

1 Friday, 5 March 2021

2 [Status Conference]

3 [Open session]

4 [The accused not present]

5 --- Upon commencing at 11.00 a.m.

6 JUDGE GUILLOU: Good morning, everyone in and outside the
7 courtroom.

8 Madam Court Officer, can you please call the case.

9 THE COURT OFFICER: Good morning, Your Honour. This is
10 KSC-BC-2020-05, The Specialist Prosecutor versus Salih Mustafa.

11 JUDGE GUILLOU: Thank you, Madam Court Officer.

12 Now, I would kindly ask the parties to introduce themselves
13 starting with the Specialist Prosecutor.

14 MR. MICHALCZUK: Good morning, Your Honour. Good morning,
15 everyone. The Prosecution team is represented today by Alex Whiting,
16 the Deputy Specialist Prosecutor; myself, Cezary Michalczuk,
17 SPO Prosecutor; Filippo de Minicis, Associate SPO Prosecutor;
18 Silvia D'Ascoli, Associate SPO Prosecutor; and also Line Pedersen,
19 Case and Evidence Manager. Thank you.

20 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

21 Now I turn to the Defence, please.

22 MR. VON BONE: Thank you very much, Your Honour. Good morning.
23 The Defence is represented by myself, Julius von Bone, lead counsel.
24 The accused is not present and has given notice of that. And
25 remotely, I think are watching some members of my team, Betim Shala,

1 co-counsel, and Fatmir Pelaj; he is an investigator. And there is
2 another gentleman, Avdi Mehmeti; he will join also later on the
3 Defence team when the paperwork is finished. Thank you very much,
4 Your Honour, for this moment.

5 JUDGE GUILLOU: Thank you for this, Mr. von Bone.

6 I note for the record that they are not present in the
7 courtroom, nor remotely, but they are just watching, according to
8 what you said, Mr. von Bone.

9 And for the record, I am Nicolas Guillou, Pre-Trial Judge for
10 this case.

11 On 17 February I scheduled the fifth Status Conference for this
12 case. My objective today is to review the status of the case and to
13 organise the last procedural steps before transmission of the case to
14 the Trial Panel.

15 I see that no written submissions were filed by either of the
16 parties. I will ask the parties for their submissions in turn,
17 according to the Scheduling Order, first on disclosure, then on
18 investigations, and then on the calendar for the remainder of the
19 pre-trial proceedings.

20 As usual, I'll remind the parties to give prior notice should
21 any submission require the disclosure of confidential information so
22 that we can go into private or closed session.

23 However, before we start with the first item on the agenda, I
24 would like to thank the parties for their joint submissions on the
25 lesser redacted version of the transcript of the third Status

1 Conference, filed on 15 February 2021, which is filing F79.

2 Accordingly, I will issue the following oral order:

3 The Registrar shall prepare a lesser redacted version of the
4 transcript of the third Status Conference, held on 14 December 2020.
5 Redactions shall be kept only for the following segment: Lines 11,
6 12, at page 97; lines 17 to 23, at page 100; lines 19 to 25, at page
7 101; lines 1 to 11 and 18 to 25, at page 102; and lines 11 to 19, at
8 page 103. All other redactions shall be lifted.

9 I would now like to move to private session briefly to discuss
10 with the parties about a very recent filing.

11 Madam Court Officer, please let me know when we are in private
12 session.

13 [Private session]

14 [Private session text removed]

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19 [Open session]

20 THE COURT OFFICER: Your Honour, we are back in public session.

21 JUDGE GUILLOU: Thank you, Madam Court Officer.

22 And the last point before we start with our agenda, I would like
23 to ask the Prosecutor whether he and when he intends to file a public
24 redacted version of his pre-trial brief.

25 MR. MINICIS: Your Honour, for the time being and for reasons

1 that also may concern the protection of witnesses and victims, the
2 Prosecution was not planning on filing a public version right now.
3 But if Your Honour wishes us to do so, we will do so as soon as
4 practicable.

