



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:** 21 January 2022

**Language:** English

**Classification:** **Public**

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**Second decision on the conduct of the proceedings**

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**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 second decision on the conduct of the proceedings.

## I. PROCEDURAL BACKGROUND

1. On 7 May 2021, the Pre-Trial Judge transmitted the case file to the Panel, pursuant to Rule 98 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).<sup>1</sup>
2. On 12 July 2021, the Panel issued the “Decision on victims’ procedural rights during trial” (Decision on Victims’ Rights).<sup>2</sup>
3. On 15 September 2021, the trial against Salih Mustafa (Accused) started before the Panel with the procedures under Rules 124 and 125 of the Rules, and the opening statements of the Specialist Prosecutor’s Office (SPO) and Victims’ Counsel, pursuant to Rule 126 of the Rules.<sup>3</sup>
4. On 20 September 2021, the first SPO witness began his testimony.<sup>4</sup>
5. On 13 December 2021, considering the advanced stage of the SPO case, the Panel informed the Parties and Victims’ Counsel of a tentative timeline for the next procedural steps in the case, for the sole purpose of giving notice of the preparatory steps to be undertaken, once the SPO case will be closed.<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> KSC-BC-2020-05, F00152, Trial Panel I, *Decision on victims’ procedural rights during trial*, 12 July 2021, public.

<sup>3</sup> KSC-BC-2020-05, Transcript of Hearing, 15 September 2021, public, pp. 301-373.

<sup>4</sup> KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, public, p. 386.

<sup>5</sup> KSC-BC-2020-05, Transcript of Hearing, 13 December 2021, public, p. 1919, line 2 to p. 1920, line 16.

## II. APPLICABLE LAW

6. The Panel notes Article 40(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 114(5), 116(1), 119, and 129 of the Rules.

## III. ANALYSIS

### A. NEXT PROCEDURAL STEPS

7. Pursuant to Article 40(2) of the Law and Rule 116(1) of the Rules, the Panel can take any necessary measures to ensure the fair and expeditious preparation and conduct of the trial proceedings.

8. The Panel recalls the SPO's submission that after the testimony of witness W04849, scheduled to take place between 31 January and 4 February 2022,<sup>6</sup> there will be no more witnesses nor any further evidentiary material to be adduced, and therefore the SPO can close its case pursuant to Rule 129 of the Rules on the same day or shortly thereafter.<sup>7</sup> In these circumstances, with a view to achieving an efficient and expeditious transition from the closing of the SPO case to the subsequent phases of the trial, the Panel considers it appropriate to set out a calendar for the next procedural steps, subject to any necessary additions and/or changes that may be required as a result of compelling or unforeseen circumstances.

9. Accordingly, considering that the last SPO witness may be heard between 1 and 3 February 2022, the Panel sets Friday, 4 February 2022, as the target date for the closing of the SPO case, pursuant to Rule 118(5) of the Rules. On 4 February 2022, or on the second working day after the last SPO witness concludes his testimony, whichever is

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<sup>6</sup> KSC-BC-2020-05, F00268/A01, Specialist Prosecutor, *SPO Order of witness testimonies for the months of January and February 2022*, 23 November 2021, public. The Panel had subsequently informed the Parties and Victims' Counsel that it would sit from 1 to 3 February 2022 (see email from Trial Panel I, KSC-BC-2020-05/CRSPD54, 3 December 2021, confidential).

<sup>7</sup> KSC-BC-2020-05, Transcript of Hearing, 14 December 2021, public, p. 2023, lines 11-18.

earlier, the Parties and Victims' Counsel shall file their request(s) tendering the exhibits from their respective examinations of the remaining SPO witnesses, with objections and observations, if any, to be filed within five days therefrom. On the same day, or at any time earlier, the SPO shall submit any application for the admission of remaining material under Article 37 of the Law, or of other material.<sup>8</sup>

10. On 4 February 2022, or on the second working day after the last SPO witness concludes his testimony, whichever is earlier, the SPO shall also file a written notice under Rule 129 of the Rules informing the Panel, the Defence, and Victims' Counsel, that there are no more witnesses to be called or other evidentiary material to be presented, and thus closing its case (Rule 129 Notice).

11. Moreover, on the same day of the filing of the Rule 129 Notice and the remaining exhibits by the SPO, and subject to Rule 130 of the Rules, the Defence shall file a written notice informing the Panel, the SPO, and Victims' Counsel, whether it will present a case pursuant to Rule 119(1) of the Rules (Rule 119(1) Notice).

12. Should the Defence wish to present a case, it shall file, by Friday 11 February 2022, its lists of witnesses and exhibits, containing the information set out in Rule 119(2)(a) and (b) of the Rules (Defence Lists of Witnesses and Exhibits). The Defence shall liaise with the SPO prior to filing the Defence List of Exhibits in order to gather, where possible, any SPO objections regarding the authenticity of the Defence exhibits to be presented, as stipulated in Rule 119(2)(b) of the Rules. This is without prejudice to the possibility, for the SPO, to raise any objection to the overall admissibility of any exhibits, should these be submitted to the Panel during the remainder of the trial.

