



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 19 April 2022

Language: English

Classification: Public

**Prosecution Response to Defence Request for Admission of Documents from the
Direct-Examinations of Defence Witnesses 200, 300, 400 and 500**

with Confidential Annex 1

Specialist Prosecutor's Office

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Victims' Counsel

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I. INTRODUCTION

1. The Defence Request¹ is flawed, goes beyond the scope of similar submissions, and should thus be rejected insofar as it seeks to introduce into evidence witness statements and/or documents that were never used in court with the specific witnesses.
2. During the direct examination of Witnesses 200, 300, 400, and 500, Defence counsel used only selected portions, if any at all, of the defence witness statements or documents.² However, multiple items listed in Confidential Annex 1 to the Defence Request are offered in their entirety.³
3. The attempt to admit unintroduced witness statements into evidence is in direct opposition to the Trial Panel's directions in this case.⁴

¹ Defence Request for Admission of Documents from the Direct-Examinations of Defence Witnesses 200, 300, 400 and 500, with Confidential Annex 1, KSC-BC-2020-05/F00380, 8 April 2022, Public ('Defence Request').

² Cf Defence Request, Annex 1. For example, Item 4 was not used in its entirety with WDSM-200: only one page of this document (that is, Item 6) was shown to the witness: *see* KSC-BC-2020-05, Official Transcript, 23 March 2022, Public, p.2650. Items 1, 2, 3 and 5 were not used at all by the Defence during direct or re-direct examination of WDSM-200. Item 8 lists the statement DSM00452-00459 in its entirety, when in fact only one question and answer were put to WDSM-300 by the Defence counsel: *see* KSC-BC-2020-05, Official Transcript, 28 March 2022, Public, p.2800.

³ *Ibid*, Items 1, 2, 4, 5, 8, 10, 12. The listed items do not specify an excerpt, portion, or any form of selection at all.

⁴ *See* KSC-BC-2020-05, Official Transcript, 04 October 2021, Public, pp.852-853.

II. SUBMISSIONS

4. Contrary to the Defence assertions,⁵ admitting unused portions of prior statements to provide ‘context’⁶ is not equivalent to admitting a document in its entirety.⁷

5. The principle of orality instructs that the testimony of a witness at trial should be given in person, unless specific circumstances exist,⁸ none of which are applicable to the Defence Request.

6. The Trial Panel has specifically set forth the orality standard concerning statements proffered into evidence but not previously introduced at trial.⁹ On 4 October 2021, the Presiding Judge instructed the SPO to only submit for admission the ‘exact parts that have been used in court’.¹⁰ The Trial Panel also clarified that previous allowances in the interest of context were exceptional,¹¹ and are ‘not to be interpreted as authorising to tender previous witness statements or part of it that were not used in court’.¹² These standards were re-confirmed in the Trial Panel’s Decision of 17 December 2021.¹³

⁵ See Defence Request, KSC-BC-2020-05/F00380, para.4.

⁶ See Prosecution Request for Admission of Documents from the Cross-Examinations of Defence Witnesses 200, 300, 400 and 500 with Confidential Annex 1, KSC-BC-2020-05/F00377, 08 April 2022, Public (‘SPO Motion’), para.7: “In some cases, larger **portions** than those strictly used are tendered into evidence in order to give a fair context to the questions and answers, and in light of comments made by the witnesses”, as confirmed in Decision on items used with witnesses W03593, W04600, W01679, and W03594 during their in-court testimony, KSC-BC-2020-05/F00285, 17 December 2021, Confidential (‘Decision’), para.13.

⁷ See Defence Request, Annex 1, items 1, 2, 5, 8, 10, 12.

⁸ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020, Rule 141(1).

⁹ See KSC-BC-2020-05, Official Transcript, 4 October 2021, Public, pp.852-853.

¹⁰ *Ibid.*, p.853, lines 18-21.

¹¹ See Decision, KSC-BC-2020-05/F00285, para.13.

¹² See KSC-BC-2020-05, Official Transcript, 04 October 2021, Public, p.853, lines 10-17.

¹³ See Decision, KSC-BC-2020-05/F00285, para.14: “...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”.

7. The Defence heeded none of the above, offering only generic language, and no justification at all, for its request to admit entire witness statements or documents.¹⁴ Furthermore, despite the clear admission framework in this case, the Defence even requests the admission of the entirety of witness statements or documents no part of which were ever used during the direct examination of the witness in question.¹⁵

III. RELIEF REQUESTED

8. For the foregoing reasons, the SPO requests that the Defence Request be denied. Alternatively, the Defence should be ordered to re-submit its request, limiting it to the specific parts, if any, of the documents and statements submitted in Annex 1 which were in fact used with the relevant witnesses.

Word count: 759



Jack Smith
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Tuesday, 19 April 2022
At The Hague, the Netherlands.

¹⁴ See Defence Request, KSC-BC-2020-05/F00380, para.4.

¹⁵ For example, Items 1, 2, 3, and 5 were never used by the Defence during the direct or re-direct examination of WDSM-200 during the trial hearings of 23 and 24 March 2022.