



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: 20 May 2021

Language: English

Classification: **Public**

Decision setting the dates for trial preparation conferences and requesting submissions

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

Victims' Counsel
Anni Pues

TRIAL PANEL I (Panel)¹ hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 15 February 2021, the Specialist Prosecutor's Office (SPO) submitted its Pre-Trial Brief, list of witnesses (SPO List of Witnesses) and list of exhibits pursuant to Rule 95(4) of the Rules.²
2. On 30 April 2021, the Defence submitted its Pre-Trial Brief, list of witnesses (Defence List of Witnesses) and list of exhibits (Defence List of Exhibits) pursuant to Rule 95(5) of the Rules.³
3. On 30 April 2021, the Pre-Trial Judge issued the "Second Decision on Victims' Participation", in which Victims 05/05, 06/05, 07/05, 08/05, and 09/05 were admitted to participate in the proceedings.⁴
4. On 7 May 2021, the Pre-Trial Judge transmitted the case file to Trial Panel I, pursuant to Rule 98 of the Rules.⁵

II. APPLICABLE LAW

5. The Panel notes Article 40(2) and (6) of the Law and Rules 116-119 of the Rules.

¹ KSC-BC-2020-05, F00114, President, *Decision Assigning Trial Panel I*, 5 May 2021, public.

² KSC-BC-2020-05, F00082/A01, 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*. A corrected version of the Pre-Trial Brief was filed on 23 February 2021, F00088/A01, in confidential and strictly confidential and *ex parte* versions.

³ KSC-BC-2020-05, F00106/COR, Defence, *Corrected Version of Submission of the Pre-Trial Brief, Witness List, and Exhibits List*, 30 April 2021, public, with Annexes 1-3, confidential.

⁴ KSC-BC-2020-05, F00105, Pre-Trial Judge, *Second Decision on Victims' Participation*, 30 April 2021, para. 54.

⁵ KSC-BC-2020-05, F00119, Pre-Trial Judge, *Decision Transmitting the Case File to Trial Panel I*, 7 May 2021, public, with Annex 1, strictly confidential, and Annex 2, confidential.

III. DISCUSSION

6. Pursuant to Articles 21, 23, 34(8), 40(2) and (6) of the Law, and Rule 116(1), (3), and (4) of the Rules, the Panel can take any necessary measures to ensure the fair and expeditious preparation and conduct of the trial. Such measures include, among others: adopting procedures, modalities and directions for the conduct of the trial proceedings; setting deadlines for the Parties and participants to file motions prior to the commencement of the trial; verifying that the disclosure obligations by the Parties have been met; and ensuring appropriate protective measures for witnesses and victims participating in the proceedings.

7. The Panel also considers that, pursuant to Article 39 of the Law and Rules 95 and 98 of the Rules, it is primarily incumbent on the Pre-Trial Judge to prepare the case for trial, including, *inter alia*, by determining the working language of the proceedings; deciding on the legal framework governing the application and admission of victims to participate in the proceedings; establishing a regime and calendar governing disclosure of evidence and redactions of material; authorising protective measures for witnesses and victims; and, generally, adopting any other procedure to ensure that the Parties and the case file are trial-ready. Therefore, unless otherwise decided by the Panel *proprio motu* or upon request by the Parties or the participants, the Panel does not intend to modify or decide anew on any matter already decided upon by the Pre-Trial Judge. Accordingly, the Pre-Trial Judge's rulings continue to apply before the Panel.

8. In accordance with Rules 116-119 of the Rules, and with a view to ensuring the expeditious preparation of the trial, the Panel considers it appropriate to convene trial preparation conferences for Wednesday, 9 June 2021, at 09:30 hours, Thursday, 10 June 2021 and Friday, 11 June 2021. The Panel notes in this regard that although the Rules provide for different and successive preparation conferences (Trial Preparation

Conference in Rule 117, Specialist Prosecutor's Preparation Conference in Rule 118 and Defence Preparation Conference in Rule 119), Article 40(2) of the Law gives discretion to the Panel to organize fair and expeditious proceedings in the way it sees fit. Consequently, the Panel is of the view that it is appropriate and efficient to gather, at once if possible, all submissions it needs to issue its directions on the conduct of the proceedings. The Panel may decide to hold further status conferences either *proprio motu* or at the request of the Parties or the Victims' Counsel. The Panel will ask the SPO, the Defence, Victims' Counsel, and the Witness Protection and Support Office (WPSO) for their submissions on a number of issues, in the order and manner listed below.

