



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: Fidelma Donlon

Date: 18 June 2021

Language: English

Classification: **Public**

Decision setting the date for the commencement of the trial and related matters

Specialist Prosecutor

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Victims' Counsel

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TRIAL PANEL I (Panel) hereby renders this decision setting the date for the commencement of the trial and related matters.

I. PROCEDURAL BACKGROUND

1. On 15 February 2021, the Specialist Prosecutor's Office (SPO) submitted its Pre-Trial Brief, list of witnesses (List of Witnesses), and list of exhibits (List of Exhibits) pursuant to Rule 95(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).¹
2. On 7 May 2021, the Pre-Trial Judge² transmitted the case file to the Panel, pursuant to Rule 98 of the Rules.³
3. On 20 May 2021, the Panel issued the "Decision setting the dates for trial preparation conferences and requesting submissions" (Decision), in which it decided to convene trial preparation conferences, both in public and closed sessions, on 9, 10, and 11 June 2021, as necessary, and requested submissions on several items from the SPO, the Defence for Salih Mustafa (Mr Mustafa or Accused), Victims' Counsel and the Witness Protection and Support Office (WPSO) of the Registry.⁴

¹ 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*. Confidential redacted versions of the SPO List of Witnesses and the SPO List of Exhibits were filed on 17 February 2021, F00085/A02 and F00085/A03. A corrected version of the Pre-Trial Brief was filed on 23 February 2021, in strictly confidential and *ex parte* (F00088/A01) and confidential redacted (F00088/A02) version.

² KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

³ 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 *ex parte*, and Annex 2, confidential.

⁴ KSC-BC-2020-05, F00123, Trial Panel I, *Decision setting the dates for trial preparation conferences and requesting submissions*, 20 May 2021, public, with Annexes 1-2, strictly confidential and *ex parte*.

4. On 2 June 2021, the SPO,⁵ the Defence,⁶ Victims' Counsel⁷ and WPSO⁸ filed their respective submissions.

5. On 9 June 2021, the Panel held a first trial preparation conference, in public session, where the Parties, Victims' Counsel and the Registry made submissions on the items listed in the Decision.⁹ On 9 and 10 June 2021, two additional trial preparation conferences took place, in *ex parte* and closed session, where units of the Registry and the SPO made submissions on the items listed in the Decision and the annexes thereto.¹⁰

II. APPLICABLE LAW

6. Pursuant to Article 40(2) and (6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rule 116(1) of the Rules, the Panel shall, on an ongoing basis, take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings. This may include, *inter alia*, setting a time limit for any motions to be made prior to the opening of the case, pursuant to Rule 117(2) of the Rules; determining the date for the opening of the case, in accordance with Rules 118(3), 124, and 125 of the Rules; and determining the timing and modalities of the opening statements, in accordance with Rule 126 of the Rules.

⁵ KSC-BC-2020-05, F00130, Specialist Prosecutor, *Prosecution Submissions pursuant to KSC-BC-2020-05/F00123* (SPO Submissions), 2 June 2021, public, with Annexes 1-2, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, F00128, Defence, *Defence submission for Trial preparation* (Defence Submissions), 2 June 2021, public.

⁷ KSC-BC-2020-05, F00129, Victims' Counsel, *Submission for Trial Preparation Conference* (Victims' Submissions), 2 June 2021, public.

⁸ KSC-BC-2020-05, F00131, Registrar, *Registry Submissions for Trial Preparation Conferences*, 2 June 2021, public, with Annex 1, confidential, and Annex 2, strictly confidential and *ex parte*.

⁹ KSC-BC-2020-05, Transcript of Hearing (9 June 2021 Public Transcript), 9 June 2021, public..

¹⁰ Transcript of Hearing, 9 June 2021, strictly confidential and *ex parte*; Transcript of Hearing, 10 June 2021, strictly confidential and *ex parte*.

