



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: 27 May 2022

Language: English

Classification: Public

**Public redacted version of
Decision on Prosecution request to present evidence in rebuttal**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Registry

Head of Witness Protection and Support
Office

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on the Prosecution request to present evidence in rebuttal.

I. PROCEDURAL BACKGROUND

1. On 19 May 2022, the Panel requested the Specialist Prosecutor's Office (SPO) to file its request to present evidence in rebuttal, if any, by 24 May 2022, with responses, if any, by the Defence for Salih Mustafa (Defence) and Victims' Counsel by 26 May 2022.¹

2. On 24 May 2022, the SPO submitted the "Prosecution request to present evidence in rebuttal" (Request).²

3. On 26 May 2022, the Defence submitted the "Defence response to the SPO's request to present evidence in rebuttal" (Response).³

4. Victims' Counsel did not file any response.

II. SUBMISSIONS

5. The SPO seeks the Panel's leave to present additional evidence in rebuttal, in accordance with Rules 127(2)(d) and 133 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules), namely: (i) testimonial evidence of witness [REDACTED] and related material (Testimonial Evidence); and (ii) documentary evidence in the form of, *inter alia*, reports of international organisations, Kosovo media outlets and international press agencies (Documentary

¹ KSC-BC-2020-05, Transcript of Hearing, 19 May 2022, public, p. 4405, line 17 to p. 4406, line 12.

² KSC-BC-2020-05, F00416, Specialist Prosecutor, *Prosecution request to present evidence in rebuttal*, 24 May 2022, confidential.

³ KSC-BC-2020-05, F00423, Defence, *Defence response to SPO's request to present evidence in rebuttal*, 26 May 2022, confidential.

Evidence).⁴ The SPO submits that the Testimonial Evidence could not have been anticipated through the exercise of due diligence, as witness [REDACTED] only contacted the SPO after the closing of its case, on the occasion of the testimony of Defence witness WDSM-200.⁵ The SPO further submits that the same holds true for the Documentary Evidence, as the need to present such evidence only arose after the testimony of SPO witness W04849 and after several Defence witnesses testified about population flows at the time of the charges.⁶ The SPO also contends that the Testimonial Evidence is relevant to the identification of alleged named joint criminal enterprise members, to the reliability and veracity of witness [REDACTED] evidence and to the credibility of Defence witness WDSM-200.⁷ As to the Documentary Evidence, the SPO contends that it will be relevant to rebut the Defence evidence concerning the Accused's alibi, which is connected to the time when population movements from Pristina took place.⁸ Lastly, the SPO contends that the proposed evidence is relevant and probative and that its presentation is in the interests of justice and will assist in ascertaining the truth.⁹

6. The Defence opposes the Request.¹⁰ It submits that the Testimonial Evidence should not be introduced, as the Defence did not have the possibility to challenge witness [REDACTED], which in turn violates the right to a fair trial.¹¹ Should leave be granted to the SPO to present such evidence, the Defence contends that witness [REDACTED] should be called to testify on the issues he raised with the SPO.¹² The Defence further submits that the Documentary Evidence: (i) is of a general nature; (ii) could have been used during the questioning of Defence witnesses instead of at this

⁴ Request, paras 3-4, 7.

⁵ Request, para. 5.

⁶ Request, para. 5.

⁷ Request, para. 3.

⁸ Request, para. 4.

⁹ Request, para. 6.

¹⁰ Response, paras 37-40.

¹¹ Response, paras 10-14, 17.

¹² Response, para. 15.

stage of the proceedings; and (iii) does not specify which portions of Defence witness testimonies it relates to.¹³ Therefore, the Defence contends that admitting such material without the Defence having an opportunity to challenge it, is unfair.¹⁴

III. APPLICABLE LAW

7. The Panel notes Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 127(2)(d) and 133 of the Rules.

IV. ANALYSIS

8. At the outset, the Panel notes that the SPO could and should have set out, in greater detail, the volume of the material it intends to present in rebuttal, specifically with regard to the Documentary Evidence. The Panel further notes that the Defence, in its Response, makes submissions on the admissibility of the material, whereas the present decision merely concerns the leave for the SPO to present such material to the Defence, Victims' Counsel and the Panel. Whether or not such material will be considered for the purpose of its judgment is subject to a determination by the Panel, in conformity with the system adopted in the present case.¹⁵

9. Regarding the material, the Panel observes that both the Testimonial Evidence and the Documentary Evidence are of a limited nature and concern identifiable and discrete issues arising mainly from the presentation of the evidence by the Defence. The Panel also finds that the SPO could not have reasonably presented such evidence during its case. In addition, given the potential relevance of the material sought to be

¹³ Response, paras 25-30.

