

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 Rapporteur
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Victims' Counsel

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**Public redacted version of Victims' Counsel response to the Rule 130(1) Motion filed
by the Defence on 15 February 2022**

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I. INTRODUCTION

1. In this submission, as per the order of the Trial Panel in its 'Third Decision on the conduct of Proceedings' on 9 February 2022¹, the Victims' Counsel will respond to the Rule 130(1) motion filed by the Defence on 15 February 2022, to dismiss any or all charges against the Salih Mustafah ('Accused') in the indictment.²

II. APPLICABLE LAW

2. Rule 130 (3) of the Rules of Procedure and Evidence (hereafter: the Rules) determines that 'the Panel may dismiss some or all charges therein by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question.'
3. Rule 139 of the Rules determines that the assessment of evidence for the purposes of judgment shall be conducted as follows:

[...]

- (2) A Panel shall assess each piece of evidence in light of the entire body of evidence admitted before it at trial. The Panel shall carry out a holistic evaluation and weighing of all the evidence taken as a whole to establish whether or not the facts at issue have been established. [...]
- (4) In determining the weight to be given to the testimony of a witness, a Panel shall assess the credibility of the witness and the reliability of his or her testimony. [...]
- (6) Inconsistencies in a piece of evidence do not per se require a Panel to reject it as unreliable. A Panel may accept parts of a piece of evidence and reject others.

¹ KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of proceedings*, 9 February 2022, public.

² KSC-BC-2020-05, F00320, Defence, *Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment*, 15 February 2022, confidential.

III. PROCEDURAL BACKGROUND

4. The trial against Mustapha Salih ('the Accused'), commenced on 15 September 2021.³ In presenting its case before the Trial Panel, the SPO has submitted a significant amount of evidence including but not limited to the testimonies of witnesses who were heard before the Trial Panel from 20 September 2021 onwards. Apart from witness-evidence, the SPO also submitted other evidence, including written documents, photographic evidence, contextual evidence. In this respect, Victims' Council refers to the SPO's Bar Table-motion of 13 September 2021. Annex 1 of that motion is a list of 412 pieces of evidence submitted by the SPO, comprising of:
- (i) Books and newspaper articles;
 - (ii) Military reports and other records relevant to the existence of an armed conflict;
 - (iii) KLA documents, including communiques;
 - (iv) Investigative materials collected during UNMIK investigations;
 - (v) Maps;
 - (vi) The Accused's interview with the SPO and relevant exhibits; and
 - (vii) Materials seized from the Accused (personal items including items extracted from his mobile phone).⁴
5. In accordance with the Trial Panel's 'Second decision on the conduct of the proceedings'⁵, the SPO closed its case against the Accused on 4 February 2022.⁶ Following the Defence's notice of intent to file Rule 130(1)-motion to dismiss any or all charges of the Indictment,⁷ and having heard parties on the matter,⁸ the

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

⁴ KSC-BC-2020-05, F00201, Specialist Prosecutor, *Prosecution Application for Admission of Material through the Bar Table With Confidential Annex 1*, 13 September 2021, par. 1 *et seq.*

⁵ KSC-BC-2020-05, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, public, par. 21 (h).

⁶ KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecutor's Notice of the Closing of the Case pursuant to Rule 129*, 4 February 2022, public.

⁷ KSC-BC-2020-05, F00309, Defence, *Defence Rule 130(1) Notice to the Panel of Defence's intention to file a motion to dismiss any or all charges of the Indictment*, 4 February 2022, public.

