



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: 9 July 2021

Language: English

Classification: **Public**

Decision on witness familiarisation

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Registry

Head of Witnesses Protection and
Support Office

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on witness familiarisation.

I. PROCEDURAL BACKGROUND

1. 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 in closed sessions, on 9, 10, and 11 June 2021, as necessary, and requested submissions from the Specialist Prosecutor’s Office (SPO), the Defence for Salih Mustafa (Defence), Victims’ Counsel, and the Registrar through the Witness Protection and Support Office (WPSO) on, *inter alia*, familiarisation of witnesses prior to testimony.¹
2. On 2 June 2021, the SPO,² the Defence,³ Victims’ Counsel,⁴ and WPSO⁵ filed their respective submissions on the items listed in the Decision.
3. 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.⁶

¹ 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*, para. 10, points 2.a-i, 14, 17(d).

² 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*.

³ KSC-BC-2020-05, F00128, Defence, *Defence submission for Trial preparation* (Defence Submissions), 2 June 2021, public.

⁴ KSC-BC-2020-05, F00129, Victims’ Counsel, *Submission for Trial Preparation Conference*, 2 June 2021, public.

⁵ KSC-BC-2020-05, F00131, Registrar, *Registry Submissions for Trial Preparation Conferences* (WPSO Submissions), 2 June 2021, public, with Annex 1, confidential, and Annex 2, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, Transcript of Hearing, 9 June 2021, public.

4. On 30 June 2021, the Parties filed a joint request for the adoption of a witness preparation protocol (Joint Request).⁷

II. SUBMISSIONS

5. The SPO submits that, in addition to a witness familiarisation process conducted with the purpose of, *inter alia*, familiarising witnesses with the courtroom and providing them with the opportunity to become acquainted with those who will examine them,⁸ witnesses should also be provided with the opportunity to review their prior statements in the context of a witness preparation session conducted between the witness and the calling Party.⁹ In this respect, the SPO submits that: (i) although witness preparation is not specifically regulated in the Specialist Chambers (SC) legal framework, the adoption of such a procedure would fall within the realm of the Panel's discretion;¹⁰ (ii) witness preparation has been widely adopted at a range of international judicial institutions;¹¹ (iii) properly conducted witness preparation contributes to the provision of relevant, accurate, and focused testimony, and can support the well-being of witnesses;¹² and (iv) witness preparation may be especially appropriate in instances where there is a known climate of witness intimidation, as it can enable the calling Party to try to allay witness fears and obtain any further relevant information regarding interference since the last contact.¹³

⁷ KSC-BC-2020-05, F00143, *Joint Prosecution and Defence Proposal for the adoption of a Witness Preparation Protocol*, 30 June 2021, public, with Annex 1, public.

⁸ SPO Submissions, paras 15-16.

⁹ SPO Submissions, para. 17.

¹⁰ SPO Submissions, para. 18, referring to, *inter alia*, Article 40(2) and (6)(f) of the Law and Rule 80(1) of the Rules.

¹¹ SPO Submissions, para. 18 and the references contained therein.

¹² SPO Submissions, para. 19.

¹³ SPO Submissions, para. 20 and the references contained therein.

6. The Defence submits that witnesses will require proper familiarisation prior to testimony, comprising: (i) courtroom familiarisation to be conducted by WPSO; (ii) making prior statements available to them in a language that they understand; and (iii) clear instructions as to their obligations before the SC and the consequences of not abiding by such obligations.¹⁴

7. WPSO provides the Panel with a summary of the support provided by it to witnesses in relation to the familiarisation process.¹⁵

8. In their Joint Request, the parties request the Panel to adopt the proposed witness preparation protocol, which they argue will: (i) ensure relevant, accurate, and focused testimony; (ii) enhance the efficiency of witnesses' examinations; (iii) contribute to smooth trial hearings and a reasonable duration of the proceedings; and (iv) contribute to the witnesses' psychological well-being.¹⁶

III. APPLICABLE LAW

9. The Panel notes Articles 34(8) and 40(2) and (6) of Law No. 05/F-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 27, 80, and 116 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

A. WITNESS FAMILIARISATION PRIOR TO TESTIMONY

10. At the outset, the Panel clarifies that it uses the term "witness familiarisation" when referring to the information and support provided by WPSO to witnesses prior to their testimony, pursuant to its obligations under Article 34(8) of the Law and

¹⁴ Defence Submissions, paras 19, 22-23, 26.