III. ANALYSIS

A. ADJUDICATED FACTS

7. Although the submission of a request under Rule 157(2) of the Rules does not presuppose any agreement between the Parties, as rightly pointed out by the SPO,¹¹ the Panel notes that the Defence appears to be willing to consult on this matter with the SPO, in order to eventually reach an agreement.¹² The Parties have expressed their intention to have those consultations this month and, regardless of whether an agreement is reached, the Parties have indicated that their motion(s) under Rule 157(2) of the Rules will be filed by the end of June 2021.¹³

8. Accordingly, the Panel orders the SPO and Defence to file, by Wednesday, 30 June 2021, joint and/or separate submissions requesting the Panel to take judicial notice of any adjudicated facts. Any responses may be filed within the time limit provided for in Rule 76 of the Rules.

B. SPO REQUESTS RELATED TO ADDITIONAL EVIDENCE

1. Submissions

9. The SPO submits that it intends to seize the Panel, in the second half of June 2021, with a request to add certain items to its List of Exhibits, notably excerpts from the content of the Accused's phone, the transcripts of two supplementary interviews with witnesses W01679 and W03593, and a few other documents.¹⁴ In relation to this, should the trial commence only after the summer judicial recess, the SPO requests the

¹¹ 9 June 2021 Public Transcript, p. 239, line 24 to p. 240, line 6.

¹² 9 June 2021 Public Transcript, p. 240, lines 9-11 and p. 241, lines 21-22.

¹³ 9 June 2021 Public Transcript, p. 241, lines 7-8 and p. 242, lines 1-4.

¹⁴ SPO Submissions, paras 5-6.

Panel to authorise redactions to these supplementary interviews in line with previously approved protective measures.¹⁵ Moreover, the SPO submits that it intends to add one witness to its List of Witnesses, resulting from a recent interview with this person, and to seize the Panel in this respect concomitantly with the request to add items to its List of Exhibits.¹⁶

2. Findings

10. In the interest of expeditiousness and with a view to providing the Defence with an opportunity to take the additional SPO evidence, if authorised for inclusion, into consideration in the preparation of its investigative missions, the Panel orders the SPO to file a request for the amendment of its List of Witnesses and its List of Exhibits pursuant to Rule 118(2) of the Rules by Wednesday, 30 June 2021. The Panel will decide on this request as well as on the related SPO request for protective measures with regard to the supplementary interviews of W01679 and W03593 at that stage. Any responses may be filed within the time limit provided for in Rule 76 of the Rules.

C. OTHER REQUESTS PURSUANT TO RULE 117(2) OF THE RULES

11. The Panel recalls that, according to Rule 117(2) of the Rules, it shall set a time limit for any motions to be made prior to the opening of the case. These motions should include any matter (not included in paragraphs 7-10 above) the resolution of which is, in the view of the Parties, a pre-condition for the start of the trial. Rule 117(2) of the Rules requires the Panel to consult with the Parties before setting a time-limit for the presentation of those motions but does not expressly specify who may present such motions. The Panel considers that the Defence and the SPO may certainly present such

¹⁵ SPO Submissions, para. 7.

¹⁶ 9 June 2021 Public Transcript, p. 211, lines 2-8.

motions. With regard to Victims' Counsel, the Panel is of the view that, in accordance with its decision of 21 May 2021,¹⁷ she may also seize the Panel with any requests, affecting the personal interests of the victims, which must be decided upon prior to the commencement of the trial.

12. Accordingly, having considered the submissions of the Parties and Victims' Counsel on the remaining steps to be taken in order to be trial-ready, the Panel considers it appropriate to set Thursday, 15 July 2021, as the deadline for the Parties and Victims' Counsel to file any request(s) within the meaning of Rule 117(2) of the Rules. In light of the summer judicial recess,¹⁸ the Panel considers it appropriate to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit for responses provided for in Rule 76 of the Rules. Thus, the Parties and Victims' Counsel may respond to any request(s) within the meaning of Rule 117(2) of the Rules by Thursday, 19 August 2021.

D. COMMENCEMENT OF THE TRIAL AND OPENING STATEMENTS

1. Submissions

13. The SPO submits that the trial should commence on 12 July 2021 with the opening of the case and the provision of initial information to the Accused pursuant to Rules 124-125 of the Rules, as well as the opening statements in accordance with Rule 126 of the Rules, to be followed by the testimony of two SPO witnesses starting on or about 15 July 2021 or, in any case, before the judicial recess.¹⁹ The SPO further submits that it intends to make an opening statement pursuant to Rule 126(1) of the Rules,

¹⁷ KSC-BC-2020-05, F00126/RED, Trial Panel I, *Public redacted version of third decision on victims' participation*, 21 May 2021, public, para. 40.

