In:	**KSC-BC-2020-05**
	The Specialist Prosecutor v. Mr. Salih Mustafa
Before:	**Trial Panel I**
	Judge Mappie Veldt – Foglia, Presiding Judge
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence
Date:	2 June 2021
Language:	English
Classification:	Public

Defence submission for

Trial preparation

Specialist Prosecutor

Mr. Jack Smith

Counsel for the Accused

Mr. Julius von Bóné

Victims' Counsel

Anni Pues

I. Introduction

1. Pursuant to the Request as laid down in paragraph 14 of the decision of 20 May, 2021. the defence hereby provides the Trial Panel with its submissions. The present submission keeps the order as requested in the decision of may 20, 2021.

A. Investigative activities and disclosure of Evidence

2. The investigative activities of the defence are ongoing and it is estimated that at the very latest 15 August 2021, these investigations will have been concluded. As it looks now, the defence investigations will continue in June, July and probably early August in which missions are scheduled.

3. Most probably, the defence anticipates to disclose additional evidence before July 26, and about one week after the August 15. If possible, it will be done earlier, or on or around that date. However that cannot be done at this particular stage, as it is not yet finished.

4. At this stage, the defence cannot anticipate whether its Pre-Trial brief will be amended, and if, in what manner that would be amended. It is at this moment too early to say.

5. It is anticipated that the defence will amend its list of Witnesses and the Defence List of Exhibits, as the defence has not concluded its investigations.

6. The defence does not require an ex-parte closed session, at this point in time, and will request for that if circumstances would make that necessary.

B. Visit to the alleged crime site

7. The defence does not understand why at this stage of the proceedings the Panel speaks about a crime site, as it is yet to be determined whether there was any crime at all, and if so where such alleged crime(s) would have taken place. The crime site as such is yet to be determined. For the defence it is an alleged crime site.

8. The defence does not understand which particular alleged crime site is envisaged, as it is not defined.

9. Both the defence and the SPO have disclosed enough material relevant to the alleged crime site mentioned in the indictment. The defence does not require a visit to the alleged crime site of which is made mention by the indictment.

10. The defence does not see the necessity that the alleged crime site be visited. Both parties have had ample opportunity to do so and have both submitted relevant material.

11. The defence submits that there is no necessity for a visit to the alleged crime site by the Panel as the Panel is no party involved in the proceedings, and it has been already visualised properly by both parties. There is hardly anything to see anymore after 20 years. If such decision were to be taken by the Panel proprio motu, then the defends submits that such visit is to take place in any case before any of the witnesses will be heard. The defence objects to any other timing.

12. If any other party, or the Panel, might deem that necessary, the defence insists on participating in that mission.

C. Conduct of proceedings

1. Tentative date for commencement of Trial and Opening Statements

13. As the investigations of the defence are ongoing, the coming 2 months will be nearly completely filled with mission, including the summer recess.

14. Before the Summer recess, which is July 26, a number of missions have been already planned for each of the defence counsel, and with barely 6 weeks to go to that date, the defence submits that the commencement of the trial should take place about 2 weeks after the summer recess, provided that no visit to the alleged crime site would take place.

15. Before the summer recess, the defence will probably know where it stands with the conclusion of its investigations. It is the intention of the defence that by the time of the summer recess, or at the end of the summer recess, the last parts of the investigations will take place, or might even have been concluded.

16. The defence will for sure inform the SPO, Victims and the Panel whether August 15 will be the date whether the investigations of the defence will have been concluded.

Opening statements

17. The defence will make an opening statement. That will be before the opening of the defence case. Tentatively, its duration is foreseen for an entire day. Visual aids and other tools will be used.

18. At this stage the defence cannot indicate whether or not the accused will make a statement pursuant to Rule 142 (1) of the Rules. The defence will, prior to the opening of the defence case, let the Panel know whether that is to take place together with the opening statement or at a later stage of the trial.

2. Familiarisation of witnesses prior to testimony

19. The defence submits that in any event a witness needs proper familiarisation with the court and its proceedings prior to testimony. Whether his testimony will be in vivo or via video link.

20. If the WPSO would have requests concerning the information from the calling party the defence submits that the WPSO makes some kind of format or sheet with information that it requires in order that witnesses appear. Than each party can provide that.

21. A courtesy meeting of both parties, including the Victims counsel, with the witness should take place at an appropriate moment, shortly before the witness is to appear. Shortly in this context would be about a day before, in vivo or via video link.

22. Courtroom familiarisation is to be conducted by the WPSO, in order that the witness can make himself familiar with the courtroom and the proceedings. If the witness testifies via video-link, an instruction video or video from any other entity of an international tribunal can be made available. It is important that the video-link will be tested shortly before the witness is to appear, so that technical issues can be resolved.

23. Statements that the witness has made must be made available to the witness in a language that the witness understands, so translators should be made available for that task in order to help the witness.

24. A report from his counsel or of the WPSO as to whether the witness is fit to testify is to be made available to the parties, with indications regarding whether the witness is literate, if he has any condition that might impair his or her testimony, or whether a medical doctor of any kind should be available for the witness.