¹⁵ WPSO Submissions, paras 14-40. *See also* Annex 1 to WPSO Submissions, pp. 27-37.

¹⁶ Joint Request, para. 4.

Rules 27 and 80(8) of the Rules. It further uses the term “witness preparation” when referring to any meeting between a witness and the calling entity, taking place before the witness’s testimony, for the purpose of discussing any matters relating to the substance of the witness’s testimony.¹⁷

11. Noting the Parties submissions as regards the witness familiarisation process,¹⁸ as well as the “WPSO Guidelines on Services to Witnesses Appearing Before the Specialist Chambers”,¹⁹ the Panel sets out below its instructions to WPSO and other relevant entities in relation to witness familiarisation prior to testimony.

1. Initial Information from the Calling Entity

12. The calling entity shall 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 witness’s expected testimony.²⁰ Moreover, every first working day of the month, the Parties and Victims’ Counsel shall submit to WPSO an updated Witness Appearance List (WAL),²¹ including: (i) the sequence of witnesses in order of appearance; (ii) whether they will testify in person at the seat of the court, by video-conference at another location, or give evidence by other means as provided for by the Rules;²² (iii) the date when each witness is required to be at the location of testimony; (iv) their dual status as witnesses-victims, if applicable; (v) protective

¹⁷ Similarly, ICC, *Prosecutor v. Ruto et al.*, Trial Chamber V, [Decision on witness preparation](#) (Ruto Preparation Decision), 2 January 2013, ICC-01/09-01/11-524, public, para. 4. The Panel understands the term “witness preparation” broadly, covering a number of expressions, including, *inter alia*, “witness proofing”, “witness training”, and “witness coaching”, used in different jurisdictions in connection with practices aimed at preparing a witness to give oral testimony. Similarly, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, [Decision on the Practices of Witness Familiarisation and Witness Proofing](#) (Lubanga Familiarisation Decision), 8 November 2006, ICC-01/04-01/06-679, public, para. 12.

¹⁸ SPO Submissions, paras 15-16; Defence Submissions, paras 19-27.

¹⁹ Annex 1 to WPSO Submissions, pp. 27-37 (WPSO Guidelines).

²⁰ See WPSO Guidelines, Section 4(1)-(2) and Annex 1 to WPSO Guidelines.

²¹ See WPSO Guidelines, Section 4(3) and Annex 1 to WPSO Guidelines.

²² See Rules 141(1), 144, 145(1) of the Rules.

measures, if applicable; (vi) the language of testimony; and (vii) the estimated length of testimony. To this end, WPSO shall make the WIF and the WAL templates available to the Parties and Victims' Counsel in a suitable electronic format as soon as possible.

13. The calling entity shall notify WPSO at the time of providing the WIF of any witness who may potentially incriminate him- or herself. In the case of a dual status witness-victim, Victims' Counsel shall also be informed. WPSO shall ensure that the Defence Office of the Registry is informed in the event that legal assistance pursuant to Rule 151(4) of the Rules is required.

14. The calling entity shall remain available to WPSO for the purpose of exchanging relevant information and, to the extent possible, gather all relevant details needed.

2. Pre-Familiarisation Process

15. Prior to the commencement of the familiarisation process, the calling entity shall 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, as applicable, for the purpose of giving testimony. WPSO shall explain to the witness the services and assistance it will provide, and inform the witness on topics related to his or her safety, welfare, travel and logistics, accommodation, and any allowances the witness is entitled to. WPSO shall also arrange all necessary travel and logistics to ensure the witness's timely appearance before the SC, with due regard to his or her safety and well-being.

3. Start of Familiarisation Process

16. Upon the witness's arrival in the Netherlands to testify in person at the seat of the SC, upon his or her arrival at the venue chosen for the conduct of the video-conference

testimony pursuant to Rule 144(2) of the Rules, or at an appropriate time prior to testimony in the case of a witness to be examined at the place where he or she resides or is in care pursuant to Rule 145(1) of the Rules, WPSO shall provide the witness with a welcome and orientation briefing describing the specific programme for the witness's appearance and testimony before the SC, including the tentative court appearance schedule, if known.

17. At that time, WPSO undertakes a vulnerability assessment of the witness. A summary of this assessment shall be submitted directly to the Panel prior to the testimony of the witness, including any appropriate recommendations as concerns special measures under Rule 80(4)(c) of the Rules. Information about recommended measures shall also be provided to the Parties and Victims' Counsel.

