



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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: Dr Fidelma Donlon

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Registry Submissions for Trial Preparation Conferences

with one confidential Annex and one strictly confidential and *ex parte* Annex

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1. Pursuant to Article 34(1) and (8) of the Law,¹ Rules 23(2) and 27 of the Rules,² and the decision setting the dates for trial preparation conferences and requesting submissions ('Trial Panel's Decision'),³ the Registrar hereby submits the following observations.

I. PROCEDURAL HISTORY

2. On 12 June 2020, the Pre-Trial Judge confirmed the indictment against Mr Salih Mustafa ('the Accused').⁴

3. A public redacted version of the Confirmed Indictment was filed on 28 September 2020, following the arrest and transfer of the Accused to the Detention Facilities of the Specialist Chambers ('SC') in The Hague, the Netherlands.⁵

4. Following the submission of Pre-Trial Briefs by the Specialist Prosecutor's Office ('SPO') and the Defence,⁶ the Pre-Trial Judge transmitted the case file to Trial Panel I on 7 May 2021.⁷

5. On 20 May 2021, Trial Panel I issued a decision requesting, *inter alia*, submissions from the Registry/Witness Protection and Support Office ('WPSO') on procedures

¹ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law'), 3 August 2015.

² Rules of Procedure and Evidence Before the Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020, ('Rules').

³ KSC-BC-2020-05, F00123, Trial Panel I, Decision Setting the Dates for Trial Preparation Conferences and Requesting Submissions, 20 May 2021, public ('Trial Panel's Decision').

⁴ F00008, Pre-Trial Judge, Decision on the Confirmation of the Indictment Against Salih Mustafa, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was filed on 5 October 2020.

⁵ F00019/A01, Specialist Prosecutor, Annex 1 to Submission of Further Redacted Version of Confirmed Indictment, 28 September 2020, public.

⁶ 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.

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.

⁷ 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.

concerning the preparations for the testimony of witnesses and on topics included in Annex 1 to the Trial Panel's Decision.⁸

II. APPLICABLE LAW

6. Article 34(8) of the Law provides that WPSO shall implement, on behalf of the Registrar, and in consultation as appropriate with the SPO, Specialist Counsel or Victims' Counsel (the 'Calling Entities'), any "court ordered or otherwise necessary protective measures and security arrangements, counselling and other appropriate assistance for witnesses and others who are at risk on account of testimony given by witnesses."

7. Pursuant to Article 23 of the Law and Rule 27 of the Rules, WPSO may make representations to the Panel on appropriate protective measures, security arrangements, counselling and assistance for a witness before, during, and after testimony, and it shall be responsible for protecting witnesses, victims participating in the proceedings and, where appropriate, others at risk on account of testimony given by witnesses.

8. Accordingly, pursuant to Rule 27(2)(b) of the Rules, WPSO provides all necessary administrative and logistical assistance to witnesses appearing before the SC, including by informing them about all relevant matters pertaining to their participation in courtroom proceedings, such as issues relating to their security and safety, the nature of courtroom proceedings, the courtroom layout and the participants, and the roles, rights, and obligations of witnesses in the proceedings.

9. In addition, pursuant to Rule 27(2) and (3) of the Rules, WPSO assists witnesses and victims participating the proceedings in obtaining medical, psychological and other appropriate support necessary for them to testify before the SC. When required, such assistance may be provided prior to, during, and after testimony, in accordance with WPSO's mandate. WPSO also ensures that witnesses are kept apart in a

⁸ Trial Panel's Decision, paras. 10, 14, 17(d).

designated area while waiting to testify and provides any other additional assistance, as decided by the Registrar or a Panel, that is consistent with its responsibilities and mandate.

10. In performing its functions, WPSO respects the interests of witnesses, maintains confidentiality, and acts impartially at all times in accordance with Rule 27(4) of the Rules.

III. SUBMISSIONS

11. The Trial Panel has requested submissions from the Registry/WPSO in relation to the procedure on familiarisation of witnesses prior to their testimony, including: WPSO's assistance in facilitating communication with the Calling Entity during the familiarisation process, courtroom familiarisation, courtesy meetings with the Parties and Victims' Counsel, informing witnesses about protective measures in place, re-reading of prior statements, in-court assistance to witnesses, and the risk of self-incrimination and legal advice, among other topics.⁹

12. As a general matter, in accordance with Rule 27(2)(b) of the Rules, it is WPSO's function to inform witnesses about, *inter alia*: "(i) any matter relating to their security and safety; (ii) the nature of the courtroom proceedings; (iii) the courtroom layout and the participants; and (iv) the role, rights and obligations of witnesses in the proceedings". Although the Rules do not further regulate the witness familiarisation process, WPSO has developed guidelines and instructions on the support it provides to witnesses prior to, during, and after their testimony, which incorporate best practices on familiarising witnesses and on other support services.¹⁰

13. What follows is a summary of the support WPSO provides to witnesses in the areas identified in the Trial Panel Decision, in particular related to the familiarisation process.

