



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:** 29 March 2022

**Language:** English

**Classification:** Public

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**Decision on items used with witnesses W04484, W04485 and W04849 during their  
in-court testimony and on evidence collected prior to the establishment of the  
Specialist Chambers**

**with one public annex**

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**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 W04484, W04485 and W04849 during their in-court testimony and on evidence collected prior to the establishment of the Specialist Chambers (SC).

## 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).<sup>1</sup>
2. On 26 August 2021, the Panel issued the “Decision on the conduct of the proceedings” (First 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 which had not already been submitted to the Panel and which was used during their respective questioning of the witnesses who testified within that month.<sup>2</sup>
3. On 21 January 2022, the Panel issued the “Second decision on the conduct of the proceedings”, in which the Panel: (i) set 4 February 2022 as the target date for the closing of the case by the Specialist Prosecutor’s Office (SPO); (ii) ordered the Parties and Victims’ Counsel to file by this date, or on the second working day after the last SPO witness concludes his testimony, whichever is earlier, applications for the admission of any material used during their questioning of the remaining SPO witnesses, with objections and observations, if any, to be filed within five days thereof; and (iii) ordered the SPO to file, by the aforementioned date, or at any time earlier, an

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

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

application for the admission of any remaining material collected prior to the establishment of the SC, or of other material.<sup>3</sup>

4. On the same day, the Panel authorised the SPO to add to its List of Exhibits a document containing a list of persons allegedly detained in April 1999 and a number of related handwritten notes (Document).<sup>4</sup>

5. On 31 January 2022, the SPO filed a request for the admission of exhibits used during its examination of W04484 and W04485 (First SPO Request).<sup>5</sup> Neither the Defence for Salih Mustafa (Defence and Accused, respectively), nor Victims' Counsel filed a response.

6. On 4 February 2022, the SPO and the Defence filed their requests for the admission of items used during their respective examinations of W04849 (Second SPO Request<sup>6</sup> and Defence Request,<sup>7</sup> respectively). No responses were filed.

7. On the same day, the SPO filed an application for the admission of remaining items collected prior to the establishment of the SC, requesting the admission of the Document mentioned above (Third SPO Request).<sup>8</sup> Neither the Defence, nor Victims' Counsel filed a response.

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<sup>3</sup> KSC-BC-2020-05, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, public, para. 21(a)-(c).

<sup>4</sup> KSC-BC-2020-05, F00294, Trial Panel I, *Decision on the Specialist Prosecutor's notice of disclosure pursuant to Rule 102(4) of the Rules*, 21 January 2022, public; see further F00302, Specialist Prosecutor, *Prosecution's submission of Updated List of Exhibits*, 1 February 2022, public, with Annex 1, confidential.

<sup>5</sup> KSC-BC-2020-05, F00301, Specialist Prosecutor, *Prosecution Request for Admission of Exhibits from the Direct Examinations of W04484 and W04485*, 31 January 2022, public, with Annex 1, confidential.

<sup>6</sup> KSC-BC-2020-05, F00305, Specialist Prosecutor, *Prosecution Request for Admission of Exhibits from the Direct Examination of W04849*, 4 February 2022, public, with Annex 1, public.

<sup>7</sup> KSC-BC-2020-05, F00311, Defence, *Defence Request for Admission of Exhibits from the Cross-Examination of W04849*, 4 February 2022, public, with Annex 1, public.

<sup>8</sup> KSC-BC-2020-05, F00306, Specialist Prosecutor, *Prosecution Application for Admission of remaining Material under Article 37 of the Law*, 4 February 2022, public, with Annexes 1-2, confidential.