5 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

6 Mr. von Bone, do you want to say anything on this?

7 MR. VON BONE: I have no objections against a non-public filing,
8 so to speak. If the Prosecutor wishes to do so, they can proceed
9 with that. The Defence have no objection with that.

10 JUDGE GUILLOU: Thank you, Mr. von Bone.

11 Now let me move to the first topic on the agenda, namely,
12 whether the SPO has completed disclosure of evidentiary material,
13 including exculpatory evidence, and if not the amount of items that
14 remains outstanding, under which rules the items to be disclosed
15 fall, by when the SPO intends to disclose such material, what are the
16 reasons for this late disclosure, and whether protective measures are
17 required and for how many witnesses.

18 I also invite the Prosecution to indicate whether the SPO still
19 has any exculpatory evidence in its custody, control, or actual
20 knowledge that must be disclosed to the Defence pursuant to Rule 103.

21 Mr. Prosecutor, you have the floor.

22 MR. MINICIS: Thank you, Your Honour.

23 Your Honour, the SPO has completed its evidence disclosure and
24 does not foresee the need for additional disclosure of evidence with
25 the exception of evidence that may stem from the investigative

1 activity that we informed Your Honour about this morning through the
2 ex parte filing.

3 With regard to exculpatory evidence, Your Honour, yesterday we
4 disclosed to the Defence, as per Your Honour's decision of 1 March of
5 this year, the material included in Annex 1 of our 15 February
6 request for redactions and delayed disclosure.

7 Now, Annex 2 of the request concerned materials for which
8 Your Honour has authorised delayed disclosure, and so authorised us,
9 the Prosecution, to withhold that material until a certain time. And
10 that, Your Honour, is the only Rule 103 material that the Prosecution
11 is yet to disclose.

12 With the exception of that, the Prosecution has completed its
13 obligation with regard to exculpatory evidence in its possession or
14 knowledge. Of course, mindful of its continuing obligation in that
15 regard, we'll continue to review our records and as well as new
16 evidence coming in from investigation across the cases, and should
17 any exculpatory evidence arise, we will inform the Defence and
18 disclose it without delay.

19 That is all, Your Honour.

20 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

21 Mr. von Bone.

22 MR. VON BONE: I take it that the Prosecutor is talking about
23 disclosure 35, which came in yesterday? Yes.

24 JUDGE GUILLOU: Mr. Prosecutor.

25 MR. MINICIS: Yes, Mr. von Bone.

1 JUDGE GUILLOU: Yes.

2 MR. VON BONE: So there is nothing else that is coming, or is
3 there still something coming?

4 MR. MINICIS: Well, not for the timing being --

5 MR. VON BONE: Yes.

6 MR. MINICIS: -- no. Like I said, not for now. There may be in
7 relation to the investigative activity that we discussed earlier.
8 And there is some Rule 103 documents that the Pre-Trial Judge has
9 authorised us to disclose at a later stage.

10 MR. VON BONE: Right. I understand. No problems. And no
11 remarks, Your Honour.

12 JUDGE GUILLOU: Mr. von Bone, any other general remarks on
13 disclosure or any difficulties that you faced on that topic?

14 MR. VON BONE: No, Your Honour.

15 JUDGE GUILLOU: Thank you, Mr. von Bone.

16 I now turn back to the Prosecution for the second item on the
17 agenda, which is the status of its ongoing investigations. In
18 particular, I would like the SPO to indicate whether its outstanding
19 investigative steps have been completed and whether an estimated date
20 of completion can be provided.

21 Mr. Prosecutor.

22 MR. MICHALCZUK: Your Honour, thank you. The SPO has completed
23 its investigations. There are only two residual investigative
24 activities. We discussed one of them during the private session and
25 also made a filing this morning in this regard, so Your Honour is

1 fully briefed about the item I'm referring to right now.

2 There is another one. The second one, again, the residual
3 investigative activity, Your Honour knows also exactly about this
4 because we also made a few filings in the past with regard to this.

