



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:** 17 December 2021

**Language:** English

**Classification:** Public

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**Public redacted version of**

**Decision on the Prosecution application pursuant to Rule 153 of the Rules**

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**To be notified to:**

**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

**Registry**

Fidelma Donlon

**Victims' Counsel**

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on the Prosecution application pursuant to Rule 153 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

## I. PROCEDURAL BACKGROUND

1. On 15 February 2021, the Specialist Prosecutor's Office (SPO) filed its initial list of witnesses pursuant to Rule 95(4)(b) of the Rules.<sup>1</sup>
2. On 25 August 2021, the Panel issued the "Decision on the submission and the admissibility of evidence" (Admissibility 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 153 and Rule 155 of the Rules by 13 September 2021.<sup>2</sup>
3. On 13 September 2021, the SPO filed the order of witness testimonies for the months of November and December 2021, scheduling the testimony of witness W04712 as *live* testimony.<sup>3</sup>
4. On 6 October 2021, the SPO filed a revised order of witness testimonies, seeking the Panel's leave to file an application for the admission of written

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<sup>1</sup> 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). With the leave of the Panel, the SPO filed an amended list of witnesses on 30 July 2021, F00161/A01, confidential and F00161/A02, confidential.

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

<sup>3</sup> KSC-BC-2020-05, F00198, Specialist Prosecutor, *SPO submission concerning the order of witness testimonies for the months of November and December 2021*, 13 September 2021, public, with Annex 1, confidential.

statements and transcripts of witness W04712 (Witness or W04712) in lieu of oral testimony, pursuant to Rule 153(1) of the Rules.<sup>4</sup>

5. On 2 November 2021, the Panel ordered the SPO to file any application under Rule 153 of the Rules, including the reasons for such late application, by 19 November 2021.<sup>5</sup>

6. On 19 November 2021, the SPO requested the admission of written statements and associated exhibits of W04712 in lieu of oral testimony (Request).<sup>6</sup>

7. On 22 November 2021, the SPO filed an *addendum* to the Request indicating the reasons for late filing.<sup>7</sup>

8. On 22 November 2021, the Defence requested an extension of time to respond to the Request.<sup>8</sup> On the same day, the Panel granted the Defence request for extension of time and ordered the Defence to file its response by 3 December 2021.<sup>9</sup>

9. On 3 December 2021, the Defence filed a response, requesting the Panel to reject the Request (Response).<sup>10</sup> The Defence did not oppose the timeliness of the Request.

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<sup>4</sup> KSC-BC-2020-05, F00229, Specialist Prosecutor, *SPO Revised order of witness testimonies for the months of October, November and December 2021*, 6 October 2021, public, paras 2-3, with Annex 1, confidential.

<sup>5</sup> KSC-BC-2020-05, Transcript of Hearing, 2 November 2021, public, p. 1280, lines 9-20.

<sup>6</sup> KSC-BC-2020-05, F00263, Specialist Prosecutor, *Prosecution Application pursuant to Rule 153(1)*, 19 November 2021, confidential, with Annex 1, confidential. A public redacted version thereof was filed on 22 November 2021 (F00263/RED).

<sup>7</sup> KSC-BC-2020-05, F00265, Specialist Prosecutor, *Addendum to Prosecution Application KSC-BC-2020-05/F00263 (Addendum)*, 22 November 2021, confidential. A public redacted version thereof was filed on the same day (F00265/RED).

<sup>8</sup> KSC-BC-2020-05, Transcript of Hearing, 22 November 2021, public, p. 1720, line 2 to p. 1722, line 5.

<sup>9</sup> KSC-BC-2020-05, Transcript of Hearing, 22 November 2021, public, p. 1753, line 25 to p. 1754, line 16.

<sup>10</sup> KSC-BC-2020-05, F00278, Defence, *Defence response to Prosecution Application 'KSCBC- 2020/F00263, dated 19 November 2021 and on Addendum to Prosecution Application KSC-BC-2020/F00263, dated 22 November 2021*, 3 December 2021, confidential.