4. Cut-off Date for Contacts with the Calling Entity

18. Once the process of witness familiarisation has commenced, the witness is in the care of the WPSO and any further meeting between the calling entity and this witness outside the courtroom is prohibited. For witnesses testifying in person at the seat of the SC, the cut-off date for contact between the calling entity and the witness prior to testimony shall be the witness's arrival in the Netherlands. For witnesses testifying via video-conference at another location, the cut-off date shall be the date of the witness's arrival at the location of testimony. For witnesses to be examined away from the trial venue pursuant to Rule 145(1) of the Rules, the cut-off date shall be the date of WPSO's arrival at the location of testimony. If the witness familiarisation process ought to start prior to the aforementioned cut-off dates, WPSO must communicate this to the Parties and Victims Counsel sufficiently in advance. WPSO shall inform the calling entity when the witness is scheduled to arrive and if major delays occur.

19. Following such cut-off date, and until the end of the witness's testimony, the calling entity's contact with the witness shall be restricted to a courtesy meeting, as further described below, and its examination of the witness in court, unless otherwise authorised by the Panel. During such period, WPSO will act as a conduit for communication between the witness and the calling entity, when necessary, and as directed by the Panel.

20. The aforementioned limitation of contact does not apply to expert witnesses. Discussions between the calling entity and its expert witnesses may take place at any stage prior to calling such witnesses.

21. As regards dual status witnesses-victims, Victims' Counsel, when not acting as calling entity, shall be entitled to speak with her clients during the whole duration of their stay at the location of testimony or of the Panel's, the Parties', Victims' Counsel's, and WPSO's stay at the location of testimony in the case of witnesses to be examined away from the trial venue pursuant to Rule 145(1) of the Rules. However, Victims' Counsel should refrain from having discussions with witnesses about the topics that are to be dealt with during their testimony.

5. Familiarisation Concerning the (Trial) Venue

22. If a witness testifies at the seat of the SC, WPSO shall accompany the witness to the courtroom and familiarise him or her 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 any in-court protective and/or special measures pursuant to Rule 80 of the Rules, where applicable. This courtroom familiarisation process may be adapted for vulnerable witnesses, as necessary.

23. WPSO shall 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 shall also be shown to the witness. If the witness requires in-court assistance, the in-court assistant shall be present, if possible.

24. For witnesses testifying via video-conference or away from the trial venue pursuant to Rule 145(1) of the Rules, this process shall be adapted by WPSO, as required, whilst ensuring that such witnesses are adequately familiarised with the different systems used in court and at the location of testimony, the participants, and the facilities available at the location of testimony.

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

6. Courtesy Meeting with the Parties and Victims' Counsel

26. In order to give witnesses the opportunity to acquaint themselves with those who may examine them in court, the Parties and Victims' Counsel, as applicable, shall provide WPSO, prior to the commencement of the familiarisation process, with the names of the persons who will be present in the courtroom, to the extent possible. WPSO shall then arrange a courtesy meeting between the witness and the aforementioned persons. (Separate) courtesy meetings will take place for each entity, on the premises of the SC and in the presence of WPSO staff. In the case of witnesses testifying via video-conference, the courtesy meeting may be held remotely using adequate video-conferencing tools. In the case of witnesses testifying away from the trial venue pursuant to Rule 145(1) of the Rules, the courtesy meeting shall take place at the location of testimony.

7. Re-Reading of Prior Statement(s) and Related Material

27. Concomitantly with the provision of the WIF for each upcoming witness, the calling entity shall indicate to WPSO the number of material, length of statement(s),

and estimated time required to read any signed statement and recorded interview by the witness, as well as any document or information generated or provided by the witness when giving his/her previous statement(s).

28. Upon commencement of the familiarisation process, the calling entity shall make available to WPSO all of the aforementioned relevant material in order for the witness to refresh his or her memory. Subsequently, WPSO shall facilitate the witness's access to such material for the purpose of re-reading it. With a view to avoiding potential disputes in court, the calling entity shall inform the non-calling entities about the material concerned three days before such material is handed out to the witness. The material shall be provided by the calling entity in the language in which it was given by the witness or in a language the witness easily understands. WPSO may arrange for reading assistance, as necessary.

