



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 3 December 2020

Language: English

Classification: **Public**

Order Setting the Date for the Third Status Conference

Specialist Prosecutor
Jack Smith

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 96(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 28 September 2020, the Accused Salih Mustafa ("Mr Mustafa") made his initial appearance and declined to enter a plea.²
2. On 5 October 2020, the Pre-Trial Judge held the first status conference on disclosure and related issues.³ Both Parties filed in advance of the hearing written submissions on a list of issues to be discussed.⁴
3. On 9 October 2020, further to submissions by the Parties,⁵ the Pre-Trial Judge, issued a framework decision on disclosure of evidence and related matters, setting out a disclosure process extending into January 2021.⁶
4. On 20 October 2020, further to a request by the Specialist Prosecutor's Office

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, Transcript, 28 September 2020, public, p. 11, lines 24-25.

³ KSC-BC-2020-05, F00023, Pre-Trial Judge, *Order Setting the Date for a Status Conference*, 30 September 2020, public, with Annex 1, public; KSC-BC-2020-05, Transcript, 5 October 2020, pp. 19-46, public.

⁴ KSC-BC-2020-05, F00029, Defence, *Defence Observations for the for the [sic] Status Conference to be Held on 5 October 2020*, 5 October 2020, public; KSC-BC-2020-05, F00030, Specialist Prosecutor, *Public Redacted Version of the Prosecution Submissions for the First Status Conference*, 5 October 2020, public.

⁵ KSC-BC-2020-05, F00024, Specialist Prosecutor, *Observations on a Redaction Regime*, 1 October 2020, public; F00029, Defence, *Defence Observations for the Status Conference to be held on 5 October 2020*, 5 October 2020, public; F00030, Specialist Prosecutor, *Public Redacted Version of Prosecution Submissions for the First Status Conference*, 5 October 2020, public; KSC-BC-2020-05, Transcript, 5 October 2020, pp. 19-46, public.

⁶ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public.

(“SPO”),⁷ the Pre-Trial Judge issued the first decision on protective measures.⁸

5. On 28 October 2020, Mr Mustafa pleaded not guilty.⁹ On the same occasion, the Pre-Trial Judge held a second status conference on disclosure and related issues.¹⁰

6. On 5 November 2020, further to a joint proposal by the SPO and the Defence,¹¹ the Pre-Trial Judge issued a decision adopting a Rule 109(c) disclosure categorisation chart.¹²

7. On 24 November 2020, further to a second request by the SPO,¹³ the Pre-Trial Judge issued the second decision on protective measures.¹⁴

8. On 1 December 2020, the SPO notified the Pre-Trial Judge of having provided the Defence notice of material and evidence under Rule 102(3) of the Rules.¹⁵

II. APPLICABLE LAW

9. Pursuant to Rule 96(1) of the Rules, following the first status conference, the Pre-Trial Judge shall convene subsequent status conferences as deemed necessary in order to: (i) organise exchanges between the Parties and, where applicable, Victims’ Counsel so as to ensure expeditious preparation for trial; (ii) take steps to ensure that all

⁷ KSC-BC-2020-05, F00035, Specialist Prosecutor, *Confidential Redacted Version of the Request for Protective Measures*, 12 October 2020, confidential.

⁸ KSC-BC-2020-05, F00041, Pre-Trial Judge, *Confidential Redacted Version of the First Decision on the Specialist Prosecutor’s Request for Protective Measures*, 20 October 2020, confidential.

⁹ KSC-BC-2020-05, Transcript, 28 October 2020, public, p. 60, lines 2-17.

¹⁰ KSC-BC-2020-05, F00039, Pre-Trial Judge, *Order Setting the Date for the Plea Hearing and a Second Status Conference*, 19 October 2020, public; KSC-BC-2020-05, Transcript, 28 October 2020, public.

¹¹ KSC-BC-2020-05, F00045, Specialist Prosecutor & Defence for Mr Mustafa, *Joint Submission of Rule 109(c) Categorisation Chart*, 4 November 2020, public.

¹² KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Request for Reconsideration or Certification for Appeal*, 5 November 2020, public.

¹³ KSC-BC-2020-05, F00047, Specialist Prosecutor, *Confidential Redacted Version of the Second Request for Protective Measures*, 11 November 2020, confidential.

¹⁴ KSC-BC-2020-05, F00053, Pre-Trial Judge, *Confidential Redacted Version of the Second Decision on Specialist Prosecutor’s Request for Protective Measures*, 24 November 2020, confidential.

¹⁵ KSC-BC-2020-05, F00057, Specialist Prosecutor, *Specialist Prosecutor’s Notice of Disclosure Pursuant to Rule 102(3)*, 1 December 2020, public.

necessary preparations are being conducted by the Parties in a timely and diligent fashion; and (iii) review the status of the case and allow the Parties and, where applicable, Victims' Counsel the opportunity to raise issues in relation thereto.

10. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in the possession of the SPO which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied. Pursuant to Rule 102(3) of the Rules, the SPO shall provide detailed notice to the Defence of any material and evidence in its possession.

11. Pursuant to Rule 95(2) of the Rules, the Pre-Trial Judge shall, *inter alia*, set out a calendar and working plan for any pre-trial obligations of the Parties; set time limits for disclosure; take steps to identify and narrow down the list of issues subject to dispute between the Parties and those which are not; decide on motions for protective measures; and set a target date for the readiness of the case for trial.

12. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit: (i) its pre-trial brief, including any admissions by the Defence and a statement of matters which are not in dispute; (ii) a list of witnesses it intends to call; and (iii) a list of exhibits it intends to present, including, where possible, any Defence objections to authenticity.

13. Pursuant to Rule 95(5) of the Rules, after submission of the items under Rule 95(4) of the Rules, the Pre-Trial Judge shall invite the Defence to file a pre-trial brief within a set time limit. Moreover, within a time limit set by the Pre-Trial Judge, the Defence shall notify the SPO of its intention to offer a defence of alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law.

14. Pursuant to Rule 96(2) of the Rules, with the Accused's written consent after receiving advice from Counsel, a status conference may be conducted: (i) in the

Accused's presence, with Counsel participating via video-conference; (ii) in Defence Counsel's presence, with the Accused participating via video-conference; or (iii) in the Accused's absence, with Counsel present or participating via video-conference.

III. DISCUSSION

15. In accordance with Rule 96(1) of the Rules and to ensure expeditious preparation for trial, the Pre-Trial Judge convenes a third status conference for Monday, 14 December 2020, at 15:00 hours.

16. The Pre-Trial Judge will ask the Parties for their updates, if any, on the outstanding issues addressed at previous status conferences. Specifically and in addition, the Pre-Trial Judge will seek updates on the following issues, in the sequence set out below:

(1) Disclosure

- a. In light of the completed steps in the SPO disclosure of evidentiary material, whether the Parties are facing or foresee any difficulties related to the remainder of the disclosure process;
- b. Whether the SPO has still exculpatory evidence in its custody, control or actual knowledge that must be disclosed to the Defence, pursuant to Rule 103 of the Rules;

(2) Investigations

- c. Whether the SPO's outstanding investigative steps have been completed or whether an estimated date of completion can be provided;
- d. Whether the SPO's previous tentative estimate of submitting, towards the end of February 2021,¹⁶ its pre-trial brief and related material under

¹⁶ KSC-BC-2020-05, Transcript, 28 October 2020, public, p. 81, lines 6-13.

Rule 95(4)(a)-(c) of the Rules still stands, in light of the remainder of the disclosure process and any ensuing Defence requests, as well as ongoing investigations;

- e. Based on the SPO's estimate on the above point and the remainder of the disclosure process (scheduled to continue into late January 2021), whether the Defence is in a position to provide updates on the status of its investigations and approximately how much time it will need to finalise such investigative activities;
- f. Based on the Defence's estimate on the above point, whether, since the second status conference,¹⁷ it has made any progress in relation to:
 - (i) any intention to give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules, and any associated disclosure, pursuant to Rule 104(1) and (2) of the Rules; and
 - (ii) any intention to make requests concerning unique investigative opportunities, pursuant to Rule 99(1) of the Rules;

(3) Points of agreement on matters of law and fact

- g. Whether the Parties have entered into discussions regarding the possibility to submit points of agreement on law and/or facts, pursuant to Rules 95(3) and 156 of the Rules;
- h. When would the Parties expect to be able to identify a list of issues subject to dispute and one with issues not subject to dispute;

¹⁷ KSC-BC-2020-05, Transcript, 28 October 2020, public, p. 83, lines 2-22.

(4) Next procedural steps

- i. Whether the Defence envisages filing a pre-trial brief and related material under Rule 95(5) of the Rules, and if so, when does it expect to be in a position to submit such a filing;
- j. When would the Parties expect to be ready for trial.

17. Finally, the Parties will be asked to share their views on the date of the next status conference in this case, if deemed necessary.

18. The Parties are invited to file written submissions, if they so wish, by Thursday, 10 December 2020 on any of the above matters, including the topics discussed at previous status conferences, or any other related matter not covered in the present order.

IV. DISPOSITION

19. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **DECIDES** to convene a status conference in the presence of the SPO and the Defence on **Monday, 14 December 2020, at 15:00 hours**; and
- b. **ORDERS** the SPO and the Defence to file written submissions, if they so wish, by **Thursday, 10 December 2020**, as set forth in paragraph 18.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 3 December 2020
At The Hague, the Netherlands.