## II. SUBMISSIONS

10. The SPO seeks the admission of the transcripts of the SPO interview of W04712 dated [REDACTED] as well as associated exhibits, namely: (i) an official note from the SPO, containing an exhibit handwritten by the Witness [REDACTED]; and (ii) a surrogate sheet of the sealed evidence bag containing the DVD of W04712's audio/video recorded interview [REDACTED] (Material).<sup>11</sup>

11. The SPO submits that the Material is relevant, reliable, of probative value and suitable for admission in written form.<sup>12</sup> In particular, the SPO contends that the Material does not go to proof of the acts and conduct of Mr Salih Mustafa (Accused) as charged in the (confirmed) indictment,<sup>13</sup> as the Witness never mentions the Accused and provides purely crime-base evidence, which is largely cumulative and corroborative of the evidence of other witnesses, who have already testified or are scheduled to testify before the Panel.<sup>14</sup> Receipt of W04712's evidence in written form would therefore enhance the efficiency of the proceedings and spare the Witness from recounting such painful events.<sup>15</sup>

12. The SPO submits that the decision to seek admission of W04712's evidence in writing was made only after the commencement of the trial, and following further review of the entirety of the evidence to be presented. It further avers that it has informed the Panel about its intention to file its Request pursuant to Rule 153 of the Rules at the earliest opportunity.<sup>16</sup>

13. In addition, the SPO avers that the admission of the Material would not prejudice the rights of the Accused, since [REDACTED] will be available for cross-examination

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<sup>11</sup> Request, para. 11; Annex 1 to the Request, pp. 77–82.

<sup>12</sup> Request, para. 2.

<sup>13</sup> Request, para. 6.

<sup>14</sup> Request, paras 6-7.

<sup>15</sup> Request, para. 8.

<sup>16</sup> *Addendum*, para. 5.

by the Defence on issues addressed in W04712's written statements, as are other witnesses who have corroborated the evidence provided by W04712.<sup>17</sup>

14. The Defence responds that the SPO does not define which particular "matter", other than the acts and conduct of the Accused, is proven, or to be proved, with the admission of the Material.<sup>18</sup> The Defence also contends that the Material is not of a corroborative nature and that the evidence given by other witnesses on the same issues differs greatly.<sup>19</sup> Moreover, the Defence disputes that the evidence of W04712 has already been established by other witnesses who testified before the Panel, and it contests the existence of these issues as established facts.<sup>20</sup>

15. The Defence further submits that facts which do not relate to acts and conduct of the Accused play a significant role in the determination of his responsibility, as they might have a mitigating or aggravating effect upon the Accused's sentence, if any.<sup>21</sup>

16. Lastly, the Defence avers that, with the admission of W04712's written statements, it will be unable to verify the veracity of such statements, and it will not have the possibility to examine the Witness on the circumstances in which the Witness received information from other persons.<sup>22</sup>

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<sup>17</sup> Request, para. 8.

<sup>18</sup> Response, para. 8.

<sup>19</sup> Response, paras 10-11.

<sup>20</sup> Response, para. 14.

<sup>21</sup> Response, para. 15.

<sup>22</sup> Response, para. 16.

### III. APPLICABLE LAW

17. 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 9(5)(a)-(b), 77(1) and (3), 123(3), 137-138, 141(1), and 153 of the Rules.

### IV. ANALYSIS

#### A. TIMELINESS OF THE REQUEST

18. As regards the timeliness of the Request, the Panel accepts that the SPO has informed the Panel at the earliest opportunity, upon review of the testimony of the initial witnesses. The Panel therefore considers that the SPO has shown good cause for its late Request in accordance with Rule 9(5)(b) of the Rules.

#### B. LEGAL TEST

19. Pursuant to Rule 153 of the Rules, and subject to Rule 155 of the Rules, the Panel may admit, in lieu of oral testimony,<sup>23</sup> the written statements of a witness, or a transcript of evidence and associated exhibits<sup>24</sup> provided by a witness in proceedings before the Specialist Chambers, when they go to proof of a matter other than the acts and conduct of the Accused as charged in the (confirmed) indictment. A set of factors set forth in Rule 153(1)(a) and (b) of the Rules guide the Panel when deciding on the admissibility of such evidence. The Panel understands the expression "acts and conduct of the Accused" to refer to the personal actions and omissions of the Accused, referring exclusively to those

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<sup>23</sup> See Admissibility Decision, para. 29.

