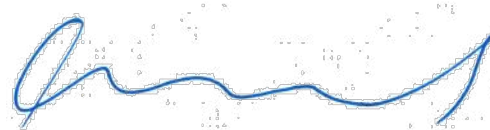
- g. **ORDERS** the non-disclosing Party and Victims' Counsel to file any objections to any such subsequent unredacted or lesser redacted versions within five days of notification of their disclosure; and
- h. **ORDERS** the Registrar to file on the case record, within two weeks of the closing of the evidentiary proceedings in accordance with Rule 134 of the Rules, a consolidated list of all items considered as admitted or considered to be available as evidence to the Panel for the purpose of its deliberations and judgment, indicating, as applicable, the portions of each respective item used with the witnesses who testified in the present case.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 17 December 2021
At The Hague, the Netherlands.