



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: 20 June 2022

Language: English

Classification: **Public**

Decision on the closing of the evidentiary proceedings and related matters

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 on the closing of the evidentiary proceedings and related matters.

I. PROCEDURAL BACKGROUND

1. On 20 September 2021, the presentation of evidence by the Specialist Prosecutor's Office (SPO) began.¹

2. On 4 February 2022, the SPO formally closed its case.²

3. On 9 February 2022, the Panel issued the "Third decision on the conduct of the proceedings", in which it requested the Parties and Victims' Counsel to provide their submissions in accordance with Rule 159(6) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules) as to whether, in the event Salih Mustafa (Mr Mustafa or 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.³ Victims' Counsel, the Defence of Mr Mustafa (Defence) and the SPO filed their submissions on 1, 6 and 7 March 2022, respectively.⁴

4. On 9 March 2022, the Panel granted the request from Victims' Counsel to present evidence and to have a victim directly address the Panel to present his views and concerns beyond the evidence that the Panel has been presented with

¹ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, public, p. 384, line 18.

² KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case pursuant to Rule 129*, 4 February 2022, public.

³ KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of the proceedings*, 9 February 2022, public, para. 15. *See also*, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, public, paras 19-20.

⁴ KSC-BC-2020-05, F00334, Victims' Counsel, *Victims' Counsel submissions pursuant to the Third decision on the conduct of the proceedings* (Victims' Counsel Submissions), 1 March 2022, confidential; F00335, Defence, *Defence submission following the Panel's request for submissions as requested in the second decision on the conduct of proceedings* (Defence Submissions), 6 March 2022, public; F00338, Specialist Prosecutor, *Prosecution Submissions pursuant to the Second and Third Decisions on the Conduct of the Proceedings* (SPO Submissions), 7 March 2022, confidential.

by the SPO,⁵ and: (i) proceeded to hear the views and concerns of Victim 05/05 on 21 March 2022;⁶ and (ii) appointed the Dutch Forensic Institute (Nederlands Forensisch Instituut) to assess the psychiatric condition and to medically assess the physical and psychological damage and injuries suffered by Victims 08/05, 09/05, and 10/05, as a result of the alleged torture, cruel treatment, and arbitrary detention to which they were subjected, and to prepare a report accordingly.⁷ On 21 March 2022 the Panel decided to reconsider its order dated 9 March 2022 on the appointment of the expert and proceeded to appoint the instituut voor Mensenrechten en Medisch Onderzoek (iMMO) to conduct the aforementioned assessment.⁸ On 28 April 2022, Victims' Counsel informed the Panel that it was not possible to conduct such an assessment for Victim 10/05 any time soon and, accordingly, withdrew the request in relation to him.⁹ The iMMO Expert Reports were submitted by Victims' Counsel on 24 May 2022.¹⁰

5. On 23 March 2022, the presentation of evidence by the Defence began.¹¹
6. On 26 May 2022, the Defence formally closed its case.¹²

⁵ KSC-BC-2020-05, Transcript of Hearing, 9 March 2022, public, p. 2519, line 18 to p. 2521, line 24; see also, F00297, Victims' Counsel, *Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January, 2022, 24 January 2022*, confidential; para. 30.

⁶ KSC-BC-2020-05, Transcript of Hearing, 21 March 2022, confidential, p. 2531, line 15 to p. 2554, line 15.

⁷ KSC-BC-2020-05, Transcript of Hearing, 9 March 2022, public, p. 2533, line 12 to p. 2534, line 4.

⁸ KSC-BC-2020-05, Transcript of Hearing, 21 March 2022, confidential, p. 2533, line 11 to p. 2534, line 4.

⁹ KSC-BC-2020-05, F00398, Victims' Counsel, *Victims' Counsel second report pursuant to the Oral Order of 21 March 2022 and response to the Oral Order of 11 April 2022*, 28 April 2022, confidential, paras 7-9, 11(b). A public redacted version was filed on 21 May 2022, F00398/RED. The related order to medically assess Victim 10/05 was withdrawn, F00403/RED, Trial Panel I, *Public redacted version of Decision on extension of time limit for submission of medical reports and requesting further observations*, 6 May 2022, public, para. 10.

¹⁰ KSC-BC-2020-05, F00417, Victims' Counsel, *Victims' Counsel's Submission of medical reports pertaining to Victims 08/05 and 09/05*, 24 May 2022, public, with Annexes 1 and 2, strictly confidential.