<sup>24</sup> Admissibility Decision, para. 29, footnote 27, in which the Panel stated 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". Similarly, ICC, *The Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/04-01/15-573-Red, Trial Chamber I, [\*Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)\*](#), 9 June 2016, para. 9.

actions and omissions of the Accused which are described in the charges brought against him, or which are otherwise relied upon to establish his criminal responsibility for the crimes charged. Such expression does not encompass the actions and omissions of others which are attributable to the Accused under the modes of liability charged by the SPO.<sup>25</sup>

20. Rule 153(2) of the Rules further requires the Panel to evaluate whether certain procedural requisites that aim at strengthening the probative value of such evidence are complied with. Notably, the statement shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her Counsel, if present, as well as, where applicable, the Specialist Prosecutor or the Judge who is present. In such circumstances, Rule 153(2) of the Rules requires that the record shall note the date, time and place of, and all persons present during the questioning. If, in exceptional circumstances, the person has not signed the record, the reasons thereof shall be noted.

21. By vesting the Panel discretionary powers to decide whether to admit written statements of a witness in lieu of oral testimony,<sup>26</sup> Rule 153 of the Rules allows the Panel to identify situations where it is not necessary for the witness to give testimony in person, as provided under the general provision of Rule 141(1) of the Rules, with a view to streamlining and expediting the proceedings<sup>27</sup> while preserving a fair and expeditious trial. However, as generally required in all

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<sup>25</sup> Similarly, ICC, *The 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](#) (Ongwen Decision), 18 November 2016, paras 11-12 and further references contained therein.

<sup>26</sup> As demonstrated by the use of "may" in the chapeau of paragraph (1) of Rule 153 of the Rules. See also Admissibility Decision, para. 30. Similarly, ICC, *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-1111-Red, Trial Chamber X, [Decision on the introduction of P-0598's evidence pursuant to Rule 68\(2\)\(b\) of the Rules](#) (Al Hassan Decision), 29 October 2020, para. 7.

<sup>27</sup> Admissibility Decision, para. 29.

instances of introduction of written statements, their admission must not be prejudicial to or inconsistent with the rights of the Accused.<sup>28</sup>

22. The Panel further notes that, while the standard admissibility criteria provided for in Rule 138(1) of the Rules, such as relevance, authenticity, probative value and absence of prejudicial effect, are generally deferred to the Panel's deliberation of its judgment,<sup>29</sup> the Panel is required to render an admissibility decision on Rule 153 material, and will proceed accordingly.<sup>30</sup>

### C. THE MATERIAL SOUGHT FOR ADMISSION

23. At the outset, the Panel addresses the Defence's argument that the SPO has not defined which particular matter is proven, or to be proved, in its Request. The Panel considers that the SPO has clearly indicated which information is provided in W04712's written statements, on which it intends to rely.<sup>31</sup> In any event, Rule 153 of the Rules does not require the Party introducing evidence under such Rule to elaborate on the facts or matters that should be proven or are proven. Accordingly, this argument is dismissed.

24. Turning to the admission requirements under Rule 153(1) of the Rules, the Panel must first assess whether the Material relates to matters other than the acts and conduct of the Accused. In this regard, the Panel notes that the Witness provides information on: (i) the arrest of [REDACTED]; (ii) the identification of

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<sup>28</sup> Similarly, [Ongwen Decision](#), para. 5; [Al Hassan Decision](#), para. 7; ICC, *The Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-685, Trial Chamber V, [Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules](#) (Yekatom and Ngaïssona Decision), 16 October 2020, para. 20.

<sup>29</sup> Admissibility Decision, para. 21. Similarly, [Ongwen Decision](#), para. 7; ICC, *The 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. 7.

<sup>30</sup> Admissibility Decision, paras 21, 22 and 40.

<sup>31</sup> See Request, para. 6.



the Kosovo Liberation Army soldiers who carried out the arrest; (iii) the attempts made by [REDACTED] to locate [REDACTED] after the arrest; (iv) a visit made by [REDACTED]; and (v) the exhumation of [REDACTED].<sup>32</sup> The Panel notes that the Witness provides solely crime-base evidence, and does not mention or provide information concerning the Accused or his role or involvement in the crimes charged. In light of the above, the Material goes to proof of matters other than the acts and conduct of the Accused.

