



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

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

Registrar: Dr Fidelma Donlon

Date: 17 February 2021

Language: English

Classification: **Public**

**Decision Establishing a Tentative Calendar for Pre-Trial Proceedings and Setting
the Date for the Fifth Status Conference**

Specialist Prosecutor
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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(2), (3), (5), 96(1), and 104 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 October 2020, the Pre-Trial Judge issued the framework decision on disclosure and related matters ("Framework Decision on Disclosure"), setting out, *inter alia*, time limits for the Specialist Prosecutor's Office ("SPO") to meet its disclosure obligations under the Rules.²
2. On 1 February 2021, the fourth status conference in this case took place ("Status Conference"),³ in which the SPO indicated that it will file its Pre-Trial Brief and related material on 15 February 2021 and that it intends to disclose additional documents to the Defence, which will effectively conclude the SPO's disclosure process.⁴
3. On 4 February 2021, following the SPO's indication at the Status Conference, the Pre-Trial Judge ordered 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 2021.⁵
4. On 8 February 2021, upon order of the Pre-Trial Judge,⁶ the SPO made further submissions on outstanding disclosure.⁷

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

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

³ KSC-BC-2020-05, F00070, Pre-Trial Judge, *Order Setting the Date for the Fourth Status Conference*, 26 January 2021, public, para. 15(a); KSC-BC-2020-05, Transcript, 1 February 2021 ("1 February 2021 Transcript"), public, pp. 123-179.

⁴ 1 February 2021 Transcript, p. 125, lines 22-23; p. 126, line 6 to p. 129, line 20.

⁵ KSC-BC-2020-05, F00073, Pre-Trial Judge, *Order for Further Submissions on Disclosure* ("Order for Further Submissions"), 4 February 2021, public, para. 14(c).

⁶ Order for Further Submissions, para. 14(a).

⁷ KSC-BC-2020-05, F00074, Specialist Prosecutor, *Prosecution's Further Submissions on Disclosure*, 8 February 2021, public.

5. On 15 February 2021, the SPO filed the Pre-Trial Brief, list of witnesses and list of exhibits pursuant to Rule 95(4) of the Rules.⁸

II. APPLICABLE LAW

6. Pursuant to Article 39(13) of the Law and Rule 95(2) of the Rules, the Pre-Trial Judge shall ensure that pre-trial proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial.

7. Pursuant to Rule 95(2)(a), (b), and (j) of the Rules, the Pre-Trial Judge shall: (i) set out a calendar and a working plan for any pre-trial obligation of the Parties; (ii) set time limits for disclosure of evidence, take any measure to ensure timely disclosure, and prepare a disclosure report for the Trial Panel; and (iii) set a target date for the readiness of the case for trial.

8. 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.

9. Pursuant to Rule 98(1) of the Rules, after receiving the SPO Pre-Trial Brief and the Defence Pre-Trial Brief, if any, the Pre-Trial Judge shall transmit the case file to the Trial Panel.

10. Pursuant to Rule 96(1) of the Rules, the Pre-Trial Judge shall convene status conferences as deemed necessary in order to: (i) organise exchanges between the Parties to ensure expeditious preparation for trial; (ii) take steps to ensure that all necessary preparations are being conducted by the Parties in a timely and diligent

⁸ KSC-BC-2020-05, F00082, Specialist Prosecutor, *Submission of Pre-Trial Brief, With Witness and Exhibit Lists*, 15 February 2021, public, with Annexes 1-3, strictly confidential and *ex parte*.

fashion; and (iii) review the status of the case and allow the Parties the opportunity to raise issues in relation thereto.

11. 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

A. CALENDAR FOR THE REMAINING PRE-TRIAL PROCEEDINGS

12. The Pre-Trial Judge recalls that, at the Status Conference, the SPO expressed its preference that the case file be transmitted to the Trial Panel as soon as practicable and that the trial should commence as early as March 2021.⁹ In the alternative, should more time be granted for the Defence investigations, the SPO requested that it be circumscribed.¹⁰

13. The Defence submitted that it will raise a defence of alibi and that related investigations will be concluded in approximately two months from the date of the Status Conference.¹¹ It further submitted that the trial should start around July 2021, after the Defence has (nearly) completed its investigations and after it has filed its Pre-Trial Brief.¹² The Defence also submitted that it was not yet in a position to anticipate whether protective measures would be needed for the witnesses it intends to rely upon.¹³

⁹ 1 February 2021 Transcript, p. 125, lines 22-23; p. 157, lines 11-14.

¹⁰ 1 February 2021 Transcript, p. 157, lines 14-17.

¹¹ 1 February 2021 Transcript, p. 138, lines 2-8; p. 139, lines 3-5.

¹² 1 February 2021 Transcript, p. 156, line 17 to p. 157, line 6.

¹³ 1 February 2021 Transcript, p. 138, lines 9-13.