¹¹ KSC-BC-2020-05, Transcript of Hearing, 23 March 2022, public, p. 2608, lines 23-24.

¹² KSC-BC-2020-05, F00421, Defence, *Defence Rule 131 Notice to close the Defence case*, 26 May 2022, public.

7. On 1 June 2022, after granting leave to that effect,¹³ the Panel heard the testimony of an SPO witness in rebuttal¹⁴ and received a request from the SPO for the admission of documentary evidence in rebuttal.¹⁵

8. On 3 June 2022, the Panel issued the “Decision under Rules 132 and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers on evidence called by the Panel”, in which it decided to call into evidence the iMMO Expert Reports, pursuant to Rule 132 of the Rules.¹⁶

9. On 9 June 2022, the Defence filed its request to present evidence in rejoinder.¹⁷

10. On 20 June 2022, the Panel issued the “Decision on items used with Witnesses WDSM 600 to 1100, 1300 to 1700 and [Redacted] during their in-court testimonies, on the Specialist Prosecutor’s request for the admission of documentary evidence in rebuttal, and on the Defence request to present evidence in rejoinder”,¹⁸ in which it granted the SPO request to admit documentary evidence in rebuttal and considered as moot the Defence request to present evidence in rejoinder.

¹³ KSC-BC-2020-05, F00424, Trial Panel I, *Decision on Prosecution request to present evidence in rebuttal*, 27 May 2022, confidential, para. 15. A public redacted version was issued on the same day, F00424/RED.

¹⁴ KSC-BC-2020-05, Transcript of Hearing, 1 June 2022, confidential.

¹⁵ KSC-BC-2020-05, F00426, Specialist Prosecutor, *Prosecution Request for the Admission of Documentary Evidence in Rebuttal*, 1 June 2022, public, with Annex 1, confidential.

¹⁶ KSC-BC-2020-05, F00430, Trial Panel I, *Decision under Rules 132 and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers on evidence called by the Panel*, 3 June 2022, confidential, para. 13. A public redacted version was filed on the same day, F00430/RED.

¹⁷ KSC-BC-2020-05, F00434, Defence, *Defence request to present evidence in rejoinder and related matters, following the order of the Panel as prescribed in filing F00430*, 9 June 2022, confidential, with Annex 1, confidential.

¹⁸ KSC-BC-2020-05, F00436/RED, Trial Panel I, *Decision on items used with Witnesses WDSM 600 to 1100, 1300 to 1700 and [Redacted] during their in-court testimonies, on the Specialist Prosecutor’s request for the admission of documentary evidence in rebuttal, and on the Defence request to present evidence in rejoinder*, 20 June 2022, public.

II. APPLICABLE LAW

11. The Panel notes Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 9(5)(a), 134, 135, 159(6), and 163 of the Rules.

III. ANALYSIS

A. CLOSING OF THE EVIDENTIARY PROCEEDINGS

12. The Panel notes that all mandatory steps provided for under the legal framework of the Specialist Chambers for the presentation of evidence in the present case with respect to the determination of the guilt or innocence of the Accused have been concluded. Accordingly, and pursuant to Rule 134(a) of the Rules, the Panel considers it appropriate to close the evidentiary proceedings in the present case.

B. SENTENCING PROCEDURE

13. The Panel recalls that Rule 159(6) of the Rules stipulates that, if the Panel finds the Accused guilty of one or more crime(s), it shall determine the appropriate sentence to be imposed on the Accused with the pronouncement of the Trial Judgment, unless, having heard the Parties and Victims' Counsel, where applicable, the Panel decides to proceed in accordance with Rules 162 and 164 of the Rules.

14. The Defence indicates that the Panel should proceed in accordance with Rules 162 and 164 of the Rules.¹⁹ The Defence further indicates that it would be in a better position to address sentencing after a pronouncement of conviction,²⁰ since, in the Defence's view, it is impossible to anticipate at this stage on which charges the Accused could be found guilty.²¹ The SPO indicates that, in the event the Accused is

¹⁹ Defence Submissions, paras 12-18.

²⁰ Defence Submissions, paras 12-18.

