

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence

**Date:** 24 January 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Defence Response to Prosecution Application**

**'KSC-BC-2020/F00263, dated 19 November 2021 and on Addendum to Prosecution  
Application KSC-BC-2020/F00263, dated 22 November 2021**

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**Specialist Prosecutor**

Mr. Jack Smith

**Counsel for the Accused**

Mr. Julius von Bóné

**Victims' Counsel**

**Anni Pues**

## I. INTRODUCTION

1. Pursuant to Rule 153 (3) Of the Rules <sup>1</sup>, the Defence Counsel, files an response to Prosecution Application to not admit the evidence of witness W04712 in writing in lieu of oral testimony (Response).
2. Defence Counsel hereby responds to the Prosecution Application KSC-BC-2020/F00263 dated 19 November 2021<sup>2</sup> and Addendum to Prosecution Application KSC-BC-2020/F00263 dated 22 November 2021.<sup>3</sup>
3. In Application, the Prosecution request the Trial Panel to: admit, in lieu of the oral testimony of witness W04712, the SPO transcript and associated exhibit listed in Annex 1.<sup>4</sup>
4. The prosecution in its application, claims that the testimony of witness W04712, does not go to proof of the acts and conduct of the Accused as charged in the indictment<sup>5</sup> prosecution in its application considers that the proposed evidence is relevant and probative of issues in the case, including arbitrary detention (Count 1), cruel treatment (Count 2), and murder (Count 4). It is, however, largely cumulative and corroborative of the evidence of other witnesses who have already testified or are scheduled to testify before the Panel.<sup>6</sup> Also the Prosecution considers that the rights of the accused will not be violated and that the defense will have access to the examination of the other witness for the issues addressed in the statement of W04712.<sup>7</sup>
5. This Response is filed as Public Redacted as per Oral Order of the Trial Panel of the 18 January 2022. Initially this paragraph read: "This Response is filed as Confidential". The content of this response is further the same as the version filed under filing number 278.

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<sup>1</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>2</sup> KSC-BC-2020-05/F00263/RED/, Prosecution Application, 19 November 2021.

<sup>3</sup> KSC-BC-2020-05/F00263/RED/, Addendum to Prosecution Application, 22 November 2021.

<sup>4</sup> Application paras. 11.

<sup>5</sup> Application paras. 6

<sup>6</sup> Application paras. 7.

<sup>7</sup> Application paras. 8.

II. SUBMISSIONS

- III. Pursuant to Rule 153(3) in connection with Rule 153 (1) (b) (ii) and (iii) of the Rules, the Panel shall decide whether to request the witness to appear for cross-examination.
- IV. Pursuant to Rule 153(1) of the Rules, the Panel may admit the written statement of a witness, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment, in lieu of oral testimony.<sup>8</sup>
- V. The SPO does not define which particular “matter” is proven, or to be proved, with its application of the written testimony of W04712.
- VI. The SPO claims that the proposed evidence is relevant, reliable, probative of issues in this case and suitable for admission in written form.<sup>9</sup> It also claims that it is also of a cumulative nature to the evidence given by other witnesses via oral testimony, is corroborated by evidence that the Defense can effectively confront through cross-examination, and does not address the acts or conduct of the Accused.
- VII. The defense disputes the claims made by the SPO in its application regarding the fact that the evidence of W04712 would be of a corroborative value.
- VIII. The evidence given by the recent witnesses regarding the arrest of [REDACTED], the location of [REDACTED], the information received by the family through individuals who were said to be detained with him, the condition of these individuals as well as their detention conditions, and lastly the situation of the location of the detention location as well as the location where the body of [REDACTED], was exhumed, as well as the circumstances and condition of the body of the victim when recovered, in fact differ greatly on the same issues.
- IX. The “matter” which is therefore sought by the SPO under Rule 153 (1), is a matter that is under dispute with the Defence views on the same issue.
- X. The SPO’s claim on the one hand seeks to rely on the evidence W04712, as it views

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<sup>8</sup> Application paras. 5

<sup>9</sup> Application paras. 7.

it as corroborative, and on the other hand deems it necessary and finds it relevant and probative for issues in the case, including arbitrary detention (Count 1), cruel treatment (Count 2), and murder (Count 4)<sup>10</sup>

14. The Defense disputes that the evidence of W04712 have already been established by the other witnesses that have been heard, and disputes the existence of these issues as established facts. These issues have become increasingly conflicting with the evidence that has been provided by the victims that have testified so far in the case.
15. Lastly, matters other than the acts and conduct of the Accused play a significant role in the entire case and in the determination of the severeness of the acts of the Accused, in the sense that these can mitigate the sentence in an aggravated manner for him.
16. Despite of the opinion of the prosecutor presented in his application, the defense considers that with the approval of this application, the defense is unable to verify the veracity of the witness's statements, and also will not have possibility to examine this witness about the circumstances of which this witness received information from the other person.

### III. RELIEF REQUESTED

17. For the foregoing reasons, the Defense Counsel request the Trial Panel to:

To REJECT the SPO Request to admit the SPO transcript in lieu of the oral testimony of witness W04712.

**Word count: 1006**

**Julius von Bóné Defence Counsel**



**24 January 2022**

At the Hague, the Netherlands

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<sup>10</sup> Application paras. 7.