⁹ Trial Panel's Decision, para. 10(a)-(i).

¹⁰ See Annex 1, confidential.

Initial information from the Calling Entity

14. WPSO will schedule a pre-trial meeting with each Calling Entity sufficiently in advance of the commencement of the presentation of evidence and no later than 35 days before the first witness is due to testify. The objective of this meeting is to exchange information and, to the extent possible, gather all relevant details regarding witness travel, accommodation, protection, vulnerability, medical and special needs, and any other information relevant to WPSO's mandate.

15. The Calling Entities are expected to provide WPSO with a completed Witness Information Form ('WIF') for each witness as soon as practicable and, in any event, no later than 35 days prior to the day the witness is required to testify. The Calling Entity is expected to make use of the WIF to indicate any assistance that may be needed, including psychosocial support and other support services.¹¹

16. Furthermore, on a regular basis, the Calling Entities are expected to submit to WPSO an up-to-date Witness Appearance List ('WAL'), including the sequence of witnesses in order of appearance, their mode, status and location of testimony, the date when each witness is required at the location of testimony, the language of testimony, and the date and estimated length of testimony and cross-examination.

Initial familiarisation procedure

17. WPSO's initial communication phase with witnesses due to testify commences when the Calling Entity introduces the witness to WPSO, prior to the scheduled travel of the witness to the location of testimony. The Calling Entity will facilitate an introductory meeting between WPSO and the witness and inform the witness that WPSO will be responsible for the necessary arrangements to facilitate the witness's travel for the purpose of giving testimony. WPSO will explain to the witness the services and assistance it will provide, as well as inform the witness on topics related to the witness's safety, welfare, travel and logistics, accommodation and any

¹¹ See Annex 1, confidential.

allowances the witness is entitled to. WPSO will also arrange all necessary travel and logistics to enable the timely appearance of the witness before the SC, with due regard to the witness's safety and well-being.

18. Upon the witness's arrival at the location of testimony, WPSO will provide the witness with a welcome and orientation briefing describing the specific program for the witness's appearance and testimony before the SC, including the witness's tentative court appearance schedule, to the extent known.

Courtroom familiarisation

19. In advance of the scheduled testimony, WPSO will accompany the witness to the courtroom and familiarise the witness with the courtroom setting and, if required, introduce the witness to the different systems used in court, paying special attention to the technical implementation of in-court protective and/or special measures, where applicable. This courtroom familiarisation process may be adapted for vulnerable witnesses, as necessary.

20. WPSO will also inform the witness about the nature of the courtroom proceedings, the courtroom layout, and the participants. The witness waiting rooms and other relevant facilities will also be shown to the witness. The waiting rooms are arranged to support the well-being of witnesses during waiting times.

21. If needed for the benefit of the witness, this familiarisation process can be repeated.

Courtesy meeting with the Parties and Victims' Counsel

22. Subject to an order of the Trial Panel on the conduct of trial proceedings, WPSO will provide witnesses with an opportunity to acquaint themselves with the Parties and Victims' Counsel. WPSO will inform the Parties and Victims' Counsel of any courtesy meeting scheduled to take place.

Re-reading of prior statement(s)

23. Subject to an order of the Trial Panel on the conduct of trial proceedings, WPSO will facilitate the witness's access to material authorised for the purpose of re-reading prior statement(s). The Calling Entity should make available to WPSO all authorised material that is required for this purpose. Given that the re-reading of prior statement(s) may take considerable time and to facilitate proper planning, it is strongly recommended that the Calling Entity provide WPSO with an indication of the estimated time the witness will require to read the material at the time of providing the WIF.

24. WPSO will closely monitor the well-being of the witness to determine if he/she requires any assistance or support during the re-reading of prior statement(s).

25. Should the Trial Panel authorise any contacts between the Calling Entity and the witness prior to the witness's testimony for the purpose of witness preparation, if any, WPSO requests an opportunity to make further submissions on proposed modalities for facilitating those contacts, in the best interest of the witness.

Cut-off date for contact between the Calling Entity and the witness

26. Following the cut-off date for contact between the Calling Entity and the witness prior to testimony, WPSO will act as a conduit for communication between the witness and the Calling Entity, when necessary and as directed by the Trial Panel.