²¹ Defence Submissions, para. 14.

found guilty, the Panel should determine the appropriate sentence together with the pronouncement of the Trial Judgment, pursuant to Rule 159(6) of the Rules.²² Victims' Counsel indicates that the sentence to be imposed on the Accused should be determined with the pronouncement of the Trial Judgment, pursuant to Rule 159(6) of the Rules.²³

15. Having received the submissions of the Parties and Victims' Counsel, the Panel notes that Rule 159(6) clearly establishes a presumption that the sentence to be imposed on the Accused should be pronounced at the same time as the pronouncement of the Trial Judgment, in case the Accused is found guilty of one or more crime(s). In the diligent exercise of their responsibilities, the Parties and Victims' Counsel must, therefore, have planned for and presented at trial all evidence they considered relevant to sentencing.²⁴ The Panel does not see any reason in the present case to proceed in accordance with Rules 162 and 164 of the Rules. In this regard, the Defence's argument that it would be in a better position to address sentencing after the pronouncement of conviction, is not persuasive and is also in contradiction with the principle of the efficiency of criminal proceedings. Whether or not the Accused will ultimately be convicted for one or more crimes does not prevent the Defence, having been apprised fully of the charges, from making, at this stage, relevant submissions and presenting evidence, if it so wishes, including on aggravating and mitigating circumstances. Any acquittal on one or more charges, or, in case of conviction, the final determination of the form of criminal responsibility, will be duly considered when weighing the arguments and related evidence of the Parties and Victims' Counsel and deciding on sentencing.

²² SPO Submissions, para. 9.

²³ Victims' Counsel Submissions, para. 28.

²⁴ See, KSC-BC-2020-07, F00553, Trial Panel II, *Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules*, 3 February 2022, public, paras 16-18. See also, F00572, Trial Panel II, *Decision on SPO Request for Disclosure of Additional Sentencing Evidence*, 10 March 2022, public, paras 11-12.

16. Accordingly, the Panel orders the Parties and Victims' Counsel to present any evidence on sentencing, including by disclosing it in Legal Workflow, and to file requests tendering such evidence, by Friday 1 July 2022. Furthermore, and in order to ensure the expeditiousness of the proceedings, the Panel decides, pursuant to Rule 9(5)(a) of the Rules, to reduce the time limit for responses, and orders the Parties and Victims' Counsel to submit any responses to such requests by Wednesday, 6 July 2022.

17. In addition, the Panel orders the Parties and Victims' Counsel, should they wish to do so, to include in their Final Trial Briefs, in the statement on the impact of the alleged crimes on victims participating in the proceedings (Impact Statement), and/or in their respective closing statements, submissions addressing the following matters: (i) the aggravating and mitigating factors relevant to the determination of sentence, including the gravity of the alleged crimes, the nature and extent of the Accused's involvement in the crimes, and the individual circumstances of the Accused, as set out in particular in Article 44(5) of the Law and Rule 163(1) of the Rules;²⁵ (iii) any proposed sentence to be imposed pursuant to Rule 163(4) of the Rules, and (iv) any other relevant information that may assist the Panel in determining an appropriate sentence.

C. FINAL TRIAL BRIEFS

18. Having announced the closing of the evidentiary proceedings in the present decision, the Panel, in accordance with Rule 134(b) and (c) of the Rules, invites the SPO, the Defence and Victims' Counsel to file their respective Final Trial Briefs and Impact Statement by Thursday, 21 July 2022.

²⁵ See also KSC-BC-2020-07, F00611/RED, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, paras 943-950, with Annexes 1-3, public.

19. The Panel reminds the Parties and Victims' Counsel that submissions in the Final Trial Briefs and in the Impact Statement should be focused and concise. The Panel expects the Parties and Victims' Counsel to concentrate on the facts, issues and circumstances relevant to their respective cases.

20. Additionally, the Defence and Victims' Counsel may also include submissions relating to the reparation proceedings, which will be taken into consideration should the Panel find the Accused guilty of one or more crime(s), but they shall not repeat arguments already included in previous submissions and may simply refer back to them.

21. The Parties and Victims' Counsel should also avoid lengthy recitations of the procedural background, summaries of testimonies and evidence heard by the Panel, and/or verbatim citations of laws or precedents. Political statements, and offensive remarks about Parties, participants, witnesses and victims shall be avoided. Parties and Victims' Counsel should refer to evidence available to the Panel for the purpose of its deliberations for the judgment by using the Evidence Registration Number (ERN).