¹⁸ The summer judicial recess runs from Monday, 26 July 2021, to Friday, 13 August 2021, *see* KSCPR-2020, President, *Judicial Recess Periods for 2021*, 10 November 2020, public.

¹⁹ SPO Submissions, para. 13; 9 June 2021 Public Transcript, p. 221, lines 9-18.

which will require the use of visual aids, and requests the allocation of two to three hours for its statement.²⁰ The SPO also submits that, should the trial start in September 2021, the first SPO witnesses should be heard immediately after the opening statements.²¹

14. Victims' Counsel submits that the trial should start after the summer recess, notably as of mid-August 2021.²² Victims' Counsel further submits that she intends to make an opening statement, without visual aids, which will require no more than one and a half hour.²³ In this respect, Victims' Counsel indicates that, were the trial to start in July 2021, she may have to defer her opening statement to a later stage, considering that she has yet to go on mission to meet with her clients, and for a meaningful opening statement she requires some preparation time.²⁴ Victims' Counsel further points out that the preparation of such a mission requires "rather complex organisations", because of the protective measures that are in place.²⁵ Victims' Counsel underlines that there have been "preliminary" discussions with the SPO regarding dual status victims/witnesses.²⁶ On this matter the SPO submits that it will assist Victims' Counsel to contact dual status victims who are also SPO witnesses. However, no in-person meetings have been organized yet and there are certain security considerations when it comes to these contacts.²⁷ Otherwise, Victims' Counsel submits that she would prefer to make her opening statement right after the SPO.²⁸ Lastly, Victims' Counsel submits that she has yet to constitute her team.²⁹

²⁰ SPO Submissions, para. 14.

²¹ 9 June 2021 Public Transcript, p. 221, line 19 to p. 222, line 1.

²² Victims' Submissions, para. 6.

²³ Victims' Submissions, para. 7.

²⁴ 9 June 2021 Public Transcript, p. 222, lines 16-25, p. 223, lines 1-14.

²⁵ 9 June 2021 Public Transcript, p. 222, lines 16-20.

²⁶ 9 June 2021 Public Transcript, p. 229, line 17-18.

²⁷ 9 June 2021 Public Transcript, p. 228, line 20 to p. 229, line 13.

²⁸ 9 June 2021 Public Transcript, p. 223, lines 1-14.

²⁹ 9 June 2021 Public Transcript, p. 208, lines 7-8.

15. The Defence submits that the trial should commence about two weeks after the summer recess, considering all the logistics and preparation needed to start such proceedings.³⁰ In this regard, the Defence stresses that it has already scheduled several investigative missions, in June, July (second and third week), and early August 2021.³¹ The Defence underlines that additional material will be disclosed after each of those investigative missions.³² The Defence also contends that it is preferable to avoid a partition of the trial, whereby one part is held before the summer recess, and another resumes afterwards.³³ It further submits that it intends to make an opening statement before the opening of the Defence case.³⁴ Such opening statement will include the use of visual aids and other tools; it is foreseen for an entire day, and may include a statement by the Accused under Rule 142(1) of the Rules.³⁵

2. Findings

16. In light of the submissions received, the Panel considers that, to date, the SPO, the Defence, and Victims' Counsel are obviously not trial-ready. Specifically, the Panel recalls that the SPO is yet to seize the Panel with its request(s) to add certain items to its List of Exhibits and to add one witness to its List of Witnesses. Transcription in English and Albanian of two interviews is still ongoing.³⁶ This newly collected material, if permission is given by the Panel under Rule 118(2) of the Rules, may be relevant for the Defence upcoming investigative missions and preparation for trial. Moreover, the Defence has planned a number of missions in the coming weeks with

³⁰ 9 June 2021 Public Transcript, p. 224, lines 17-25.