14. In the absence of an agreement on points of facts and law,¹⁴ the Parties endeavoured to reach such an agreement by Monday, 1 March 2021, at the latest.¹⁵

15. Considering the advanced stage of the pre-trial proceedings and the different timelines envisaged by the Parties to complete their preparation ahead of trial, it is necessary to set out a tentative calendar for the remaining steps, in chronological order, up until the transmission of the case file to the Trial Panel, pursuant to Rule 98(1) of the Rules. The Pre-Trial Judge intends to discuss this calendar, in particular the Defence related deadlines, with the Parties at the fifth status conference, as convened in the present decision.

16. The Pre-Trial Judge further considers that, while the present decision sets out a tentative calendar for disclosure of evidence by the Defence and for other pre-trial obligations, such deadlines are indicative of the minimum notice only. When possible, either Party should endeavour to fulfil its respective obligations ahead of the established deadlines.¹⁶

1. Agreement on Points of Law and Fact

17. Rule 95(3) of the Rules prescribes that the Pre-Trial Judge record the Parties' agreement on points of law and fact, which is reflected in the Handover Document, to be prepared in connection with the transmission of the case file to the Trial Panel, as stated in Rule 98(1)(e)(ii) of the Rules. Accordingly, as already stated at the Status Conference,¹⁷ an agreement on points of law and fact does not constitute a pre-condition for the case to proceed to trial and the Parties are under no obligation to reach such agreement; it simply serves the purpose of speeding up the trial.

¹⁴ 1 February 2021 Transcript, p. 144, line 13 to p. 145, line 19; p. 146, line 2 to p. 148, line 22.

¹⁵ 1 February 2021 Transcript, p. 154, lines 15-23; p. 154, line 24 to p. 155, line 24.

¹⁶ *Similarly*, Framework Decision on Disclosure, para. 37.

¹⁷ 1 February 2021 Transcript, p. 152, line 18 to p. 153, line 14.

Moreover, pursuant to Rule 156 of the Rules, agreed facts are not binding on the Trial Panel.

18. In light of the above considerations and the Parties' commitment to exhaust their discussion on this issue in the course of February 2021, the Pre-Trial Judge considers it appropriate to set Monday, 1 March 2021, as the deadline to reach any agreement on points of law and fact and notify the Pre-Trial Judge accordingly by joint submission. Any points of law and fact not agreed upon by that deadline shall be left to the determination of the Trial Panel.

2. Defence of Alibi and Protective Measures for Alibi Witnesses

19. Regarding the Defence's intention to raise a defence of alibi, the Pre-Trial Judge notes that, pursuant to Rule 95(5) of the Rules, the Defence shall notify the SPO of its intention to raise such a defence within a time limit to be set by the Pre-Trial Judge. Considering that the Defence requires two months to complete the investigations related thereto, the Pre-Trial Judge finds it appropriate to set Tuesday, 6 April 2021, as the proposed time limit for the Defence to notify the SPO of its alibi, and to disclose any relevant related material, pursuant to Rule 104(1)(a) of the Rules. Should the Defence need to seize the Pre-Trial Judge with any request(s) for protective measures prior to disclosing alibi-related material, it should do so no later than Thursday, 18 March 2021.

20. In accordance with the Framework Decision on Disclosure,¹⁸ the Defence shall submit a strictly confidential and *ex parte* as well as a confidential redacted version of its request for protective measures in relation to alibi-related material. The SPO may respond, if it so chooses, within five days from notification of the confidential redacted version of such request. The Witness Protection and Support Office ("WPSO") shall

¹⁸ Framework Decision on Disclosure, para. 88.

submit its risk assessments with regard to any witnesses for whom the Defence seeks protective measures within five days of notification of such request.¹⁹

3. Protective Measures for Non-Alibi Witnesses

21. Regarding any request(s) for protective measures for any witnesses other than those relied upon for the purposes of the alibi, the Pre-Trial Judge invites the Defence, to the extent possible, to prioritise its investigations with regard to those witnesses ahead of the proposed date for filing of the Defence Pre-Trial Brief, as set out below. This will facilitate any ruling on protective measures for non-alibi witnesses, so that the Defence may include them in its Pre-Trial Brief and disclose related material, pursuant to Rule 104(1)(b) of the Rules. In order to allow sufficient time for any SPO response and the preparation of the risk assessments by the WPSO, the Pre-Trial Judge considers it appropriate to set Tuesday, 6 April 2021 as the proposed deadline for the Defence to file any request for protective measures for this category of witnesses.

22. As is the case with alibi-related witnesses,²⁰ the Defence shall submit a strictly confidential and *ex parte* as well as a confidential redacted version of its request for protective measures for these witnesses. The SPO may respond, if it so chooses, within five days from notification of the confidential redacted version of such request. The WPSO shall submit its risk assessments with regard to any witnesses for whom the Defence seeks protective measures within five days of notification of such request. The Defence shall thereafter disclose to the SPO any witness-related material in relation to whom protective measures were sought as soon as possible and no later than five days from the decision of the Pre-Trial Judge.

23. As the Defence investigations progress, the Defence may seize the Pre-Trial Judge or the Trial Panel, as the case may be, with further requests for protective measures.

¹⁹ Framework Decision on Disclosure, paras 88, 90(p).

²⁰ See *supra* para. 20.