⁸ KSC-BC-2020-05, F00314, Trial Panel I, *Order for submissions on the conduct of the proceedings following the Defence's Rule 130(1) notice of its intention to file a motion to dismiss any and all of the charges in the Indictment*, 8 February 2022, public. See also: KSC-BC-2020-05, F00316, Specialist Prosecutor, *Prosecution submissions on the conduct of the proceedings following the Defence's Rule 130(1) notice* (SPO Submissions), 9 February 2022, public; KSC-BC-2020-05, F00317, Defence, *Defence submission following the Panel's order for submissions on the conduct of proceedings following the Defence's Rule 130(1) notice* (Defence Submissions),

Trial Panel issued its 'Third Decision on the conduct of Proceedings' on 9 February 2022.⁹ In that decision, the Trial Chamber vacated the deadlines set out in paragraph 21(f)-(i) of its Decision of 21 January 2022, and cancelled the Defence Preparation Conference, which had been scheduled together with a Victims' Status Conference on 17-18 February 2022.¹⁰ The Trial Panel then instructed the Defence to file its Rule 130(1)-motion by 15 February 2022, instructed the SPO and Victims' Council to present their submissions (if any) in response thereto by 21 February 2022, and notified parties of its intent to render a decision on the Rule 130-motion between 23 and 25 February 2022.¹¹

6. On 15 February 2022 the Defence filed its 'Rule 130(1) Motion'.¹² The present submission by Victims' Council is her response thereto.

IV. OBSERVATIONS

Standard of proof for a no-case-to-answer motion

7. The Trial Panel is required to evaluate the evidence thus far presented and determine and only determine that there is no case to answer when no evidence has been presented capable of supporting a conviction beyond reasonable doubt.¹³
8. The standard for a no-case-to-answer motion differs across those jurisdictions in which such motions are permissible. Specifically drawing on the legal framework of the KSC and the standard in Rule 130(3) of the Rules, the International Criminal Court Appeals Chamber determined that a no-case-to-answer motion may only successfully lead to an acquittal or the dismissal of specific charges, if the evidence thus far presented is insufficient in law to sustain a conviction on

9 February 2022, public; KSC-BC-2020-05, F00315, Victims' Counsel, *Victims' Counsel submissions on the Defence preparation conference and the Victim's status conference scheduled on 17 and 18 February 2022 and related written submissions* (Victims' Counsel Submissions), 9 February 2022, public

⁹ KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of proceedings*, 9 February 2022, public.

¹⁰ KSC-BC-2020-05, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, public, par. 21 (h).

¹¹ KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of proceedings*, 9 February 2022, public, par. 13.

¹² KSC-BC-2020-05, F00320, *Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment*, 15 February 2022, confidential.

¹³ Rule 130 (3) of the Rules.

one or more of the charges, which is the case if the evidence thus far presented does not satisfy the standard of beyond reasonable doubt.¹⁴

9. The Prosecution has presented witnesses and a broad range of other evidentiary materials such as photographs, written documents, videos, and an earlier statement by the accused. The Trial Panel is required to holistically assess this body of evidence in its entirety. Rule 139(2) of the Rules is applicable at this stage, drawing on the evidence presented so far. Possible inconsistencies do not necessarily require the Trial Panel to dismiss the piece of evidence in full, as stipulated in Rule 139(6) of the Rules.
10. The Defence submission is flawed in its approach, as it assesses witness testimony heard in court in isolation and disregards cross-corroborative evidence, let alone that it places the witness testimonies in the broader context.
11. In contrast to what the Defence submission suggests, the Trial Panel will be required to view the evidence presented by the Prosecutor in 'its best light' – in the sense of being undistracted, unobstructed or unopposed for the time being by evidence introduced on behalf of the defence; although evidence presented by the defence through cross-examination may be considered, "the benefit of any doubt should be given to [the evidence] presented by the prosecution".¹⁵
12. The ICTY Appeals Chamber employed a similar approach when establishing the test that the Panel needs to be satisfied that "there is evidence (if accepted) upon which [...] [it] could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".¹⁶
13. Although the Trial Panel will have to determine whether the evidence presented suffices to prove the charges beyond reasonable doubt, it will have to bear in mind that any such assessment at this point has to be provisional.
14. The Trial Panel is required to reconcile the still pending submissions of the Victims Counsel and the need for the fairness towards the participating victims with the current assessment of available evidence. It can best do so by assessing the credibility and reliability of witness testimony on the basis of the following standard applied at the Special Court for Sierra Leone according to which "the Prosecution's evidence is entitled to credence unless it is incapable of belief; to be incapable of belief that evidence must be obviously incredible or unreliable, and

¹⁴ *Prosecutor v Gbagbo v. and Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, ICC-02/11-01/15-1400 01-04-2021, Para 309-310 (Hereafter: ICC Appeals Chamber decision).

