



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 15 July 2021

Language: English

Classification: **Public**

**Decision dismissing "Salih Mustafa's Preliminary Defence Motion to Oppose
KSC Jurisdiction"**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision dismissing “Salih Mustafa's Preliminary Defence Motion to Oppose KSC Jurisdiction” (Defence Motion).¹

I. PROCEDURAL BACKGROUND

1. On 28 September 2020, the Pre-Trial Judge held the initial appearance of Salih Mustafa (Mr Mustafa or Accused), in which, *inter alia*, the Accused was informed of his rights, including the right to file preliminary motions.²
2. On 23 October 2020, as ordered by the Pre-Trial Judge,³ the Specialist Prosecutor's Office (SPO) finalised the disclosure to the Defence of the material falling under Rule 102(1)(a) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules), thereby triggering the 30-day deadline for the Defence to file any preliminary motions within the meaning of Rule 97(1)(a) to (c) of the Rules.⁴
3. On 7 May 2021, in the absence of any Rule 97 preliminary motions by the Defence and with all other necessary procedural steps having been taken, the Pre-Trial Judge transmitted the case file to the Panel, pursuant to Rule 98(1) of the Rules.⁵
4. On 7 July 2021, the Defence submitted the Defence Motion.

¹ KSC-BC-2020-05, F00149, Defence, *Salih Mustafa's Preliminary Defence Motion to Oppose KSC Jurisdiction* 7 July 2021, public.

² KSC-BC-2020-05, Transcript of Hearing, 28 September 2020 (28 September 2020 Transcript), public, p. 9, lines 12-14.

³ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* (Framework Decision on Disclosure), 9 October 2020, public, para. 90(b).

⁴ See disclosure packages 5, 6, 8, and 28. See also, KSC-BC-2020-05, F00119/A02, Pre-Trial Judge, *Handover Document* (Handover Document), 7 May 2021, confidential, p. 18.

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.

II. APPLICABLE LAW

5. The Panel notes Articles 33(1)(b), 39(1), 40(1) and 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 9(5), 97, 98(1), and 102(1)(a) of the Rules.

III. ANALYSIS

6. The Panel underlines that the legal framework applicable before the Specialist Chambers (SC) clearly indicates when preliminary motions, including those challenging the jurisdiction of the SC, may be filed. According to Rule 97(2) of the Rules, a preliminary motion challenging the jurisdiction of the SC, such as the Defence Motion, shall be brought within thirty (30) days from the disclosure of all material and statements referred to in Rule 102(1)(a) of the Rules. Pursuant to Rule 102(1)(a) of the Rules, such disclosure, which pertains to supporting material to the indictment submitted for confirmation as well as all statements obtained from the Accused, shall in turn take place within thirty (30) days of the initial appearance of the Accused pursuant to Rule 92 of the Rules. Considering that the initial appearance of Mr Mustafa took place on 28 September 2020⁶ and that disclosure of Rule 102(1)(a) material by the SPO to the Defence was completed by 23 October 2020,⁷ the deadline for the Defence to file any preliminary motions within the meaning of Rule 97(1)(a) to (c) of the Rules was Tuesday, 24 November 2020.

7. The Panel further considers that the SC legal framework clearly stipulates that it is incumbent upon the Pre-Trial Judge, pursuant to Article 39(1) of the Law, to exhaustively deal with any preliminary motions within the meaning of Rule 97 of the Rules, prior to transmitting the case file to the Panel. Furthermore, with regard to

⁶ 28 September 2020 Transcript.

