



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:** 4 February 2021

**Language:** English

**Classification:** **Public**

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**Order for Further Submissions on Disclosure**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for the Accused**  
Julius von Bóné

**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 95(2)(b) and (j) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

## I. PROCEDURAL BACKGROUND

1. On 9 October 2020, the Pre-Trial Judge issued the framework decision on disclosure and related matters ("Framework Decision"), setting out, *inter alia*, time limits for the Specialist Prosecutor's Office ("SPO") to meet its disclosure obligations, including under Rule 102(1)(b) and (3) of the Rules.<sup>2</sup>

2. On 1 February 2021, during the fourth status conference in the proceedings ("Status Conference"),<sup>3</sup> the SPO indicated to the Pre-Trial Judge that, even though it has largely completed the disclosure under Rules 102(1)(b), (3) and 103 of the Rules,<sup>4</sup> additional items under these provisions are to be disclosed.<sup>5</sup>

## II. SUBMISSIONS

3. In relation to the disclosure under Rule 102(1)(b) of the Rules, the SPO submitted during the Status Conference that, despite having disclosed the majority of the evidentiary material between October and November 2020, in compliance with the Framework Decision,<sup>6</sup> one additional item was disclosed on 29 January 2021<sup>7</sup> and a

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

<sup>2</sup> KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Framework Decision"), 9 October 2020, public, para. 90(c)-(h).

<sup>3</sup> KSC-BC-2020-05, F00070, Pre-Trial Judge, *Order Setting the Date for the Fourth Status Conference*, 26 January 2021, public, para. 15(a).

<sup>4</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, pp. 126-129. It seems that the SPO Counsel incorrectly referred to Rule 102(2) of the Rules when discussing disclosure obligations under Rule 102(3) of the Rules.

<sup>5</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, pp. 126-129.

<sup>6</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 126, lines 14-18.

<sup>7</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 126, lines 19-22.

few further items, including maps and duplicates,<sup>8</sup> will be disclosed slightly before or together with the submissions under Rule 95(4) of the Rules.<sup>9</sup> The SPO further indicated that it may add one additional witness to its witness list, but did not specify under which category this disclosure would occur.<sup>10</sup>

4. In relation to the disclosure under Rule 102(3) of the Rules, the SPO submitted during the Status Conference that, despite having disclosed the relevant list to the Defence on 1 December 2020, in compliance with the Framework Decision,<sup>11</sup> additional items will be added to the list, such as recent SPO interviews.<sup>12</sup> The updated list would be submitted to the Defence in conjunction with the submissions under Rule 95(4) of the Rules.<sup>13</sup> The SPO further indicated that some of the additional items will also be disclosed as exculpatory evidence pursuant to Rule 103 of the Rules.<sup>14</sup>

5. In relation to the disclosure under Rule 103 of the Rules, the SPO submitted that it already disclosed the bulk of the exculpatory material in this case in the past month, and that it will disclose further exculpatory evidence together with the submissions under Rule 95(4) of the Rules.<sup>15</sup> The SPO further stated that, in relation to some of the material to be disclosed under Rule 103 of the Rules, a request for protective measures will be made before or in conjunction with the submissions under Rule 95(4) of the Rules.<sup>16</sup>

6. In relation to the submissions under Rule 95(4) of the Rules, the SPO reiterated that such material will be filed by 15 February 2021.<sup>17</sup>

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<sup>8</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 127, lines 5-19.

<sup>9</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 127, lines 20-23.

<sup>10</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, pp. 126, lines 23-25 – 127, lines 1-4.

<sup>11</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, pp. 127, lines 24-25 – 128, line 1.

<sup>12</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 128, lines 3-8.

<sup>13</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 128, lines 9-12.

<sup>14</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 128, lines 13-15.

<sup>15</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 128, lines 20-22.

<sup>16</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 129, lines 5-12.

<sup>17</sup> KSC-BC-2020-05, Draft Transcript, 1 February 2021, confidential, p. 125, lines 20-23.

### III. APPLICABLE LAW

7. Pursuant to Rule 95(2)(b) of the Rules, the Pre-Trial Judge shall set time limits for disclosure of evidence, take any measure to ensure timely disclosure, and prepare a disclosure report for the Trial Panel.