## II. SUBMISSIONS

8. In the First SPO Request, the SPO seeks the admission into evidence of items used during its examination of W04484 and W04485, namely: (i) the portions of the witnesses' prior statements that were referred to during their direct examinations; and (ii) the material shown to the witnesses during their direct examinations.<sup>9</sup> The SPO submits that the documents are relevant, authentic, have probative value and their admission would cause no undue prejudice to the Accused.<sup>10</sup> It adds that W04485 was shown photographs which were part of a larger packet and seeks to tender the entire packet in order to provide the Panel with a more complete record and context, including information going to reliability and authenticity.<sup>11</sup>

9. In the Second SPO Request, the SPO seeks the admission into evidence of items used during its examination of W04849, namely: (i) the portions of W04849's prior statements that were referred to during his direct examination; and (ii) the material shown to the witness during his direct examination.<sup>12</sup> The SPO submits that the documents are relevant, authentic, have probative value and their admission would cause no undue prejudice to the Accused.<sup>13</sup>

10. In the Defence Request, the Defence seeks the admission into evidence of items used during its cross-examination of W04849, namely: (i) the prior statements of W04849 that were referred to during his cross-examination; and (ii) the material shown to the witness during his cross-examination.<sup>14</sup> The Defence submits that the documents are relevant, authentic and have probative value.<sup>15</sup>

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<sup>9</sup> First SPO Request, paras 1, 5, 7; Annex 1 to First SPO Request, listing the items used.

<sup>10</sup> First SPO Request, para. 2.

<sup>11</sup> First SPO Request, para. 6.

<sup>12</sup> Second SPO Request, paras 1, 4, 6; Annex 1 to Second SPO Request, listing the items used.

<sup>13</sup> Second SPO Request, para. 2.

<sup>14</sup> Defence Request, para. 1; Annex 1 to Defence Request, listing the items used.

<sup>15</sup> Defence Request, para. 2.

11. In the Third SPO Request, the SPO seeks the admission into evidence of the Document.<sup>16</sup> It submits that it is part of a large collection of documents seized by Serb forces from Kosovo Liberation Army (KLA) bases, handed over to the International Criminal Tribunal for the former Yugoslavia (ICTY) and then passed on to the Special Investigative Task Force (SITF).<sup>17</sup> The SPO adds that the Document is relevant, has probative value, contains sufficient indicia of authenticity and its admission would cause no undue prejudice to the Accused.<sup>18</sup>

### III. APPLICABLE LAW

12. The Panel notes Articles 37 and 40(2), (5) and 6(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 24(1) and 137-139 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

13. The Panel further incorporates by reference its interpretation of the admissibility criteria under Rule 138(1) of the Rules, as set out in its "Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material".<sup>19</sup>

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<sup>16</sup> Third SPO Request, paras 1, 9.

<sup>17</sup> Third SPO Request, paras 5-6.

<sup>18</sup> Third SPO Request, para. 3.

<sup>19</sup> KSC-BC-2020-05, F00281, Trial Panel I, *Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material*, 13 December 2021, confidential, paras 10-14. A public redacted version was issued the same day, F00281/RED.

#### IV. ANALYSIS

##### A. ITEMS USED WITH W04484, W04485 AND W04849 (FIRST SPO REQUEST, SECOND SPO REQUEST AND DEFENCE REQUEST)

14. The Panel notes, first, that two items from the First SPO Request<sup>20</sup> and one item from the Second SPO Request<sup>21</sup> which the SPO seeks to tender into evidence have already been admitted or are available for consideration by the Panel in the judgment.<sup>22</sup> The portions of the First SPO Request and the Second SPO Request pertaining to these items are therefore moot.

15. Second, the Panel understands that the SPO also seeks to tender: (i) a more legible copy of one of the items already available for consideration by the Panel in the judgment;<sup>23</sup> and (ii) a copy of one other item already available for consideration which was marked by W04849 during his direct examination.<sup>24</sup> Neither of these copies have been previously tendered into evidence. Accordingly, the Panel will consider them in the present decision.

16. Turning to the remaining items that the parties seek to tender into evidence by means of the First SPO Request, the Second SPO Request and the Defence Request, the Panel does not consider it necessary to exercise its discretion with a view to excluding any of them. Therefore, in accordance with the Admissibility Decision and the First 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

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<sup>20</sup> Annex 1 to First SPO Request, items 3, 6 (excluding the copy U000-9804-U000-9804).

<sup>21</sup> Annex 1 to Second SPO Request, item 7.