A. INVESTIGATIONS AND DISCLOSURE OF EVIDENCE

- a. Confirmation by the SPO that its investigations and disclosure of incriminating evidence in this case are completed;
- b. Whether the SPO intends to disclose to the Defence further exculpatory evidence under Rule 103 of the Rules or further material or evidence under Rule 102(3) of the Rules and, if so, how many items and when; in addition, whether the SPO intends to request redactions for this material and, if so, when;
- c. Whether, at this stage, the Defence can already anticipate carrying out further investigations and approximately how much time it will need to finalise such investigative activities;
- d. Whether, at this stage, as a result of these investigative activities, the Defence can already anticipate disclosing additional evidence and amending its Pre-Trial Brief, and/or the Defence List of Witnesses, and/or the Defence List of Exhibits; and

- e. Whether the Defence requires an *ex parte*, closed session in the near future in order to update the Panel on any matter related to its preparation for trial, including access to the necessary means to meaningfully assist Mr Mustafa.

B. CRIME SITE VISIT

- a. Submissions by the Parties and Victims' Counsel on the necessity for the proper administration of justice and timing of a crime site visit pursuant to Rule 74 of the Rules.

C. CONDUCT OF PROCEEDINGS

1. Commencement of Trial and Opening Statements

9. The Panel intends to conduct the opening statements entirely in public session and requests the Parties and Victims' Counsel to prepare accordingly.
 - a. Submissions by the Parties and Victims' Counsel as to a tentative date for the commencement of the trial, if possible before the summer recess;
 - b. Whether the SPO intends to make an opening statement pursuant to Rule 126(1) of the Rules and, if so: (i) how much time it will require; and (ii) whether visual aids or other tools will be used;
 - c. Whether the Victims' Counsel intends to make an opening statement pursuant to Rule 126(3) of the Rules and, if so: (i) how much time she will require; and (ii) whether visual aids or other tools will be used;
 - d. Whether, at this stage, the Defence can already anticipate making an opening statement pursuant to Rule 126(2) of the Rules and, if so: (i) whether such opening statement will take place directly after the

- opening statement(s), if any, of the SPO and Victims' Counsel, or before the opening of the Defence case; (ii) how much time it will require; and (iii) whether visual aids or other tools will be used; and
- e. Whether, at this stage, the Defence can already indicate whether or not Mr Mustafa wishes to make an unsworn statement pursuant to Rule 142(1) of the Rules and, if so, whether it will take place together with the Defence opening statement or at a later stage of the trial.

2. Familiarisation of Witnesses Prior to Testimony

10. Submissions by the Parties, Victims' Counsel and WPSO with regard to, *inter alia*:
- a. The procedure on familiarisation of witnesses prior to their respective testimony, in particular the cut-off date of contact between the calling entity and witnesses prior to testimony, WPSO's assistance in facilitating communication with the calling entity during the familiarisation process, scope of communication between the calling entity and witnesses, and involvement of the Victims' Counsel representing dual status witnesses;
 - b. Provision of information from the calling entity to WPSO about witnesses to appear;
 - c. Courtesy meeting with the Parties and Victims' counsel;
 - d. Courtroom familiarisation;
 - e. Re-Reading of prior statement(s) – and timeline for provision of material by the calling entity to WPSO;
 - f. WPSO's assistance during the familiarisation of the witnesses, including when re-reading prior statement(s);
 - g. Informing the witnesses about protective measures in place;

- h. Risk of self-incrimination and legal advice; and
- i. In-court assistance to witnesses, including medical, psychological and other appropriate support or other specific measures.