25. The WPSO is to be in charge of the protective measures if these are required. A counsel can be assigned for the witness. If any self-incrimination risk exists, then legal advise is to be provided.

26. There must be clear instructions to the witness as to his obligations before the court. In particular the obligations that the witness has towards the court and the parties, conduct or behaviour that impairs the proper administration of justice, and the consequense of making a false statement, improper behaviour, perjury or any violation of the administration of justice.

27. In court, or near-court assistance can be made available for the witness through the WPSO.

3. Presentation of Evidence by the Parties and Participants

28. At this stage, the defence can confirm that the defence will present a case. The number of witnesses and/or expert witnesses it intends to call and the requested time is still to be determined.

29. It is the intention of the defence to request admission of prior statements or transcripts in lieu of oral testimony. An in-deep analysis of the witnesses under Rules 153-155 of the Rules cannot be given at this stage as investigations are ongoing. Prior to the presentation of defence case this will be given for each of the witnesses, unless this was done at a prior stage.

4. Order of appearances and issues related to questioning of witnesses.

30. The defence cannot, at this stage, indicate the order in which it intends to call the witnesses that are at this point included in the Defence list of Witnesses. The defence List of witnesses is not final.

31. As investigations are ongoing, the defence will eventually try to “group” witnesses in an appropriate manner. Before the opening of the defence case, the indications with regard to the modality of the witnesses’ testimony will be given. Only a few witnesses have yet indicated to testify via a video-link, but a final list concerning that will be prepared before the opening of the defence case, or at any earlier stage. In the coming months, the defense will check with the witnesses.

32. With regard to the scope and mode of questioning, the defence submits the following.

33. The defence objects to the mode in which each witness would commence with a free narration by the witness.

34. The defence objects to the questioning by the presiding judge of the witness.

35. Neither a free narration nor the questioning by the presiding judge is provided for in the Rules.

36. Besides, the parties are calling the witness simply for questioning the witness, and not for any other purpose. That is what the witness is for and it is the obligation of the witness to respond to those questions. The witness does not come to make any kind of narrative. It will raise only new or different issues, issues other than raised by the parties and for what the witness is here for.

37. Questioning by the presiding judge is counter to the "dialectique" (the dialectics) of the proceedings, in which the parties prepare there (own) line of questioning. The parties can object to some questions, and such objection will be dealt with by the Panel. However, when judges are questioning the witnesses and these questions would be biased, then there is no appellate possibility to object to that and leaves parties no other method than to make a motion for disqualification of the judge. Each of the participants has its own role in the proceedings. Parties are unable to even anticipate on any kind of line of questioning by the presiding judge and it can simply run counter to whatever the calling party is trying to elicit from the witness. At all times, the impartiality of the judges is to be safeguarded and therefore judges should not assume any role in which that could be jeapordised.

38. In order to streamline the proceedings, the defence submits that prior to the testimony of the witness, a list of documentation which the calling party intends to use, could be provided by that party to the participants. If the other party (the "non-calling" party) wishes to use any kind of documents, that should be allowed. There must be some kind of flexibility as to the usage of documentation, in the sense that when it is not listed, but it is in the case file, the document can be used by either of the parties. Most of the documentation will probably be evidence that has been tendered, but in order to enable the technical preparation of it, it might be useful to make a brief summary of it prior to testimony.

5. Non-oral evidence

39. The defence's position is, as to non-oral evidence disclosed by the SPO, that it cannot indicate whether it will object to the admissibility of it. At this stage, and prima facie, non-oral evidence that has been disclosed does seem to raise objections by the defence.

40. The defence submits that when admissibility issues arise, they should be decided at trial. In any event, parties should have the opportunity to be heard, as otherwise either of the parties will have had no opportunity to raise an objection and explain the nature of its objection and and parties should be given time to elaborate on the issue.

41. In sum, it depends on the nature of the disclosed non-oral evidence whether objections will be raised.

6. Judicial notice of adjudicated facts

42. The defence has, at this point, not been discussing with the SPO the possibility to request the Panel to take judicial notice of adjudicated facts under Rule 157 (2).

43. The defence has however scheduled an appointment with the SPO in order to do so. At the time of the status conference, these consultations will most probably not have ended, but will continue and at some point in time a conclusion whether a requests to the panel for adjudicated facts will be requested. At this stage, it is too early to say.

44. It is anticipated that at a later stage, prior to the presentation of the Defence case, the defence might intend to make such request.

7. Topics to be added and additional status conference

45. The defence would like to know how at trial, when participating team members or the accused would join via video-link, a proper privileged conversation can be held with client. The defence is unaware of possibilities within the Court to do so.

46. A further status conference could be held prior to trial, if any of the parties deems that necessary. If such necessity exists by either of the parties, a motion to that extent can be submitted. As for now, unforeseen circumstances do not give rise to the defence to request an extra status conference.

Conclusion

47. The defence might elaborate on some of the issues during the status conference but has at this point no further submissions.

Word count: 2244

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2 June 2021

At The Hague, the Netherlands