¹⁴ Response, paras 31, 36.

¹⁵ KSC-BC-2020-05, Trial Panel, *Decision on the submission and the admissibility of evidence*, 25 August, 2021, public.

presented in relation to the determination of the truth, the Panel considers that it is in the interests of justice to allow the SPO to present such evidence in rebuttal.

10. With regard to the concerns expressed by the Defence in relation to the impossibility to challenge witness [REDACTED] and related material, the Panel recalls that the present decision only concerns leave for the SPO to present such evidence. As elaborated below, the Panel intends to call witness [REDACTED] as a result of such leave. Accordingly, the Parties and Victims' Counsel will be allowed to question him on the limited matters he raised with the SPO, as indicated in the Request.¹⁶

11. With regard to the concerns expressed by the Defence in relation to the Documentary Evidence, the Panel finds that the SPO could not have foreshadowed, at any time earlier, potential contradictions in the testimonies of Defence witnesses with their previous statements on the topic of movements of population out of Pristina. The Panel equally finds that the Documentary Evidence is not too general, as it is expected to focus on the movements of population out of Pristina between 24 March and 6 April 1999.

12. In light of the above considerations, the Panel is not persuaded by the arguments of the Defence and therefore grants the Request.

13. Regarding the Testimonial Evidence, and with a view to expeditiously progressing towards the closing of the evidentiary proceedings under Rule 134(a) of the Rules, the Panel sets Wednesday, 1 June 2022 (with Thursday, 2 June 2022 as reserve day), as the dates for the testimony of witness [REDACTED]. In this respect, the SPO and the Defence shall each have one (1) hour for their questioning, and Victims' Counsel shall have 30 minutes for her questioning, subject to leave granted by the Panel for additional time in case of need. Should the Parties and Victims'

¹⁶ Request, para. 3.

Counsel wish to tender into evidence any exhibits used during the testimony of witness [REDACTED], they shall submit their applications to this effect by Friday, 3 June 2022, with responses, if any, to be filed within five days therefrom.

14. Regarding the Documentary Evidence, the Panel orders the SPO to file its request tendering such material by Wednesday, 1 June 2022. In addition, the Panel considers it appropriate, pursuant to Rule 9(5)(a) of the Rules, to shorten the deadline for responses to such request by the Defence and Victims' Counsel, if any, to Friday, 3 June 2022.

V. DISPOSITION

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

- a. **GRANTS** the Request;
- b. **ORDERS** the SPO to submit its request for the admission of the Documentary Evidence by **Wednesday, 1 June 2022**;
- c. **VARIES** the deadline for responses and **ORDERS** the Defence and Victims' Counsel to submit their responses, if any, to the request under (b) above, by **Friday, 3 June 2022**;
- d. **SETS Wednesday, 1 June 2022 (with Thursday, 2 June 2022 as reserve day)**, as the dates for the testimony of witness [REDACTED];
- e. **ORDERS** the SPO and the Witness Protection and Support Office, to take all necessary steps to organise the testimony of witness [REDACTED];
- f. **ORDERS** the Parties and Victims' Counsel to provide their respective lists of material to be used during the examination of witness [REDACTED] by **Tuesday, 31 May 2022**; and

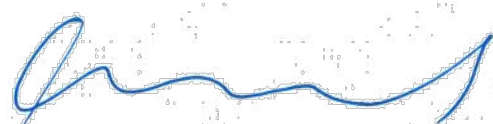
g. **ORDERS** the Parties and Victims' Counsel to submit any request for admission of material used during their respective examination of witness [REDACTED], which has not already been submitted to the Panel, by **Friday, 3 June 2022**, with responses, if any, to be filed within five days therefrom.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 27 May 2022
At The Hague, the Netherlands.