

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: 6 March 2022

Language: English

Classification: Public

**Defence submission following the Panel's request for submissions as requested
in the second decision on the conduct of proceedings**

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Mr. Julius von Bóné

Victims' Counsel

Anni Pues

I. Introduction

1. In accordance with the Request of the trial Panel¹ (“Request”) for submissions as formulated in the second decision on the conduct of proceedings following, the Defense hereby files its submissions.

II. Procedural background

2. The Panel requested submissions on various matters in its second decision on the conduct of proceedings.
3. The timeline to submit these submissions were amended in the third decision on the conduct of proceedings².
4. As per request of the Trial Panel, the Defense hereby files its submission on the requested matters.

III. Submissions

Opening statement

5. The Defense submits that it will make an opening statement pursuant to rule 126 (2) before the presentation of evidence by the Defense. The duration is expected to take about 2 hours at a maximum. It will not include at that time an unsworn statement of the Accused pursuant to Rule 142 (1), but that will be done at a later stage of the proceedings (at the end of the last defense witness). The Defense will most probably use some visual aids or other tools, however all of those will be material that already has been disclosed.

Order of the witnesses

¹ KSC-BC-2020-05, Filing 00296, Request of the trial Panel1 (“Request”) for submissions, 21 January 2022 para. 20, as amended in the Third decision on the conduct of proceedings, KSC-BC-2020-05, Filing 00318, 9 February 2022, para. 15.

² KSC-BC-2020-05, Filing 00318, 9 February 2022, para. 15

6. The order of the witnesses is the same as indicated in the Annex 1 of the Rule 119 2 (a) filing by the Defence.³ The defence is of the view that it is feasible to have for some witnesses to schedule 2 witnesses per week. Both the order and the scheduling of the witnesses might depend on the schedule of the individuals. For the first two witnesses, it will take one (1) week.

Admission of prior statements or transcripts in lieu of oral testimony

7. At this point the Defense does not foresee an intend to request admission of prior statements or transcripts in lieu of oral testimony under Rule 153-155. If a case would occur, the Defence will make a request to that effect.

Redactions to any other material

8. The Defense does not at this point foresee that it will request redactions to any other materials.

Protective measures for proposed witnesses

9. The Defense is not conclusive at this point, but in only one (1) occasion it might seek protective measures for a witness. Such protective measures would be only that the witness might not want to appear on TV and might want to use voice distortion. As the defence is busy to verify it with the witness in question, we cannot be conclusive at this point in time. The witness is not within the range of the first 10 witnesses. The defence will inform the Panel as soon as this has been verified with the witness in question.

Schedule for the first proposed witness

10. The Defense is in the position to call its first proposed witness in the first week of April.

Outstanding material that is to be disclosed

³ Filing F00333/COR/AO1, page 1

11. There is at this point no outstanding material that is to be disclosed. There is only some photographic material, statements or documentary evidence that might be disclosed. In any event that this would be the case, it will be done well in advance before the examination of the witness in question. This material does not play a role in the examination of the first 10 witnesses. The defence will not, as the SPO did, seek the admission of material that is being disclosed the evening prior to the hearing of a witness.

Determination of sentencing

12. The Defense submits, without prejudice to submit additional submissions pursuant to Rule 131 of the Rules, that in case the Accused is found guilty, on one or more crimes charged the Panel should proceed in accordance with Rule 162 and 164 of the Rules.

13. The Defense submits to this effect and at this stage that, in the event that the Accused is found guilty, there are a number of factors that can be taken into consideration regarding the sentence that is to be imposed.

14. There is first of all the amount of charges upon which the Accused can be found guilty, or those charges from which he can be acquitted. Considering also the difference in the type of charges, it is nearly impossible to anticipate on how many and to which type of the charges the Accused can be found guilty or not guilty at the time that the arguments or submission relating to this matter will be made.

15. The defense submits that as the Panel shall determine, pursuant to Rule 163 (4) of the Rules a sentence in respect of each charge. The defense submits that the mode of the commission or the (mode of) participation in the commission of a charge might play a role in the determination of the sentence. The defense submits that the defense would be in a better position to make submissions

once these modes of commission and/or the participation of the Accused in the charge in question would have been established by the Panel. The submissions as to the determination of the sentence could be formulated more precise and better tailored to the charges to which the Accused has been found guilty, including the absence (or presence) of mitigating and/ or aggravating circumstances in one or more of those charges.

16. As the indictment has a variety of charges, each with its own specifics, the defense believes it would be better to proceed in accordance with Rule 162 and 164 of the Rules. The charge of torture is an entirely different one than arbitrary detention, which differs again on its turn from cruel treatment.
17. The Defense wishes to file additional submissions on this issue at the latest by the closing of the defense case pursuant to Rule 131 of the Rules. Additional information might become available along the course of the proceedings, and could be relevant regarding this matter.
18. Proceedings in the proposed manner will not make a difference on the expeditiousness of the entire case. The defense believes that in the application of Rule 162 and 164 a more careful procedure is established. Considering the type of the charges, the defense would find it more appropriate to apply it. In determining the sentence, the defense believes that more relevant information can be given to assist the Panel in the determination of the appropriate sentence, once the Trial Judgment has been pronounced.

For the above mentioned reasons:

15. The Defense submits that it has fulfilled the request of the Panel as formulated in paragraph 20 of the Second decision on the conduct of proceedings.

Word count: 1234



Julius von Bóné
Defence Counsel

6 March 2022

At the Hague, the Netherlands