25. The Panel further observes, pursuant to Rule 153(1)(a)(i) and (ii) of the Rules, that the written statements of W04712 are – contrary to the Defence’s assertion – cumulative and corroborated by the in-court testimonies of several witnesses, such as W01679,<sup>33</sup> W03593,<sup>34</sup> W03594,<sup>35</sup> W04390,<sup>36</sup> W04391,<sup>37</sup> W04600,<sup>38</sup> W04603,<sup>39</sup> and W04674,<sup>40</sup> as well as the evidence provided in W04648’s written statements, which have already been admitted pursuant to Rule 155(1) of the Rules.<sup>41</sup> The Panel considers in particular that, on the above-mentioned events, several witnesses have given detailed (first-hand) information to the Panel, and

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<sup>32</sup> Annex 1 to the Request, pp. 3-41.

<sup>33</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 4 October 2021, p. 910, lines 10-25.

<sup>34</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 20 September 2021, p. 486, line 22 to p. 488, line 25.

<sup>35</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 13 October 2021, p. 1153, lines 7-19 and p. 1153, line 25 to p. 1154, line 5.

<sup>36</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 24 November 2021, p. 1866, lines 4-23; p. 1869, line 25 to p. 1870, line 19; p. 1897, lines 15-24; and p. 1911, lines 16-24.

<sup>37</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 22 November 2021, p. 1747 lines 1-8; p. 1750, lines 16-20; and p. 1761 lines 16-19.

<sup>38</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 23 September 2021, p. 723, lines 1-10; and p. 727, lines 10-14.

<sup>39</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 2 November 2021, p. 1299, line 16 to p. 1302, line 3 and lines 17-23.

<sup>40</sup> See, *inter alia*, KSC-BC-2020-05, Transcript of Hearing, confidential, 13 December 2021, p. 1935, line 12 to p. 1936, line 17; p. 1956 lines 10-22; and p. 1957 lines 17-18.

<sup>41</sup> KSC-BC-2020-05, F00235, Trial Panel I, *Decision on the Prosecution application for the admission of prior statements of witness W04648 and related documents*, 15 October 2021, confidential. A public redacted version was filed on the same day (F00235/RED).

the Accused has been given the possibility to effectively confront them, including through cross-examination by his Counsel.

26. The Panel also notes that, pursuant to Rule 153(1)(a)(vii) of the Rules, the Material relates to factors to be taken into account in determining the sentence, if any, such as the gravity of the crimes. In this regard, the Panel notes the Defence's submission that the Panel should not admit written statements which go to proof of matters other than the acts and conduct of the Accused since such evidence plays a significant role in the entire case and in the determination of the gravity of the acts of the Accused.<sup>42</sup> The Panel recalls that Rule 153(1)(a)(vii) of the Rules states that, in evaluating whether to admit written statements of a witness, the Panel may take into consideration whether such evidence relates to factors to be taken into account in determining sentence. Contrary to the Defence's assertion, the Panel observes that, as clearly stated in the chapeau of Rule 153(1)(a) of the Rules, such a factor militates in favour of the admission of such evidence, rather than against. Accordingly, the Defence's argument is dismissed.

27. Moreover, the Panel heeds to Rule 153(1)(b)(iii) of the Rules, according to which the Material may not be admitted if it is appropriate for the witness to appear for cross-examination. In this regard, the Panel notes the Defence's argument that, with the admission of W04172's written statements in lieu of oral testimony, the Defence will be unable to verify the truthfulness of the Witness's prior statements, and will not have the possibility to examine the Witness about the circumstances on which this Witness received information from other persons. The Panel is aware that Rule 153 of the Rules represents a full exception to the principle of orality and deprives the Accused of his right to examine the witness in court.<sup>43</sup> However, the Panel considers that in the current case the

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<sup>42</sup> Response, para. 15.

<sup>43</sup> Admissibility Decision, para. 29. Similarly, [Yekatom and Ngaïssona Decision](#), para. 30.

Defence has had the proper opportunity to counter the evidence in question by putting questions to the aforementioned witnesses, and it will have the opportunity to present its own evidence. The impossibility to examine the Witness, particularly in light of the limited nature and scope of W04712's evidence, does not adversely affect the Accused's position and overall right to examine the witnesses against him on the same matters that can be found in the Material. The introduction of W04712's written statements will, however, save court-time and spare the Witness the burden of appearing. Accordingly, the Defence's argument is dismissed.

28. As regards the procedural requirements under Rule 153(2) of the Rules, the Panel notes that the transcripts of the interview were generated from an audio-video recording in the form of a word-by-word transcript of such interview. Accordingly, the transcripts of the interview are not physically signed by the Witness. The Panel notes, however, that the SPO has confirmed that the DVD containing the recording of the interview has been signed by both the Witness and the SPO Prosecutor, and that the Panel is able to verify the authenticity of such signature. Additionally, the Panel finds that the interview recorded the date, time and place of the questioning, as well as all persons present during such interview.