<sup>22</sup> 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*, 13 December 2021, public, paras 19, 24, 26(e), (f); referring to F00201/A01, Specialist Prosecutor, *Annex 1 to Prosecution Application for Admission of Material through the Bar Table*, 13 September 2021, confidential, items 49, 67, 74.

<sup>23</sup> Annex 1 to First SPO Request, item 3: U000-9804-U000-9804.

<sup>24</sup> Annex 1 to Second SPO Request, item 7: REG0102, originating from SPOE00238094-00238094.

purpose of its deliberations for the judgment on the guilt or innocence of the Accused,<sup>25</sup> with the following caveat.

17. As far as the prior statements of W04484, W04485 and W04849 are concerned,<sup>26</sup> the Panel recalls that, in accordance with the principle of orality, only those portions discussed with the witnesses during their in-court testimonies will be considered.<sup>27</sup> In accordance with paragraph 37 of the Admissibility Decision, the same applies to the corresponding portions of any audio-visual recordings of such prior statements.<sup>28</sup>

18. In addition to the aforementioned items and/or portions thereof tendered by the Parties, the Panel will also *proprio motu* consider: (i) the portions of W04484's prior statement used by the Panel during its questioning of the witness,<sup>29</sup> as reflected in the transcript and recorded by the Registry's Court Management Unit (CMU) for administrative purposes;<sup>30</sup> (ii) the portions of W04485's prior statement used by the Defence and the Panel during their respective questioning of the witness,<sup>31</sup> as reflected in the transcript and recorded by CMU for administrative purposes; (iii) item 104784-104833 used by the SPO during its questioning of W04849;<sup>32</sup> and (iv) the portions of

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<sup>25</sup> Admissibility Decision, para. 21; First Conduct of Proceedings Decision, para. 37.

<sup>26</sup> Annex 1 to First SPO Request, items 1-2, 4-5, 7-8; Annex 1 to Second SPO Request, items 1-6; Annex 1 to Defence Request, item 1.

<sup>27</sup> See KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, public, p. 852, line 14 to p. 854, line 21. The Panel notes that, during its questioning of W04849, the SPO stated that it was using the following part of the witness's prior statement, among others: 1000954-TR-ET Part 3, page 8, lines 23-25 and page 9, lines 8-13 (see KSC-BC-2020-05, Transcript of Hearing, 1 February 2022, public, p. 2362, line 16 to p. 2363, line 6). The Panel notes however that the SPO was, in fact, referring to 1000954-TR-ET Part 3, page 7, lines 23-25 and page 8, lines 8-13. The Registry's Court Management Unit is instructed to record this portion of W04849's prior statement accordingly.

<sup>28</sup> Annex 1 to First SPO Request, items 2, 5; Annex 1 to Second SPO Request, item 5.

<sup>29</sup> 069889-TR-ET, Part 1, Part 2 RED 1 (including the corresponding Albanian version, 069889-TR-AT Part 1 Revised, Part 2 Revised RED 1, and corresponding audio-video recording, 069889b, Part 1, Part 2 Partial 1, Part 2 Partial 2).

<sup>30</sup> See for the oral order on this matter: KSC-BC-2020-05, Transcript of Hearing, 2 November 2021, public, p. 1281, lines 10-23.

<sup>31</sup> 069474-TR-ET, Part 1 RED, Part 2, Part 3 (including the corresponding Albanian version 069474-TR-AT, Part 1 Revised RED, Part 2 Revised, Part 3 Revised, and corresponding audio-video recording, 069474b, Part 1 Partial 1, Part 1 Partial 2, Part 2, Part 3).

<sup>32</sup> Including the corresponding (partial) English translations, 104803-104804-ET, 104816-104818-ET, 104820-104820-ET, 104832-104833-ET.

W044849's prior statements used by the Panel during its questioning of the witness,<sup>33</sup> as reflected in the transcript and recorded by CMU for administrative purposes.

19. The Panel recalls that, as far as the admission of lengthy material is concerned, as a general rule, such material shall be considered 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 Parties, as the case may be.<sup>34</sup> Accordingly, the Panel will consider item 104784-104833 used by the SPO during its questioning of W04849 in its entirety.