8. Pursuant to Rule 102(2) and (4) of the Rules, any statements of additional SPO witnesses, which have not been disclosed within the time limit set by the Pre-Trial Judge, and no later than 30 days prior to the opening of the Specialist Prosecutor's case, and whom the SPO intends to call to testify at trial, shall be made available to the Defence as soon as possible, in a language the Accused understands and speaks, and shall be accompanied by reasons for late disclosure. Any such disclosure shall be finalised during the pre-trial stage.

9. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit, its Pre-Trial Brief, the list of witnesses that the SPO intends to call to testify at trial, and the list of proposed exhibits it intends to present at trial.

10. Pursuant to Rule 95(2)(j) of the Rules, the Pre-Trial Judge shall set a target date for the readiness of the case for trial.

### IV. DISCUSSION

11. The Pre-Trial Judge recalls that the Framework Decision set out strict time limits for finalising disclosure, based on the submissions of the SPO, including under Rule 102(1)(b) and (3) of the Rules.<sup>18</sup> The Pre-Trial Judge notes favourably that the SPO has largely completed disclosure under the aforementioned provisions within the time limits provided under the Framework Decision. That being said, mindful of his duties under Rule 95(2) of the Rules to ensure an expeditious preparation of the case for trial, including compliance with disclosure time limits established in the

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<sup>18</sup> Framework Decision, para. 90(c)-(h).

Framework Decision, the setting of time limits for Defence disclosure and a target date for readiness for trial, the Pre-Trial Judge considers it appropriate to receive further submissions from the SPO on the following issues:

a) Rule 102(1)(b) of the Rules:

- i. the number and nature of items disclosed and expected to be disclosed under Rule 102(1)(b) of the Rules after the time limit for such a disclosure as set in the Framework Decision, and whether translations, if required by law, are or will be available to the Accused;<sup>19</sup>
- ii. the reasons for the late disclosure of each of the aforementioned items;
- iii. whether the SPO intends to call the additional witness to testify (Rule 102(1)(b)(i) of the Rules) or whether the SPO intends to present the statement of said witness at trial (Rule 102(1)(b)(ii) of the Rules), when the SPO expects to disclose the statement of said witness, whether protective measures will be requested for this witness, whether a translation of the witness's statement will be disclosed at the same time, if required by law, and the reasons for its late disclosure as required under Rule 102(2) of the Rules; and
- iv. whether the SPO expects any additional disclosure under Rule 102(2) of the Rules prior to or in conjunction with the submissions under Rule 95(4) of the Rules, and the reasons for such late disclosure;

b) Rule 102(3) of the Rules:

- i. the number and nature of items expected to be added to the list under Rule 102(3) of the Rules after the time limit for such a disclosure as

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<sup>19</sup> Framework Decision, para. 90(c)-(d).

set in the Framework Decision, the date when the amended list will be made available to the Defence, whether protective measures will be requested in relation to such material, should the material be disclosed;<sup>20</sup> and

- ii. the reasons for the late addition of each of the aforementioned items; and

c) Rule 103 of the Rules:

- i. the number and nature of aforementioned items expected to be disclosed (also) as exculpatory evidence, pursuant to Rule 103 of the Rules, when such disclosure will take place, and whether the anticipated request for protective measures of Rule 103 material concerns also the additional items under Rule 102(3) of the Rules.

12. Furthermore, the Pre-Trial Judge invites the Defence to respond, if it so wishes, to the further submissions to be made by the SPO.

13. Lastly, the Pre-Trial Judge takes note of the SPO's indication that its Pre-Trial Brief, list of witnesses and list of proposed exhibits will be filed by Monday, 15 February 2021, and, pursuant to Rule 95(4) of the Rules, orders the SPO to make such submissions by the indicated deadline. The Pre-Trial Judge further recalls that the Rule 109(c) categorisation chart will be filed one week after the aforementioned submissions under Rule 95(4) of the Rules.<sup>21</sup>

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<sup>20</sup> Framework Decision, para. 90(e).

<sup>21</sup> KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 23(c).

## V. DISPOSITION

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

- a. **ORDERS** the SPO to file further submissions, by **Monday, 8 February 2021**, on the issues set out in paragraph 11;
- b. **INVITES** the Defence to respond to the SPO's submissions, if it so wishes, by **Wednesday, 10 February 2021**; and
- c. **ORDERS** the SPO to file its Pre-Trial Brief, list of witnesses and list of proposed exhibits pursuant to Rule 95(4) of the Rules by **Monday, 15 February 2021**.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Thursday, 4 February 2021  
At The Hague, the Netherlands.