13. With regard to the presentation of evidence called by the Panel at the request of Victims' Counsel pursuant to Rule 114(5) of the Rules, the Panel recalls that Victims'

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<sup>8</sup> KSC-BC-2020-05, F00169, Trial Panel, *Decision on the submission and the admissibility of evidence*, 25 August 2021, public, paras 35-39, 43-47.

Counsel may request to present evidence related to, *inter alia*, the establishment of the truth, and may seek authorisation for victims to directly address the Panel in order to present their views and concerns.<sup>9</sup> In order to properly organise the next procedural steps to this effect, the Panel finds it appropriate to order Victims' Counsel to file, by Friday, 11 February 2022: (i) a list of proposed (expert) witnesses to be called by the Panel and relevant non-oral material she wishes the Panel to order the submission of related to the establishment of the truth, if any, including the information set out in paragraphs 34-35 of the Decision on Victims' Rights; and (ii) a request, if any, seeking the Panel's authorisation for victims she represents to present their views and concerns before the Panel.

14. Lastly, the Panel will give further directions, as applicable, on the presentation of evidence by Victims' Counsel pertaining to reparations in its upcoming decision concerning the application of Article 22(9) of the Law, to be issued in due course.

#### B. DEFENCE PREPARATION CONFERENCE AND VICTIMS' STATUS CONFERENCE

15. In accordance with Rule 119(3) of the Rules, within one (1) week of the filing of the Defence Lists of Witnesses and Exhibits, the Panel shall convene a Defence Preparation Conference in order to discuss matters related to the presentation of evidence by the Defence. After having heard the Parties and Victims' Counsel, the Panel may, *inter alia*: (i) determine the number of witnesses the Defence may call and instruct the Defence to remove repetitive witnesses; (ii) determine the time available for the Defence to present evidence; (iii) request the Defence to shorten the estimated length of the direct examination of any proposed witness; and (iv) give any further directions as necessary to ensure a fair and expeditious trial. In addition, in accordance

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<sup>9</sup> Decision on Victims' Rights, paras 18, 37.

with Rule 119(4), the Panel shall determine the date for the opening of the Defence case, which shall be within thirty (30) days of the Defence Preparation Conference.

16. Moreover, in order to ensure the fairness and expeditiousness of the proceedings, the Panel may hold a status conference to discuss and organise the presentation of evidence called by the Panel upon Victims' Counsel's request, if any, for the purposes of the establishment of the truth.<sup>10</sup> Thereafter, the Panel may determine the length and scope of such presentation of evidence, including a starting date to hear such evidence.

17. In light of the above, the Panel decides to convene the Defence Preparation Conference, jointly with a status conference on the presentation of evidence called by the Panel upon Victims' Counsel's request, on Thursday, 17 February 2022, starting at 09:30 hours, with Friday, 18 February 2022 as reserve day, starting at 09:30 hours. The Panel will ask the SPO, the Defence, Victims' Counsel, and a representative of the Registry for their submissions on a number of issues, in the order and manner listed in Sections III.C and III.D below.

18. The Panel will determine the next procedural steps to be taken in the case after hearing the submissions of the Parties, Victims' Counsel, and the Registry.

### C. DEFENCE CASE

- a. Whether the Defence intends to make an opening statement pursuant to Rule 126(2) of the Rules and, if so, how much time it will require, whether visual aids or other tools will be used and whether it will include an unsworn statement by the Accused pursuant to Rule 142(1) of the Rules.

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<sup>10</sup> Decision on Victims' Rights, para. 33.

- b. Whether the order in which the Defence intends to call its proposed witnesses is the order in which they are included in the Defence List of Witnesses;
- c. Whether the Defence intends to request admission of prior statements or transcripts in lieu of oral testimony under Rules 153-155 of the Rules and, if so, in relation to which witnesses, how many items, and under which provision;
- d. Whether the Defence intends to request protective measures for any of its proposed witnesses and, if so, what protective measures and for which of its proposed witnesses;
- e. Whether the Defence intends to request redactions to any other material and, if so, the extent of such material;
- f. An estimate as to when the Defence would be in a position to call its first proposed witness;
- g. Whether there remains outstanding material that the Defence intends to disclose to the SPO and Victims' Counsel, and to communicate to the Panel, and if so, the extent of such material, the type (audio/video material, documentary evidence, statements), by when it intends to disclose it, and whether the Defence intends to request redactions thereof and to what extent; and
- h. Whether and to what extent the Registry is in a position to shorten the standard 35-day notice<sup>11</sup> required for the organisation of a witness's

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<sup>11</sup> KSC-BC-2020-05, F00150, Trial Panel, *Decision on witness familiarisation*, 9 July 2021, public, para. 12; 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*, paras 14-15.

testimony, in particular for witnesses who do not require any protective measures.