5 These two activities will not hamper -- they will not have any
6 adverse impact on our readiness to go to trial, which is now. We are
7 trial-ready as I speak.

8 At the last Status Conference, we also indicated that because of
9 other investigations in other cases that we have where we still
10 conduct some investigative activities, some material could also be
11 discovered there that has an impact on this case or is relevant for
12 this particular case. But if such material is discovered at any
13 point, we will fully and quickly comply with our disclosure
14 obligations. And, again, these will not also have any adverse impact
15 on our readiness for trial.

16 Thank you, Your Honour.

17 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

18 Now I turn to the Defence.

19 Mr. von Bone, can you give an update on your investigations? In
20 particular, I would like the Defence to indicate an estimated date of
21 completion, first on the defence of alibi and then on the remainder
22 of the Defence investigations.

23 You have the floor.

24 MR. VON BONE: Yes, Your Honour.

25 JUDGE GUILLOU: Microphone, please, Mr. von Bone.

1 MR. VON BONE: Excuse me.

2 Yes, Your Honour. The Defence have seen, obviously, the
3 tentative calendar that the Judge made, and we seek at this point a
4 little bit relief. The reason for that is actually that 6 April,
5 which is now the deadline for the notification of the alibi, I think
6 that falls nearly in the middle of a mission in which we are
7 establishing that alibi, and I would like to actually notify the SPO
8 when that is more or less nearly complete.

9 In fact, I believe that in that month we will have probably,
10 most probably, some other alibi witnesses, and I would like to make
11 it as complete as possible in the pre-trial brief, that is. So the
12 deadline as it stands for now, 6 April, which would be just after
13 Easter, if I'm well informed, that would be a little difficult for
14 the Defence to meet.

15 Now, that being said, there is another deadline which is on 18
16 March, which is a request for protective measures. As it stands now,
17 as it stands of today, I do not believe that we would, in fact, seek
18 protective measures, but I cannot foresee what will happen in that
19 mission, because that's going to be the longest mission of us. So if
20 we extend it, for example, to any other date previous to the deadline
21 for the pre-trial brief, if it would be up to me, Your Honour, I
22 would like to request, it stands now for 16 April, the pre-trial
23 brief, if that would be able to move to the 30th.

24 I have seen that the 30th we would like to transmit the file to
25 the Panel. However, I think that in that month we will more or less

1 be able to complete most of it.

2 So that is the reason why I think for, well, the efficiency of
3 the case and the completeness of the pre-trial brief that that would
4 be very useful to have that extension.

5 As for the Status Conference afterwards, I think it would be
6 then early May or something like would be useful. Probably other
7 team members will be also able to attend that session, including my
8 client. You will have a complete picture of everything, and then we
9 can more or less treat residual matters as if they would occur.

10 So, basically, what we would like to ask is the deadline of the
11 notification, which stands for 6 April, that is a little bit too
12 soon, that could be either 16 April, for example, or falling on the
13 same time, more or less, as the filing of the pre-trial brief, so
14 that we have it complete for that matter. But that's up to
15 discussion as far as I'm concerned. It would move about two weeks.

16 And I hope that will be possible, so that gives basically the
17 Defence the possibility to use the month of April and the month of
18 March, because my next mission is about to start not this week but
19 next week, so then we can get to a conclusion more or less of it.

20 So obviously I know that the pre-trial brief can be amended and
21 also some witnesses can be added, but as it looks now, some of our
22 witnesses were simply unavailable and are available in a particular
23 timeframe. So, therefore, that would be useful to move it a little
24 bit.

25 That is what we seek, Your Honour.

1 JUDGE GUILLOU: Thank you, Mr. von Bone. Can you give me the
2 date of your next mission to Kosovo?

3 MR. VON BONE: Yes, it's tentatively 19 March up to 5 April. So
4 that's why 6 April is such a struggle, to make it. And if I end on
5 5 April, then I will just need a little bit -- take the time and see
6 whether we need to seek protective measures. I do not, as it stands
7 now, foresee it, but I cannot exclude it either. So that is why I
8 seek a little bit of delay on that matter.