¹⁵ ICC Appeals Chamber Decision, para 311, 317.

¹⁶ *Prosecutor v Jelusic* Judgement, IT-95-10-A, 5 July 2001, para 37.

this is not the stage in the trial to make ‘fine assessments of credibility or reliability’.”¹⁷

15. Based on this standard, the SPO has offered ample evidence supporting the charges.

Credibility and reliability of the evidence provided

16. Contrary to the flawed Defence submission, the accounts of [REDACTED] are credible; both of them describing arbitrary detention, cruel treatment and torture. Both testimonies featured typical signs of authenticity, such as body language that was consistent with the testimony. This submission will refrain from a detailed discussion of specific aspects of witness credibility at this point, as the standard at this juncture is one in which credence must be given to the Prosecution witnesses. Instead of discussing a multitude of details, only some examples for relevant cross-corroborating details will be provided to illustrate the existence of cross-corroboration and underline the credibility of these witnesses.
17. Often small details are the best examples for the authenticity of a witness account. [REDACTED]¹⁸ [REDACTED]¹⁹ [REDACTED]²⁰
18. [REDACTED]²¹ [REDACTED]²² [REDACTED]²³ [REDACTED]
19. These are only two such examples of cross-corroboration, chosen as they directly support the reliability and credibility of [REDACTED], whose testimony had been attacked by the Defence as unreliable. These details are small parts of a bigger picture, which is overall a very consistent account of what happened considering that the Prosecution case had to reconstruct events that took place more than 22 years ago. Overall, witnesses coherently described the compound where they were held as a barn, stable, or place animals were kept in. They described various forms of maltreatment and torture with various witnesses

¹⁷ *Prosecutor v. Alex Tamba Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-04-16-469-T, para. 8; *Prosecutor v Bangura et al* Decisions on Defence Motions on behalf of Hassan Papa Bangura et al for Judgement of Acquittal pursuant to Rule 98, SCSL-2011-02-T, 10 August 2012, para 24.

¹⁸ Confidential transcript of 5 October 2021, p. 968, lines 7-5.

¹⁹ Confidential transcript of 10 November 2021, p. 1400, lines 18-20.

²⁰ Confidential transcript of 10 November 2021, p. 1401, lines 5-9.

²¹ Confidential transcript of 24 November 2021, p. 1870, lines 5-14.

²² *Ibid*, p 1879, line 13.

²³ *Ibid*, p 1878, lines 4-11.

stressing the extremely poor state due to torture and mistreatment of the subsequently killed victim; they identified the location with sufficient certainty to link this to one specific geographical location in Zllash; and witnesses were able – entirely contrary to the assertions by the Defence, to place the events in time not least through the link to the commencement of the Serbian offensive in that area.

20. Should the Trial Panel at this stage consider dismissing any of the dual-status witnesses as not credible or not reliable, Victims Counsel recalls its request to the Trial Panel to appoint a medical expert to conduct an assessment as to the physical and psychological harm suffered.²⁴ Such assessment will support the witnesses' accounts of their experiences and aid the Trial Panel in better understanding the extent of the damage and harm done.

V. RELIEF REQUESTED

21. For these reasons, Victims' Counsel respectfully requests the Trial Panel to dismiss the Defence motion in full.

Word count: 2,274



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At The Hague, the Netherlands

²⁴ KSC-BC-2020-05/F00297, *Victims' Counsel, Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022, 24 January 2022.*