³¹ Defence Submissions, paras 13-15; 9 June 2021 Public Transcript, p. 224, lines 9-10; see also p. 215, lines 1-8.

³² 9 June 2021 Public Transcript, p. 215, lines 8-11.

³³ 9 June 2021 Public Transcript, p. 224, lines 15-15, p. 225, lines 3-4.

³⁴ Defence Submissions, para. 17.

³⁵ Defence Submissions, paras 17-18; 9 June 2021 Public Transcript, p. 223, line 22 to p. 224, line 2.

³⁶ 9 June 2021 Public Transcript, p. 211, lines 16-18.

the goal to complete its investigations by mid-August 2021, which may result in the disclosure of further evidence thereafter.³⁷ In this regard, the Panel considers that, should the trial start before the summer recess, the Defence would not be in a position to meaningfully prepare, in particular for the questioning of the first SPO witnesses. In addition, the Panel supports the Defence's expressed intention of completing its investigations prior to the commencement of the trial, which will result in tangible time savings during the trial. Lastly, the Panel considers that there still exist considerable logistical and security impediments for Victims' Counsel when it comes to meeting those victims who are also SPO witnesses.³⁸ In this regard, the Panel notes that more than a month after the assignment of Victims' Counsel,³⁹ discussions between the SPO and Victims' Counsel concerning access by the latter to the victims who have dual status, are still at a preliminary stage. It is vital, in the view of the Panel, that those discussions progress quickly in order to allow Victims' Counsel to prepare and to be in a position to meaningfully represent the victims. Moreover, Victims' Counsel needs to constitute her team. Accordingly, Victims' Counsel requires appropriate time to prepare for the opening of the trial.

17. In light of the Panel's assessment regarding the trial-readiness of the Parties and Victims' Counsel, the Panel is of the view that a commencement date for the trial prior to the summer judicial recess is impracticable. Concomitantly, the Panel considers it important to avoid unnecessary gaps, other than related to the courtroom logistics, between the testimonies of witnesses, including for reasons related to witness security. Therefore, the Panel decides, first, to vary, pursuant to Rule 9(5)(a) of the Rules, the time-limit provided for in Rule 118(3) of the Rules, which normally prescribes that the

³⁷ Defence Submissions, paras 2-3; 9 June 2021 Public Transcript, p. 212, line 22 to p. 214, line 9, p. 214, line 22 to p. 215, line 14.

³⁸ 9 June 2021 Public Transcript, p. 222, lines 16-25; p. 228, line 20 to p. 229, line 20.

³⁹ KSC-BC-2020-05, F00117, Registrar, *Notification of Assignment of Victims' Counsel to Group 1 of Victims Participating in the Proceedings*, 7 May 2021, public.

commencement of the trial shall be within thirty (30) days of the Specialist Prosecutor's Preparation Conference under Rule 118 of the Rules. The Panel already received all necessary information foreseen under Rule 118 of the Rules in the course of the joint trial preparation conferences. Accordingly, the Panel decides to set Wednesday, 15 September 2021, and Thursday 16 September 2021 (as a reserve day),⁴⁰ as the starting date(s) of the trial, which shall include the procedures under Rules 124 and 125 of the Rules, the opening statement of the SPO, and thereafter the opening statement of Victims' Counsel, in accordance with Rule 126 of the Rules.

18. With regard to the length of the opening statements, to be delivered in public session, the Panel decides to allocate three (3) hours to the SPO for its opening statement, and one and a half (1,5) hour to Victims' Counsel for her opening statement, as requested. The SPO and Victims' Counsel are authorised to use visual aids and other material during their respective opening statements, which shall be communicated to the Court Management Unit, the Defence, and the Panel at the earliest opportunity and in any case no later than seven (7) days before the opening of the trial. Any objections to the use of any of the visual aids or other material indicated by the SPO and Victims' Counsel shall be raised in writing no later than five (5) days before the opening of the trial.

19. Subject to Rule 130 of the Rules, the Panel shall give directions regarding the opening statement of the Defence under Rule 126(2) of the Rules at a later stage.