⁷ Handover Document, p. 18.

preliminary motions challenging the SC jurisdiction (Rule 97(1)(a)), pursuant to Article 45(2) of the Law and Rule 97(3) of the Rules, either Party has the right to directly appeal the Pre-Trial Judge's decision(s) on such jurisdictional challenges. Critically, the case file may only be transmitted by the Pre-Trial Judge to the Trial Panel, pursuant to Rule 98(1) of the Rules, once any final decision on preliminary motions, if they were submitted, has been taken. In this regard, the Panel also draws attention to the combined reading of Articles 33(1)(b) and 40(1) of the Law, which provide that the President of the SC shall assign a trial panel as soon as any preliminary motions, including challenges to the form of the indictment and jurisdiction, have been decided and the case has been assessed by the Pre-Trial Judge as being ready for transmission to trial.

8. It follows that any preliminary motions within the meaning of Rule 97 of the Rules, including therefore the Defence Motion, shall in principle be submitted during the pre-trial stage of a case, before the Pre-Trial Judge, with whom jurisdiction over such challenges lies. Moreover, with regard to preliminary motions challenging the jurisdiction of the SC, the Law and the Rules establish a legal framework where issues related to the SC jurisdiction must be resolved, including at the appellate level, in principle, before the case is transmitted to the Panel, in order to ensure that the case is prepared properly for trial and such issues do not arise during the trial phase.

9. Even assuming that a derogation to this system may be envisaged in exceptional circumstances, by virtue of Article 40(6)(a) of the Law, the Panel notes that, in the present case, the Defence did not provide any arguments justifying a delay of almost eight months in submitting the Defence Motion, nor did it formulate any request to vary the relevant time limit pursuant to Rule 9(5) of the Rules. In this respect, the Panel also recalls that, during the initial appearance of the Accused, the Pre-Trial Judge informed Mr Mustafa that he had the right to file preliminary motions challenging the jurisdiction of the SC and to appeal directly any such decisions issued on these

motions.⁸ On the same occasion, Lead Counsel for Mr Mustafa stated that he did not exclude that he may file such challenges.⁹ Furthermore, at the status conference held on 14 December 2020 (thus after the expiry of the deadline under Rule 97(2) of the Rules), the Pre-Trial Judge noted that the Defence had not filed any preliminary motions by the time limit set forth in Rule 97(2) of the Rules, and Lead Counsel did not react to that.¹⁰

10. In light of the foregoing, the Panel finds that the Defence Motion shall be dismissed on procedural grounds, without going into the merits, as it was submitted after the expiry of the time limit set forth in Rule 97(2) of the Rules, without any justification as to why the Panel should derogate from the legal framework applicable before the SC.

11. The Panel also considers it appropriate to emphasise that, pursuant to Article 6 (d), and (h) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (Code of Conduct),¹¹ Defence Counsel practicing before the SC have to uphold basic professional standards, including, as far as relevant: (i) acting within and in compliance with the SC legal framework; and (ii) taking all reasonable steps to fulfil their obligations with the necessary knowledge and professional competency with respect to the Law and procedure applicable before the SC. Moreover, pursuant to Article 10(b) of the Code of Conduct, Defence Counsel shall act in a timely and efficient manner.

12. The Panel reminds Lead Counsel for Mr Mustafa and his team to adhere to the above mentioned professional standards set forth in the Code of Conduct.

⁸ 28 September 2020 Transcript, p. 9, lines 12-14, p. 10, lines 10-12.

⁹ 28 September 2020 Transcript, p. 12, lines 14-16.

¹⁰ KSC-BC-2020-05, Transcript of Hearing, 14 December 2020, public, p. 89, lines 10-11.

¹¹ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07, 1 March 2019.

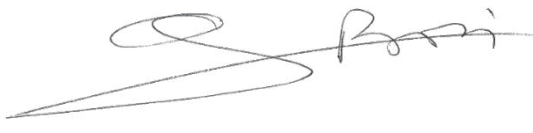
IV. DISPOSITION

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

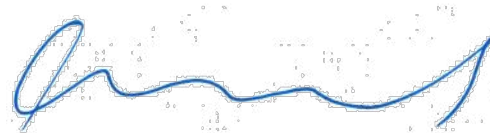
DISMISSES the Defence Motion.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 15 July 2021
At The Hague, the Netherlands.