

**In:** KSC-BC-2020-05  
**The Prosecutor v. Mr. 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

**Filing Participant:** Defence

**Date:** 9 February 2022

**Language:** English

**Classification:** Public

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**Defence submission following the Panel's order for submissions on the conduct of proceedings following the Defence's Rule 130 (1) Notice**

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**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Mr. Julius von Bóné

**Victims' Counsel**

Anni Pues

## I. Introduction

1. In accordance with the Order of the trial Panel<sup>1</sup> (“Order”) for submissions on the conduct of proceedings following the Defence’s Rule 130 (1) Notice of its intention to file a motion to dismiss any or all of the charges in the Indictment, the defence hereby files its submissions.

## II. Procedural Background

2. The SPO has closed its case on 4 February 2022, in accordance with Rule 129 of the Rules<sup>2</sup>.
3. The Defence’s filed on 4<sup>th</sup> of February 2022 its Rule 130 (1) Notice of its intention to file a motion to dismiss any or all of the charges in the Indictment.
4. As per Order of the Trial Panel<sup>3</sup>, the Defence had to file on the same day that the SPO closed its case the Rule 119 (1) Notice. In the same decision, the Panel decided to convene a Defence Preparation Conference on 17 February 2022.

## III. Submissions

5. The Defence filed its Rule 119 (1) Notice solely for the purposes of complying with the Order of the Panel. The Notice is nothing else than a Notice. It does not and did not have any other intent than simply to comply with the Order of the Panel.

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<sup>1</sup> KSC-BC-2020-05, Filing 00314, Order of the trial Panel<sup>1</sup> (“Order”) for submissions on the conduct of proceedings following the Defence’s Rule 130 (1) Notice of its intention to file a motion to dismiss any or all of the charges in the Indictment.

<sup>2</sup> KSC-BC-2020-05, Filing F00308, 4 February 2022

<sup>3</sup> KSC-BC-2020-05, Filing 00296, Trial Panel, Second decision on the conduct of proceedings, 21 January 2022, paras 11-12

6. As earlier the same day the Defence filed its Rule 130 (1) Notice, it was stressed and submitted that Defence is of the opinion that the Rule 130 (1) Notice would take precedence over the-later that day-filed Rule 119 (1) Notice. It was also written in the second decision on the conduct of proceedings<sup>4</sup>
7. As both Notices had to be done the same day and considering the ambiguity of the decision of the Panel regarding the filing of these Notices, the Defence wanted to be “better safe than sorry”, and filed both Notices on the same day, though separate in time, and stipulating the view regarding which Notice would have precedence.

#### IV. Analysis

8. The Defence submitted that the list of Witnesses and Exhibits, containing information set out in Rule 119 (2) (a) and (b) of the Rules (Defence list of Witnesses and Exhibits) will be filed as “*per Order of the Trial Panel*”. That *Order* is the Order as understood (by the defence) that would follow the final decision on the Rule 130 proceedings. Such decision would follow thus after the completion of the Rule 130 proceedings and is mentioned in the heading of Rule 119 (2) of the Rules (“Should the Defence decide to present a case, the Panel shall *order* the filing of”).

#### V. Views of the Defence

9. It is the view of the Defence that the dates of 17-18 February Preparation Conference and the deadlines for the related written submission should not be maintained.

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<sup>4</sup> KSC-BC-2020-05, Filing 00296, Trial Panel, Second decision on the conduct of proceedings, 21 January para. 11

10. The Defence does not agree to proceed with the indicated Preparation Conference and the deadlines for the related written submission.
11. Even if no decisions will be taken by the Panel on the points under Rule 119 (3) and (4), there is no point in scheduling such conference and submit observations. If the Panel decides to dismiss any or all of the charges of the Indictment all kinds of amendments would need to be made and the observations of parties would need all kinds of reservations.
12. If any or all of the charges would be dismissed, it would have implications for the amount, and therefore the List of witnesses, and the (List of) exhibits that would be filed.
13. For example, if one or more of the charges would be dropped, it is very feasible that the List of Witnesses would not remain the same. The same counts for the List of Exhibits.
14. There is for any of the Parties no point in making reservations on each of their observations, if the List of witnesses would be amended anyway, or if the List of Exhibits is to be amended as a result of the decision to dismiss some or all of the charges.
15. As the time limits for the Rule 130 are clear in the Rules of Procedure and Evidence, the entire proceedings of the decision regarding the dismissal of the charges can hardly take longer than about 1 month, excluding an appeal, if any, by the SPO if any or all of the charges would be dismissed. Such time hardly impacts the expeditiousness of the proceedings.
16. Considering the fact that the Accused has a right to a fair and impartial proceeding with regard to his motion that the charges be dismissed, it is the