3. Dual Status Witnesses-Victims

Submissions by the SPO and the Victims' Counsel as to whether they have exchanged information relevant to identify which participating victim is eventually also an SPO witness and *vice versa* and, if not, whether they plan to do so or otherwise have objections to any such communication or disclosure of information, including to WPSO.

4. Presentation of (Witness) Evidence by the Parties and Participants

- a. Confirmation⁶ by the SPO of the number of witnesses it intends to call, the requested time for direct examination, and whether it intends to call expert witnesses;
- b. Whether the SPO intends to request admission of prior statements or transcripts in lieu of oral testimony under Rules 153-155 of the Rules and, if so, in relation to which witnesses, how many items and under which provision;
- c. Whether, at this stage, the Defence can confirm, pursuant to Rule 119 of the Rules, its intention to present a case and, if so, the number of witnesses it intends to call,⁷ the requested time for direct examination, and whether it

⁶ See SPO List of Witnesses, pp. 1-2.

⁷ Defence List of Witnesses, p. 2.

intends to call expert witnesses, without prejudice to further changes to be communicated sufficiently in advance of presenting the Defence case;

- d. Whether the Defence intends to request admission of prior statements or transcripts in lieu of oral testimony under Rules 153-155 of the Rules and, if so, in relation to which witnesses, how many items and under which provision; and
- e. Whether, at this stage, and subject to Rule 114(5) of the Rules, the Victims' Counsel can already inform the Panel of her intention to submit evidence and to call (expert) witnesses, and/or participating victims to testify or to express their views and concerns, respectively, without prejudice to further changes to be communicated sufficiently in advance of presenting the Victims' case.

5. Order of Appearance and Issues Related to the Questioning of Witnesses

- a. Submissions by the SPO as regards the order in which it intends to call the witnesses included in the SPO List of Witnesses, whether that list is final, and the modality of the witnesses' testimony (live or video-link);
- b. Whether, at this stage, the Defence can already indicate the order in which it intends to call the witnesses included in the Defence List of Witnesses, whether that list is final, and the modality of the witnesses' testimony (live or video-link), without prejudice to further changes to be communicated sufficiently in advance of presenting the Defence case;
- c. Whether, at this stage, and subject to Rule 114(5) of the Rules, the Victims' Counsel can already indicate the order in which she intends to call (expert) witnesses, and/or participating victims to testify or to express their views and concerns, and the modality of testimony/expression of views and

- concerns (live or video-link), without prejudice to further changes to be communicated sufficiently in advance of presenting the Victims' case; and
- d. Submissions on any issue the Parties and the Victims' Counsel find relevant with regard to the scope and mode of questioning of witnesses, including:
- (i) commencing each witness examination with a free narration by the witness upon questioning of the Presiding Judge;
 - (ii) use of documents or other material (audio/video) during witness examination and advance notification thereof; and
 - (iii) procedure to inform the Panel, the Parties and the Victims' Counsel prior to testimony of potential self-incrimination of witnesses.

6. Non-Oral Evidence

- a. Whether the SPO or the Victims' Counsel intends to object to the admissibility of any non-oral evidence under Rule 104 of the Rules and, if so, what is the nature of the objections;
- b. Whether the Defence or the Victims' Counsel intends to object to the admissibility of any non-oral evidence disclosed under Rule 102 of the Rules and, if so, what is the nature of the objections; and
- c. Submissions by the Parties and Victims' Counsel, as to whether the admissibility of non-oral evidence should be decided at the time of its submission at trial or whether it can be deferred to the judgment, after giving the Parties and Victims' Counsel an opportunity to make submissions, if they wish to do so, on the admissibility of any such items.

7. Judicial Notice of Adjudicated Facts

- a. Whether the Defence and the SPO have been discussing the possibility to request the Panel to take judicial notice of adjudicated facts under Rule 157(2) of the Rules;
- b. Whether the SPO intends to request the Panel to take judicial notice of adjudicated facts within the meaning of Rule 157(2) of the Rules and, if so, when it intends to make such request and for how many facts; and
- c. Whether, at this stage, the Defence anticipates requesting the Panel to take judicial notice of adjudicated facts within the meaning of Rule 157(2) of the Rules and, if so, when it intends to make such request and for how many facts.