D. PRESENTATION OF EVIDENCE CALLED BY THE PANEL UPON VICTIMS' COUNSEL'S REQUEST

- a. Whether the order in which the Victims' Counsel intends to call its proposed (expert) witnesses is the order in which they are included in the Victims' Counsel's list of (expert) witnesses;
- b. Whether Victims' Counsel intends to request admission of prior statements or transcripts in lieu of oral testimony under Rules 153-155 of the Rules and, if so, in relation to which witnesses, how many items, and under which provision;
- c. Whether Victims' Counsel intends to request protective measures for any of her proposed (expert) witnesses and, if so, what protective measures and for which of her proposed (expert) witnesses;
- d. Whether Victims' Counsel intends to request redactions to any other material and, if so, the extent of such material;
- e. An estimate as to when Victims' Counsel would be in a position to call her first proposed (expert) witness;
- f. Whether there remains outstanding relevant non-oral material that Victims' Counsel wishes the Panel to order the submission of in relation to the establishment of the truth, and if so, the extent of such material, the type (audio/video material, documentary evidence, statements), by when she intends to make such material available to the Parties and the Panel,



and whether the Victims' Counsel intends to request redactions thereof and to what extent; and

- g. Whether and to what extent the Registry is in a position to shorten the standard 35-day notice required for the organisation of a (expert) witness's testimony, in particular for witnesses who do not require any protective measures.

19. In addition to the above topics and to ensure an expeditious conduct of proceedings, the Panel considers it appropriate to receive submissions in accordance with Rule 159(6) of the Rules from the Parties and Victims' Counsel as to whether, in the event the Accused is found guilty of one or more crimes charged, the Panel should determine the appropriate sentence with the pronouncement of the Trial Judgment, or should proceed in accordance with Rules 162 and 164 of the Rules. This is without prejudice to the Panel's determination of whether the Accused is guilty or not guilty. Should the Parties and the Victims' Counsel not be in a position to submit the requested observations at this stage, they shall file submissions stating the reasons therefor. In any case, the Panel shall receive submissions on this matter at the latest by the closing of the Defence case pursuant to Rule 131 of the Rules.

20. In order to assist the Panel and expedite the submissions to be made in court, the Panel orders the Parties, Victims' Counsel, and the Registry, to file written submissions, on any of the above matters, or any other related matter not specifically referred to in the present decision by Wednesday, 16 February 2022, at noon.

#### IV. DISPOSITION

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

- a. **SETS Friday, 4 February 2022**, as the target date for the closing of the SPO case, pursuant to Rule 118(5) of the Rules;

- b. **ORDERS** the Parties and Victims' Counsel to file, by **Friday, 4 February 2022**, or on the second working day after the last SPO witness concludes his testimony, whichever is earlier, their request(s) tendering the exhibits from their respective examinations of the remaining SPO witnesses, with objections and observations, if any, to be filed within five days therefrom;
- c. **ORDERS** the SPO to file, by **Friday, 4 February 2022**, or at any time earlier, any application for the admission of remaining material under Article 37 of the Law, or of other material;
- d. **ORDERS** the SPO to file, by **Friday, 4 February 2022**, or on the second working day after the last SPO witness concludes his testimony, whichever is earlier, the Rule 129 Notice;
- e. **ORDERS** the Defence to file, on the same day of the filing of the Rule 129 Notice, the Rule 119(1) Notice;
- f. **ORDERS** the Defence to file, by **Friday, 11 February 2022**, the Defence Lists of Witnesses and Exhibits;
- g. **ORDERS** Victims' Counsel to file, by **Friday, 11 February 2022**: (i) a list of proposed (expert) witnesses to be called by the Panel and relevant non-oral material she wishes the Panel to order the submission of related to the establishment of the truth, if any, including the information set out in paragraphs 34-35 of the Decision on Victims' Rights; and (ii) a request, if any, seeking the Panel's authorisation for victims she represents to present their views and concerns before the Panel;
- h. **DECIDES** to convene the Defence Preparation Conference jointly with a Victims' status conference, in the presence of the SPO, the Defence, Victims' Counsel, and a representative of the Registry on **Thursday, 17 February**

2022, at 09:30 hours, with Friday, 18 February 2022 as reserve day, starting at 09:30 hours; and

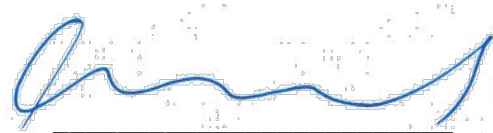
- i. **REQUESTS** the SPO, the Defence, Victims' Counsel, and the Registry, to file, by **Wednesday, 16 February 2022, at noon**, written submissions as specified in paragraph 20 of the present decision.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Friday, 21 January 2022  
At The Hague, the Netherlands.