D. CLOSING STATEMENTS

22. Pursuant to Rule 134(d) of the Rules, the Panel shall also schedule a hearing for closing statements which shall take place within twenty-one (21) days of the filing of the briefs and statement(s) referred to in Rule 134(b) and (c) of the Rules. The order of closing statements is set forth in Rule 135(1) of the Rules. In light of the upcoming period of summer judicial recess,²⁶ the Panel considers it appropriate, pursuant to Rule 9(5)(a) of the Rules, to extend the time limits for the hearing on the closing statements, and decides to schedule such hearing on Tuesday 13 September 2022,

²⁶ KSCPR-2021/F00002, President, *Judicial Recess Periods for 2022*, 11 November 2021, public.

Wednesday 14 September 2022 and Thursday 15 September 2022, with Friday 16 September 2022 as a reserve day, with a total of 5.5 hours of hearing per day.²⁷ In order to design an efficient and fair schedule for the closing statements, the Panel orders the Parties and Victims' Counsel to make submissions, by Tuesday, 23 August 2022, on the estimated time they seek for their respective closing statements, including a breakdown of the time needed to address issues concerning the guilt or innocence of the Accused, sentencing and reparations (the latter topic limited to the Defence and Victims' Counsel only), taking into consideration that the purpose of the closing statements is not to repeat arguments already contained in the Final Trial Briefs or Impact Statement. The Defence is invited to indicate whether Mr Mustafa will exercise his right to speak last, pursuant to Rule 135(4), third sentence, of the Rules, by Tuesday 23 August 2022.

23. To facilitate the submissions by the Parties and Victims' Counsel, the Panel recalls that it may put questions at any time during the hearing on the closing statements.²⁸ The Panel also reminds the Parties and Victims' Counsel that, pursuant to Rule 135(2) of the Rules, closing statements may refer to evidence available to the Panel for the purpose of its deliberations for the judgment and its reliability, the credibility of witnesses, the record of the proceedings and the applicable law. In line with paragraphs 17 and 20 of the present decision, the closing statements may also address sentencing and reparation matters. Illustrative material and concise summaries of selected evidence, if they are based on the evidence mentioned, may be used. The Parties and Victims' Counsel should refer to evidence by using the ERN. Moreover, should the Parties and Victims' Counsel wish to use visual aids or other tools during the hearing on the closing statements, they shall communicate such material, through the Court Management Unit, at least five days prior to the

²⁷ Four sessions per day, as follows: 09:30-11:00; 11:30-13:00; 14:30-16:00; 16:30-17:30.

²⁸ Rule 135(3) of the Rules.

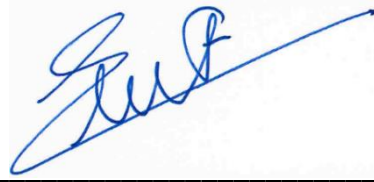
commencement of the hearing on the closing statements, and not later than Wednesday 7 September 2022.

24. The Panel finally stresses that in their closing statements the Parties and Victims' Counsel should not repeat submissions already made in the Final Trial Briefs and Impact Statement and shall focus, instead, on issues not yet addressed or respond to arguments made by the other Party or by Victims' Counsel. Political statements and offensive remarks about Parties, participants, witnesses and victims shall be avoided.

IV. DISPOSITION

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

- a. **DECIDES** to close the evidentiary proceedings in the case of the **Prosecutor v. Salih Mustafa** (KSC-BC-2020-05);
- b. **ORDERS** the Parties and Victims' Counsel to submit any requests concerning sentencing evidence by **Friday, 1 July 2022**, with responses, if any, by **Wednesday, 6 July 2022**, as specified in paragraph 16 above;
- c. **ORDERS** the Parties and Victims' Counsel to submit their Final Trial Briefs and Impact Statement by **Thursday, 21 July 2022**, as further specified in paragraphs 19-21 above;
- d. **ORDERS** the Parties and Victims' Counsel to file submissions, in accordance with paragraphs 22-24 above, on the estimated time needed for their respective closing statements by **Tuesday, 23 August 2022**;
- e. **SCHEDULES** the hearing on the closing statements on **Tuesday 13 September 2022, Wednesday 14 September 2022 and Thursday 15 September 2022**, with **Friday, 16 September 2022** as a reserve day, as specified in paragraph 22 above, and
- f. **ORDERS** the Parties and Victims' Counsel to comply with the directions set out in paragraphs 22-24 above.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 20 June 2022

At The Hague, the Netherlands.