11. In addition to the above topics, the Panel considers it appropriate to hold an *ex parte*, closed session, with the SPO, the WPSO, and a representative of the Registry, to discuss certain issues concerning witness protection and the practical aspects of the testimonies of witnesses to be called, which are instrumental for the Panel's decision on the conduct of the proceedings and, more generally, for the scheduling of the trial hearings. Such session shall take place after the discussion with the Defence and the Victims' Counsel has been exhausted, and shall be guided by the topics listed in Annex 1 to the present decision, without prejudice to the prerogative of the Panel to ask any other questions that it considers appropriate.

12. Moreover, after the session with the SPO and WPSO/Registry is completed, the Panel finds it appropriate to hold a further *ex parte*, closed session, in the presence of the SPO only, to discuss certain investigative matters, as listed in Annex 2 to the present decision, without prejudice to the prerogative of the Panel to ask any other questions that it considers appropriate.

13. Finally, the Panel considers it appropriate to receive submissions from the Parties and the Victims' Counsel as to whether other topics should be added to those mentioned in this decision and whether further status conferences are needed before the commencement of the trial and, if so, when and on which topics.

14. The Parties and the Victims' Counsel shall file written submissions, by Wednesday, 2 June 2021, on any of the above matters, or any other related matter not covered in the present decision and its annexes. By the same deadline, the SPO shall also file written submissions on the issues listed in Annexes 1-2 to this decision; and the WPSO/Registry shall file written submissions on the procedures concerning the preparations for the testimony of witnesses and on the topics included in Annex 1 to this decision, with a view to providing the Panel with exhaustive and detailed information to issue its forthcoming decision on the conduct of trial proceedings.

15. The Panel recalls that, pursuant to Article 40(6)(a) of the Law, it can exercise any functions or powers of the Pre-Trial Judge as referred to in Article 39 of the Law, including taking necessary measures for the expeditious preparation of the trial, such as holding status conferences with the modalities of participation set out in Rule 96 of the Rules.

16. Accordingly, while Mr Mustafa and his Counsel have the right to be present in person, pursuant to Rule 96(2) of the Rules, considering the technical nature of the topics to be discussed, the status conference: (i) may be attended by the Accused with Counsel participating via video-conference; (ii) may be attended by Counsel, with the Accused participating via video-conference; or (iii) may take place in the Accused's absence, with Counsel present or participating via video-conference. These arrangements, however, necessitate the written consent of the Accused, after receiving advice from his Counsel, in accordance with Rule 96(2) of the Rules, and in line with the practice adopted during the pre-trial stage of the proceedings.

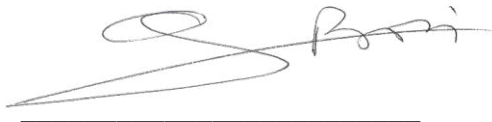
IV. DISPOSITION

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

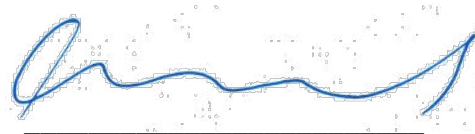
- a. **DECIDES** to convene a trial preparation conference, in public session, in the presence of the SPO, the Defence, and the Victims' Counsel on **Wednesday, 9 June 2021, at 09:30 hours**, and to be continued, if necessary, on **Thursday, 10 June 2021, at 09:30 hours**;
- b. **DECIDES** to convene a trial preparation conference, *ex parte* and in closed session, in the presence of the SPO, the WPSO and a representative of the Registry, on **Thursday, 10 June 2021, at 14:30 hours**, or as soon as the previous session is complete, and to be continued, if necessary, on **Friday, 11 June 2021, at 09:30 hours**;
- c. **DECIDES** to convene a trial preparation conference, *ex parte* and in closed session, in the presence of the SPO, on **Friday, 11 June 2021, at 11:30 hours** or as soon as the previous session is complete; and
- d. **REQUESTS** the SPO, the Defence, the Victims' Counsel and the WPSO/Registry, to file written submissions as specified in paragraph 14 of the present decision.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 20 May 2021
At The Hague, the Netherlands.