29. With regard to the associated exhibits produced during the Witness's interview, the Panel notes that the handwritten exhibit has been signed and dated by W04712, and it is accompanied by an official note signed and dated by the SPO Prosecutor. The Panel notes a small discrepancy in the official note submitted by the SPO, indicating that the handwritten exhibit was signed on [REDACTED], instead of [REDACTED]. However, the Panel observes that the exhibit concerned was dated by the witness [REDACTED] and considers this to

be a negligible clerical error, which does not affect the reliability of the exhibit submitted for admission.

30. Additionally, the Panel observes that: (i) the interview of W04712 was conducted by the SPO with an interpreter in a language understood by the Witness;<sup>44</sup> (ii) he has confirmed that the contents of his statement are true and accurate; (iii) his statement was given voluntarily without any threats, force, or guarantees; and (iv) he had no objections to the manner or process by which the statement was taken.<sup>45</sup>

31. Having considered the above, the Panel is satisfied that the requirements of Rule 153(2) of the Rules are fulfilled.

32. 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 and absence of prejudicial effect. In this regard, the Panel considers that the requirement of authenticity has been already undertaken by the Panel while assessing the requirements of Rule 153(2).<sup>46</sup> Accordingly, the Panel will only evaluate the relevance, probative value and absence of prejudicial effect of the Material.

33. The Panel considers the Material 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 W04712's evidence is relevant for the evaluation of the credibility of other witnesses who testified on the same events. As such, the Panel is satisfied that the Material is relevant and has probative value. Such assessment is without prejudice to the fact that, when deliberating the judgment, and in accordance

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<sup>44</sup> Annex 1 to the Request, pp. 3-4.

<sup>45</sup> Annex 1 to the Request, pp. 13-14.

<sup>46</sup> See *supra*, paras 28-31.

with Rule 139(2) of the Rules, the Panel shall carry out a holistic evaluation and weighing of all the evidence taken as a whole to establish whether or not the facts at issue have been established.

34. Lastly, the Panel considers that the introduction of W04712's Material will not be prejudicial to or inconsistent with the rights of the Accused or the fairness of the trial and will instead ensure that the proceedings proceed expeditiously.

35. In light of the above, the Panel grants the Request and admits the Material.

## V. VARIATION OF TIME LIMITS

36. The Panel notes that pursuant to Rule 123(3) of the Rules, during recess periods set by the President, unless otherwise determined by a Panel, time limits shall not be suspended. In light of the upcoming winter judicial recess running from Monday, 20 December 2021 until Friday, 7 January 2022,<sup>47</sup> the Panel considers it appropriate to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit to request certification to appeal under Rule 77 of the Rules, should either Party wish to do so. Accordingly, the time limit to file any such request(s) shall run as of Monday, 10 January 2022, and any application filed before that date will not trigger any time limit for responses or for a decision by the Panel.

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<sup>47</sup> KSCPR-2020/F00002, President of the Specialist Chambers, *Judicial Administration File for 2020*, 10 November 2020, public, p. 1.

## VI. DISPOSITION

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

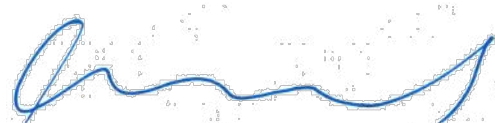
- a. **GRANTS** the Request;
- b. **ADMITS** into evidence the written statements of W04712 and associated exhibits listed in Annex 1 to the Request and any translation thereof;
- c. **ORDERS** the Registrar to assign exhibit numbers to the aforementioned items, for the sole purpose of maintaining an accurate record of the proceedings pursuant to Article 40(5) of the Law and Rule 24(1) of the Rules;
- d. **ORDERS** the Registrar to classify W04712's written statements and associated exhibits as confidential;
- e. **ORDERS** the Defence to file a public redacted version of its Response by Wednesday, 12 January 2022; and
- f. **DECIDES** to vary the time limit for requests for certification to appeal, if any, starting from Monday, 10 January 2022, as specified in paragraph 36 of the present decision.



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



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Friday, 17 December 2021

At The Hague, the Netherlands.