20. 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 from the Parties and Victims' Counsel.<sup>35</sup> 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 opposing 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.

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<sup>33</sup> 100954-TR-ET Part 1 RED, Part 2 (including the corresponding Albanian version, 100954-TR-AT Part 1 RED, Part 2, and corresponding audio-video recording, 100954b, Part 1, Part 2); DSM00100-00118 (including the corresponding Albanian version, DSM00100-DSM00118-AT).

<sup>34</sup> Admissibility Decision, para. 38; First Conduct of Proceedings Decision, para. 38.

<sup>35</sup> *See also* First Conduct of Proceedings Decision, para. 38.



B. EVIDENCE COLLECTED PRIOR TO THE ESTABLISHMENT OF THE SC (THIRD SPO REQUEST)

21. The Panel notes that the Document the SPO seeks to tender into evidence<sup>36</sup> contains a list of persons allegedly arrested and detained in April 1999, a period which coincides with the temporal framework of the charges against the Accused.<sup>37</sup> The Document mentions personal details of the detainees (surname, last name, father's name, date and place of birth), the date of arrest and the date of release. The Panel is therefore satisfied that the Document is relevant to the charges in the present case.

22. The Panel further notes the information provided by the SPO investigator regarding the provenance of the Document, which indicates that the Document was received by the SITF from the ICTY, as part of a series of documents reportedly found by Serbian authorities in KLA bases in the course of 1998 and 1999.<sup>38</sup> In light of this, the Panel is satisfied that the Document appears to be authentic and has probative value.

23. Lastly, the Panel notes that the Defence does not oppose the Document's admission into evidence and the Panel is satisfied that no undue prejudice is caused to the Accused by admitting it. In light of the foregoing, the Panel considers it appropriate to admit the Document into evidence.

24. For ease of reference, the Panel lists all items addressed in the present decision in an annex to the decision. The annex contains all items which should receive an exhibit number. To the extent that, for some items, only portions thereof are considered to be available to the Panel for the purpose of its deliberations and judgment, said portions shall be recorded in Legal Workflow, in the field "General

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<sup>36</sup> U001-0310-U001-0325 (including the corresponding English translation, U001-0310-U001-0322-ET); see Annex 1 to Third SPO Request.

<sup>37</sup> See KSC-BC-2020-05, F00019/A01, Specialist Prosecutor, *Annex 1 to Submission of further redacted version of confirmed indictment*, 28 September 2020, public, para. 35.

<sup>38</sup> Third SPO Request, paras 5-6; Annex 2 to Third SPO Request, paras 5, 7-9.

comments”, as reflected in the transcripts and recorded by CMU for administrative purposes.

## V. DISPOSITION


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

- a. **PARTLY GRANTS** the First SPO Request;
- b. **PARTLY GRANTS** the Second SPO Request;
- c. **GRANTS** the Defence Request;
- d. **GRANTS** the Third SPO Request and **ADMITS** the Document into evidence, including its English translation;
- e. **ORDERS** the Registrar to assign exhibit numbers to the items listed in the annex to the present decision, as indicated therein, and to classify the items as confidential;
- f. **ORDERS** the Registrar to reflect in the field “General comments” in Legal Workflow, as applicable, the portions of the items listed in the annex to the present decision used with each respective witness by the Parties, Victims’ Counsel and/or the Panel, as reflected in the transcripts and recorded by CMU for administrative purposes, or as indicated in footnote 27 of the present decision, as the case may be;
- g. **ORDERS** the disclosing Party to immediately inform the other Party, Victims’ Counsel, the Panel and CMU should any subsequent unredacted or lesser redacted versions of the items listed in the annex to the present decision 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; and

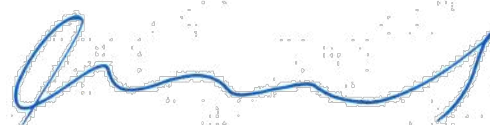
- h. **ORDERS** the non-disclosing Party and Victims' Counsel to file any objections to any such subsequent unredacted or lesser redacted versions within five days of notification of their disclosure.



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



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Tuesday, 29 March 2022

At The Hague, the Netherlands.