29. WPSO shall closely monitor the well-being of the witness to determine if he or she requires any assistance or support during this process. WPSO is under no duty to record anything the witness says during the reading process. Only if something exceptional occurs during the reading process shall WPSO report it to the calling entity, the witness's counsel, if applicable, and the Panel.

30. WPSO shall keep a record of the material provided to the witness, the dates the material was made available to the witness, and when said material was returned to the calling entity.

8. Information on Protective Measures

31. When meeting witnesses, WPSO shall inform them about any matter related to their 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. It shall also inform them, pursuant to Rule 80(8) of the Rules, about the risks of inadvertent or unlawful

disclosure of their 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.

32. Should WPSO, in the course of the familiarisation process, encounter new information that it believes may justify a request for (additional) protective measures, it shall discuss the matter with the witness and inform the calling entity and the Panel directly.

9. Information about Role, Rights, and Obligations

33. Prior to their testimony, WPSO shall 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.

34. WPSO shall also remind witnesses about Rule 151 of the Rules concerning self-incrimination. In the case of dual status witnesses-victims who have been assigned Victims' Counsel, it is the responsibility of Victims' Counsel to inform them about this provision.

B. WITNESS PREPARATION

35. As regards witness preparation, the Panel notes that the SPO and the Defence acknowledge that the practice of witness preparation is not specifically regulated in the SC legal framework and that the Panel has broad discretion in this regard.²³

36. The Panel concurs with the Parties in that neither the Law nor the Rules make any reference to such practice and that therefore, the Panel has broad discretion in this

²³ Joint Request, para. 4; SPO Submissions, para. 18.

regard to adopt the procedures and modalities that it finds necessary to facilitate the fair and expeditious conduct of the proceedings, as provided for in Article 40(2) of the Law. Furthermore, witness preparation is also not expressly provided for in the Kosovo Criminal Procedure Code. The Panel further notes that international jurisdictions do not follow the practice of witness preparation uniformly: while this practice has been, for the most part, permitted at the ICTR and the ICTY,²⁴ the majority of ICC chambers have been opposed to it.²⁵

37. With regard to the purported usefulness of witness preparation for the purpose of receiving relevant, accurate and focused witness testimony in the courtroom,²⁶ the Panel highlights, at the outset, that it is the responsibility of the entity calling a witness to streamline its in-court examination so as to address solely matters relevant to the present case. Further, and importantly, the possibility for witnesses to re-read their prior statement(s) and related material prior to appearing before the Panel also adds

²⁴ See, for example, ICTR, *Prosecutor v. Karemera et al.*, Appeals Chamber, [Decision on Interlocutory Appeal Regarding Witness Proofing](#), 11 May 2007, ICTR-98-44-AR73.8, public, paras 3-14; ICTY, *Prosecutor v. Limaj et al.*, Trial Chamber II, [Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses](#), 10 December 2004, IT-03-66-T, public.

²⁵ See ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, [Decision on Protocols at Trial](#), ICC-01/14-01/18-677, 8 October 2020, public, paras 17-30; *Prosecutor v. Ongwen*, Trial Chamber IX, [Decision on Protocols to be Adopted at Trial](#), ICC-02/04-01/15-504, 22 July 2016, public, paras 4-17; *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, [Decision on witness preparation and familiarization](#), ICC-02/11-01/15-355, 2 December 2015, public, paras 13-19; *Prosecutor v. Bemba et al.*, Trial Chamber VII, [Decision on Witness Preparation and Familiarisation](#), ICC-01/05-01/13-1252, 15 September 2015, public, paras 20-25; *Prosecutor v. Bemba*, Trial Chamber III, [Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial](#), ICC-01/05-01/08-1016, 18 November 2010, public, paras 31-35; *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, [Decision on a number of procedural issues raised by the Registry](#), ICC-01/04-01/07-1134, 14 May 2009, public, paras 17-18; *Prosecutor v. Lubanga*, Trial Chamber I, [Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), ICC-01/04-01/06-1049, 30 November 2007, public, paras 35-52; [Lubanga Familiarisation Decision](#), paras 11-17, 28-42. By contrast, only four ICC trial chambers have allowed the substantive preparation of witnesses: ICC, *Prosecutor v. Al Hassan*, Trial Chamber X, [Decision on witness preparation and familiarisation](#), ICC-01/12-01/18-666, 17 March 2020, public, paras 9-18; *Prosecutor v. Ntaganda*, Trial Chamber VI, [Decision on witness preparation](#), ICC-01/04-02/06-652, 16 June 2015, public, paras 13-18; [Ruto Preparation Decision, paras 26-51](#); *Prosecutor v. Muthaura and Kenyatta*, Trial Chamber V, [Decision on witness preparation](#), ICC-01/09-02/11-588, 2 January 2013, public, paras 30-53.