view of the Defence that to prematurely schedule a Defence Preparation Conference, even without making – at that time - a decision on the points under Rule 119 (3) and (4), indicates no good cause. It is reasonably being perceived as giving rise to the fact that a Preparation Conference should precede over a Rule 130 hearing even though such Rule 130 hearing could result in the dismissal of any or all of the charges. It is being perceived as a bias that exists regarding the feasibility of the Defence Rule 130 Motion, whereas the Accused has the right to an impartial hearing on and treatment of his motion to dismiss any or all of the charges. The Defence is of the view that choosing this order of proceedings conflicts the integrity of the proceedings.

17. As the Defence indicated in its Rule 119 (1) Notice, the Defence is of the opinion that the Rule 130 (1) Notice takes precedence over this Rule 119 (1) Notice. Therefore, the Defence did not request a suspension of the briefing schedule or postponement of the preparation Conference.
18. It follows from Rule 130 (1) that as this Rule takes precedence over Rule 119, such request is not necessary. Precedence implies that any other Rule, or at least Rule 119 (2), will be dealt with after the Rule 130 decision has been completed. The Notice of Rule 119 (1) in itself has no effect as to when any order of Rule 119 (2) is to be given.
19. But if any ambiguity for this matter should exist regarding this matter, the Defence requests that the briefing schedule and the Defence Preparation Conference be suspended until the completion of the Rule 130 proceedings.
20. Alternatively, the Defence could file a motion for withdrawal of the Rule 119 (1) Notice, without prejudice that such notice could be filed after the completion of the Rule 130 proceedings. The Defence did not do so as it stipulated in its filing that Rule 130 would take precedence. The relevant paragraph of the Second

Decision on the Conduct of Proceedings indicated that the Rule 190 Notice was subject to Rule 130 of the Rules.<sup>5</sup>

**For the above-mentioned reasons:**

21. The Defence does not agree to proceed with the indicated Preparation Conference and the deadlines for the related written submission.
22. Rule 130 takes precedence over Rule 119 proceedings and therefore upon completion of the Rule 130 proceedings, the material issues of Rule 119 (2) and (3) should be dealt with in the light of the outcome of the Rule 130 proceedings.
23. The Defence requests that, in case the issue of the meaning of "*precedence*" would be ambiguous, the Defence requests that the briefing schedule and the Defence Preparation Conference be suspended until the completion of the Rule 130 proceedings.
24. The Defence is of the view that choosing the order of first having the Defence preparation Conference and briefing schedule before completing the Rule 130 proceedings conflicts the integrity of the proceedings. It is reasonably being perceived as giving rise to the fact that a Preparation Conference and briefing schedule should precede over a Rule 130 hearing even though such Rule 130 proceedings could result in the dismissal of any or all of the charges. It is being perceived as a bias that exists regarding the feasibility of the Defence Rule 130 Motion, whereas the Accused has the right to an impartial hearing on and treatment of his motion to dismiss any or all of the

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<sup>5</sup> KSC-BC-2020-05, Filing 00296, Trial Panel, Second decision on the conduct of proceedings, 21 January para. 11

charges

25. As the time limits for the Rule 130 are clear in the Rules of Procedure and Evidence, the entire proceedings of the decision regarding the dismissal of the charges can hardly take longer than about 1 month, excluding an appeal, if any, by the SPO if any or all charges would be dismissed. Such time hardly impacts the expeditiousness of the proceedings.

26. If the Rule 119 (1) Notice submitted by the Defence was premature, then the Defence is ready to withdraw that Rule 119 (1) notice, as long as it will not prejudice its filing thereof at a later stage, and will not be held against the Defence as non-compliance with the order of the panel as laid down in its Second decision on the conduct of proceedings.

**Word count: 1662**



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**Julius von Bóné**  
**Defence Counsel**

9 February 2022

At the Hague, the Netherlands