20. Upon conclusion of the opening statements of the SPO and Victims' Counsel, the Panel considers it appropriate to hear the testimony of the first two SPO witnesses between Monday, 20 September 2021 and Tuesday, 28 September 2021. In this respect, the Panel requests the SPO to file, by Thursday, 15 July 2021, the order of testimony

⁴⁰ Thursday, 16 September 2021 will only be used as courtroom day in case the procedures under Rules 124-125 of the rules and the opening statements of the SPO and Victims' Counsel are not concluded.

of SPO witnesses for the months of September and October, together with information on whether they will appear live or via video-link, and the proposed length of examination per witness.⁴¹ Should any changes be made during the trial to the order of testimony of SPO witnesses, these shall be communicated immediately by the SPO to the Panel, the Defence, and Victims' Counsel.

E. OTHER MATTERS

21. Considering the nature of part of the submissions made in Annex 2 to the "Prosecution Submissions pursuant to KSC-BC-2020-05/F00123" (F00130/A02) (Annex 2), on items a-d therein, the Panel orders the SPO, pursuant to Rule 82(5) of the Rules, to file a confidential redacted version of Annex 2, to be shared with the Defence and Victims' Counsel, or to provide submissions on the reasons why Annex 2 (items a-d) should remain strictly confidential and *ex parte*.

IV. DISPOSITION

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

- a. **ORDERS** the SPO and the Defence to file, by **Wednesday, 30 June 2021** joint and/or separate submissions requesting the Panel to take judicial notice of any adjudicated facts;
- b. **ORDERS** the SPO to file, by **Wednesday, 30 June 2021**, a request for the amendment of its List of Witnesses and its List of Exhibits pursuant to Rule 118(2) of the Rules;

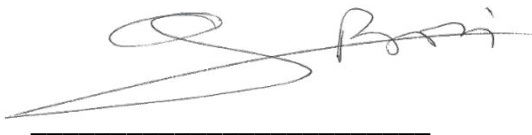
⁴¹ The Panel notes that an initial proposed length of examination in chief was provided by the SPO in its List of Witnesses, pp. 2-3.

- c. **ORDERS** the SPO, the Defence and Victims' Counsel to file, by **Thursday, 15 July 2021**, any request as specified in paragraph 12 of the present decision;
- d. **DECIDES** to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit for responses to any request(s) under point (c) above, to **Thursday, 19 August 2021**;
- e. **ORDERS** the SPO and Victims' Counsel to report to the Panel by **Wednesday, 7 July 2021**, on the progress of their discussions as referred to in paragraphs 14 and 16 of the present decision;
- f. **DECIDES** to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit provided for in Rule 118(3) of the Rules and **DECIDES** that the trial shall commence on **Wednesday, 15 September 2021**, and **Thursday, 16 September 2021** (as a reserve day), with the procedures prescribed under Rules 124 and 125 of the Rules, followed by the opening statements of the SPO and Victims' Counsel, in this sequence;
- g. **DECIDES** that the SPO shall have three (3) hours for its opening statement, which shall be made in accordance with the terms set out in paragraph 18 of the present decision;
- h. **DECIDES** that Victims' Counsel shall have one and a half (1,5) hour for her opening statement, which shall be made in accordance with the terms set out in paragraph 18 of the present decision;
- i. **DECIDES** to hear the testimony of the first two SPO witnesses between Monday, 20 September 2021 and Tuesday, 28 September 2021;
- j. **ORDERS** the SPO to file, by **Thursday, 15 July 2021**, the order of testimony of SPO witnesses, as specified in paragraph 20 of the present decision; and

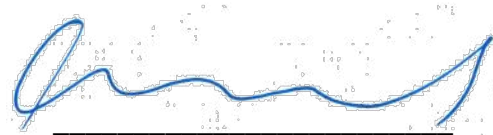
- k. **ORDERS** the SPO to file, by **Wednesday, 30 June 2021**, a confidential redacted version of Annex 2 to the "Prosecution Submissions pursuant to KSC-BC-2020-05/F00123" (F00130/A02), to be shared with the Defence and Victims' Counsel, or to provide submissions on the reasons why it should remain strictly confidential and *ex parte*, as specified in paragraph 21 of the present decision.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 18 June 2021
At The Hague, the Netherlands.