²⁶ Joint Request, para. 4; SPO Submissions, para. 19.

to the quality of the upcoming testimony. Moreover, the Panel finds it necessary, in accordance with its aforementioned broad discretion, that any potential inaccuracy, inconsistency or contradiction in the upcoming testimony of a witness is not “ironed out” in *ex parte* discussions with the calling entity. Rather, any such inaccuracy, inconsistency or contradiction shall be aired in the courtroom, allowing the Panel, the Parties, and Victims’ Counsel to properly assess the testimony on equal footing. Further, the Panel also considers that whether or not a witness can speak to a particular documentary item not previously shown to him or her²⁷ shall best be established during the witness’s testimony before the Panel. The Panel underscores that the witness’s natural reaction, such as not being able to speak to a documentary item, can also carry evidentiary value.

38. The Panel further notes that, while the witnesses in the present case will indeed testify about events which occurred approximately 22 years ago, they have been interviewed by the SPO about these events as recently as 2019, 2020, or even 2021.²⁸ In these circumstances, a further session preparing the witnesses to give “relevant, accurate and focused”²⁹ in-court testimony is not warranted.

39. Moreover, the witness familiarisation process to be carried out under the auspices of WPSO allows witnesses to prepare sufficiently, on their own, for their upcoming testimony, including by re-reading their prior statement(s) and related material.³⁰ This enables witnesses to understand the topic(s) to be discussed and prepares them generally on what to expect during the judicial process.

40. The Panel is further of the view that providing the opportunity for witnesses to prepare for their upcoming testimony in any way other than by re-reading their prior

²⁷ SPO Submissions, para. 19.

²⁸ See KSC-BC-2020-05, F00085/A03, Specialist Prosecutor, *Exhibits list pursuant to Rule 95(4)(c)*, 17 February 2021, confidential. See also SPO Submissions, paras 5-6.

²⁹ Joint Request, para. 4.

³⁰ See *supra* paras 27-30.

statement(s) and related material would inevitably detract from the spontaneity and reduce the benefits of the immediacy of their testimony. Discussing matters relating to the substance of the testimony with the calling entity upfront outside the courtroom also bears the risk of unintentionally transmitting a certain expectation of the calling entity about the upcoming testimony, thereby inadvertently influencing or contaminating the witness.

41. With regard to the purported usefulness of witness preparation for ensuring the well-being, safety, and security of witnesses,³¹ the Panel emphasises that, in light of its particular role within the SC legal framework in accordance with Rule 27 of the Rules, WPSO, as a neutral and specialized unit of the Registry, bears the primary responsibility for the witnesses' well-being, *inter alia* and especially in the period immediately leading up to their testimony. Furthermore, WPSO is also the entity best placed to provide support services and information to witnesses in relation to any topics of concern, address any fears they may have, and obtain information as concerns any alleged interference.³² The Panel is confident that WPSO's professional and specialized assistance to the needs of the witnesses addresses fully the SPO's concerns in this regard.

42. In light of the foregoing, and mindful of its duty to establish the truth in accordance with Rule 132 of the Rules, the Panel does not consider it appropriate, in the exercise of its discretion under Article 40(2) of the Law, to allow for a witness preparation session to be conducted between the witness and the entity calling such witness prior to the witness's in-court testimony.

³¹ Joint Request, para. 4; SPO Submissions, paras 19-20.

³² See also *supra* paras 15, 31-32.

V. DISPOSITION

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

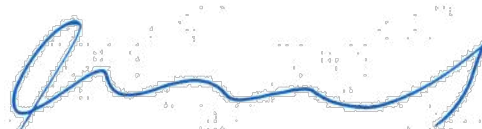
- a. **REJECTS** the Joint Request; and
- b. **DIRECTS** the Parties, Victims' Counsel, and WPSO to facilitate witness familiarisation in accordance with paragraphs 12 to 34 above.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 9 July 2021
At The Hague, the Netherlands.