4. Defence Pre-Trial Brief

24. The Pre-Trial Judge recalls that the Defence shall be invited, pursuant to Rule 95(5) of the Rules, to file a Pre-Trial Brief indicating: (i) in general terms, the nature of the Accused's defence; (ii) the charges and matters which the Accused disputes, with reference to particular paragraphs of the SPO Pre-Trial Brief, and the reasons why the Accused disputes them; and (iii) a list of potential witnesses that it intends to call at trial, specifying to which relevant issue their evidence relates.

25. The Pre-Trial Judge notes that the Defence shall only indicate the nature of the Accused's defence *in general terms*, and, as specified in Rule 95(5)(c) of the Rules, is at liberty to amend its list of *potential* witnesses at a later stage of the proceedings, as its investigations progress. It follows that the Defence need not conclude its investigations in order to delineate its case in general terms, including a list of potential witnesses to be called at trial. Accordingly, the Pre-Trial Judge sets Friday, 16 April 2021,²¹ as the proposed date for the Defence to file its Pre-Trial Brief and related material under Rule 95(5) of the Rules, without prejudice to subsequent amendments thereof.

26. The Pre-Trial Judge, however, points out that the continuation of the Defence investigations after the filing of its Pre-Trial Brief should not be unreasonably prolonged, so as to ensure the right of the Accused to be tried without undue delay, pursuant to Article 21(4)(d) of the Law.

²¹ The Pre-Trial Judge notes that, if adopted, Friday, 16 April 2020, will also be the deadline for receiving applications for victim participation in the present case. As previously held by the Pre-Trial Judge, applications for victim participation "may be submitted to the Pre-Trial Judge until the submission of the Defence filing pursuant to Rule 95(5) of the Rules, which is the final deadline for applications submitted during the pre-trial phase. After that date, the VPO may submit the applications to the Trial Panel, as determined by that Panel", *see* KSC-BC-2020-05, F00055, Pre-Trial Judge, *Framework Decision on Victims' Applications*, 27 November 2020, public, paras 19, 55(e).

5. Transmission of the Case File to the Trial Panel

27. The Pre-Trial Judge recalls that Rule 98(1) of the Rules prescribes that the transmission of the case file to the Trial Panel shall take place after the SPO Pre-Trial Brief and the Defence Pre-Trial Brief, if any, are submitted, together with the related material. Considering that the Defence is entitled to continue its investigations for a reasonable amount of time after the filing of its Pre-Trial Brief and may amend it, if necessary, the Pre-Trial Judge sets as a proposed time limit for the transmission of the case file to the Trial Panel on or around Friday, 30 April 2021. The time between the filing of the Defence Pre-Trial Brief and the transmission date will allow the Parties to raise any residual matter(s) they deem appropriate and the Pre-Trial Judge to rule on any outstanding issue(s), including reclassification of filings and transcripts.

28. In this regard, the Pre-Trial Judge urges the Parties to raise, at the earliest opportunity, any matter that may potentially affect the proposed transmission date.

B. FIFTH STATUS CONFERENCE

29. In accordance with Rule 96(1) of the Rules and to ensure expeditious preparation for trial, the Pre-Trial Judge convenes the fifth status conference for Friday, 5 March 2021, at 11:00 hours.

30. The Pre-Trial Judge will ask the Parties for their submissions on the specific issues set out below, in the following order:

(1) Disclosure:

- a. Whether the SPO has concluded its disclosure of evidentiary material, and if not:
 - i. The amount of items that remain outstanding;
 - ii. Under which Rule(s) the items to be disclosed fall;
 - iii. By when the SPO intends to disclose such material;
 - iv. What are the reasons for this late disclosure; and

- v. Whether protective measures are required and for how many witnesses; and
- b. Whether the SPO still has any exculpatory evidence in its custody, control or actual knowledge that must be disclosed to the Defence, pursuant to Rule 103 of the Rules.

(2) SPO Investigations:

- a. Whether the SPO's outstanding investigative steps have been completed or whether an estimated date of completion can be provided.

(3) Calendar for the Pre-Trial Stage:

- a. Submissions by the Defence and the SPO with regard to the calendar proposed in the present decision, in particular:
 - i. The deadline for the Defence notice of the alibi, together with disclosure of related material, and any request(s) for protective measures in this respect;
 - ii. The deadline for the Defence request(s) for protective measures for any witnesses other than those relied upon for the purposes of the alibi; and
 - iii. The deadline for the filing of the Defence Pre-Trial Brief and related material.

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

32. The Parties are invited to file written submissions, if they so wish, by Wednesday, 3 March 2021, 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. Should the parties disagree with the proposed calendar, they are invited to address this matter in their written submissions in advance of the Status Conference.

IV. DISPOSITION

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

- a. **ORDERS** the SPO and the Defence to file joint submissions on their agreement, if any, on points of law and fact, by **Monday, 1 March 2021**;
- b. **DECIDES** to convene a status conference in the presence of the SPO and the Defence on **Friday, 5 March 2021, at 11:00 hours**; and
- c. **ORDERS** the SPO and the Defence to file written submissions, if they so wish, by **Wednesday, 3 March 2021**, as set forth in paragraph 32.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Wednesday, 17 February 2021
At The Hague, the Netherlands.