Dual Status Victims-Witnesses

27. With regard to witnesses who have also been granted status as participating victims in the proceedings ('Dual Status Victims-Witnesses'), the Calling Entity will be requested to indicate such status in the WIF.

28. Contacts between Victims' Counsel and Dual Status Victim-Witnesses will be facilitated by WPSO as directed by the Trial Panel.

Information on protective measures

29. WPSO will inform the witness about any matter related to his/her security and safety, including any protective measures ordered, as well as the right to request such measures pursuant to Rule 80(1) of the Rules.

30. Likewise, pursuant to Rule 80(8) of the Rules, WPSO will inform the witness about the risks of inadvertent or unlawful disclosure of his/her identity or testimony, despite any protective measures ordered, and the possibility that such measures may be varied in accordance with Rule 81 of the Rules.

31. Should WPSO, in the course of the familiarisation process, encounter new information that it believes may justify a request for protective measures or support services, it will discuss the matter with the witness and inform the Calling Entity and/or the Trial Panel directly, as appropriate, subject to any order of the Trial Panel on the conduct of trial proceedings.

32. To the extent possible, security concerns and support-related details should be brought to the attention of WPSO in the WIF.

In-court assistance, including medical, psychological, and other support¹²

33. In accordance with Rule 27(2)(c) of the Rules, WPSO will assist witnesses in obtaining medical, psychological, and other appropriate support necessary for them to testify before the SC.

34. To the extent possible and with the consent of the witness, when submitting the WIF, the Calling Entity should bring to the attention of WPSO all critical information at their disposal that may impact on the witness's physical or psychological well-

¹² Should the Trial Panel order that a witness's testimony be received via video-conference, the Registrar shall ensure the efficient and expeditious implementation of the order, and WPSO will assist the witness in obtaining any appropriate support necessary for the witness to testify before the SC via video-conference. *See* Rules 141(1) and 144 of the Rules.

being, dignity, safety, and privacy in relation to their travel and appearance, including any special needs.¹³

35. Before their testimony, witnesses will be provided with a psychosocial support briefing, during which WPSO support services and the availability of WPSO psychologists will be explained. WPSO will monitor the witness's well-being before, during, and after testimony and, subject to the witness' consent, provide psychosocial support and intervention as required, in accordance with WPSO's mandate.¹⁴

36. Pursuant to Rules 27(3) and 80(4)(c) of the Rules, WPSO may, on order of a Panel or *proprio motu*, conduct a psychological assessment, prior to a court appearance, on a person's fitness to appear and on any necessary protective measures, including any special measures to facilitate the testimony of traumatised or vulnerable witnesses. Recommended measures may include the provision of in-court assistance by a WPSO staff member who speaks the same language as the witness, the presence of WPSO psychologists, or the presence of a family member or other person requested by the witness, among other measures.

37. Should a witness require any special measures or other type of in-court assistance, WPSO will discuss the measures with the witness and, subject to the witness's consent and any order of the Trial Panel on the conduct of trial proceedings, inform the Calling Entity and/or the Trial Panel directly, as appropriate.

Information about role, rights, and obligations and risk of self-incrimination

38. WPSO will inform witnesses about their role, rights, and obligations as witnesses before the SC, including the obligation to testify truthfully and to take a solemn declaration before giving testimony, in accordance with Rule 141(2) of the Rules.

39. In addition to the Calling Entity's obligations under Rule 151 of the Rules, WPSO will also remind witnesses about the provisions of Rule 151 concerning self-

¹³ See Annex 1, confidential.

¹⁴ Ibid.

incrimination. For Dual Status Victims-Witnesses who have been assigned Victims' Counsel, it is the responsibility of Victims' Counsel to fully inform Dual Status Victims-Witnesses about this issue.

40. To the extent possible, it is the responsibility of the Calling Entity to notify WPSO at the time of providing the WIF of any witnesses who may potentially incriminate themselves. WPSO will ensure that the Defence Office of the Registry is informed in the event that legal assistance is need pursuant to Rule 151 of the Rules.

IV. CLASSIFICATION

41. This submission is filed as public, whereas Annex 1 is submitted as confidential as it contains internal regulations concerning operations of the Registry that are not authorised for public distribution. Annex 2 is filed as strictly confidential and *ex parte* for distribution to SPO and WPSO only, pursuant to Rule 82(4) of the Rules.

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Dr Fidelma Donlon
Registrar

Wednesday, 2 June 2021
At The Hague, the Netherlands