9 And then afterwards, on 5 April, my next mission will be
10 probably from 16 until 23 April, in that timeframe, so that will
11 then -- well, we try to finalise in that, with a team together, the
12 people that we see both for alibi and non-alibi witnesses, which we
13 would like to include in the pre-trial brief.

14 That is basically how it stands as of today, Your Honour.

15 JUDGE GUILLOU: Do you think you can finalise your investigative
16 activity related to the alibi defence during your first/next mission?

17 MR. VON BONE: That is absolutely the priority, yes, absolutely.
18 And the non-alibi witnesses -- so that's why it's also a little bit
19 longer. I must say that there is most probably also an alibi witness
20 abroad, living not in Kosovo, so that that -- that will probably then
21 either be done in the third mission or not at all. It just depends
22 how it is going to work out.

23 But we will continue, obviously, a little bit with the
24 witnesses, but the priority of it certainly is within that timeframe.
25 That's why the mission will take about two weeks.

1 JUDGE GUILLOU: Thank you, Mr. von Bone.

2 This leads me to actually the next item in our agenda, which is
3 the --

4 MR. VON BONE: Yes.

5 JUDGE GUILLOU: -- calendar for the pre-trial stage.

6 As you will recall, Mr. von Bone, I proposed a calendar for the
7 last procedural steps of the pre-trial proceedings, taking into
8 account that the SPO has now filed its pre-trial brief, its witness
9 list, and its exhibit list, and that the Defence has now -- is in the
10 process of completing its investigations in the following weeks.

11 I would like to ask the parties their views on the calendar.
12 Mr. von Bone, you already mentioned a couple of requests. And in
13 particular, I'd like the parties to comment on the following dates
14 that were in my Scheduling Order:

15 Thursday, 18 March, as a deadline for the Defence to seize the
16 Pre-Trial Judge with any requests for protective measures prior to
17 disclosing alibi related material;

18 6 April 2021 as the limit for the Defence to notify the SPO of
19 its alibi and to disclose any relevant related material, pursuant to
20 Rule 104(1) (a) of the Rules;

21 6 April 2021 as the proposed deadline for the Defence to file
22 any requests for protective measures for non-alibi witnesses;

23 Friday, 16 April 2021 as the proposed date for the Defence to
24 file its pre-trial brief and related material under Rule 95(5) of the
25 Rules, without prejudice to suppliant amendments thereof;

1 And to transmit the case to the Trial Panel on or around Friday,
2 30 April 2021, depending on the need for the parties to raise any
3 residual matters they deem appropriate and on the Pre-Trial Judge to
4 rule on any outstanding issues, including the reclassification of
5 filings and transcripts.

6 So this is the proposed calendar. Mr. von Bone, you just
7 mentioned already a couple of dates that you would like to be moved
8 from this tentative calendar. I'll first give the floor to the
9 Prosecution to comment on this agenda, please, taking into account
10 what Mr. von Bone already mentioned in his proposals.

11 Mr. Prosecutor, please.

12 MR. MINICIS: Thank you, Your Honour.

13 Your Honour, as just recalled by Your Honour, the Prosecution
14 has filed its pre-trial brief, witness list, exhibit list, and
15 Rule 109 chart, and so the Prosecution is ready to move to trial.

16 The Prosecution has no objection to an adjustment of the
17 calendar to accommodate the Defence's needs for investigations.
18 However, the Prosecution would like to keep 30 April or shortly
19 thereafter as a date that we should strive for to forward the case
20 file to the Trial Chamber, either on 30 April or as soon as
21 practicable shortly thereafter.

22 So we have no objection and we leave it to Your Honour to
23 decide, keeping that in mind.

24 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

25 Mr. von Bone, let me go back to each deadline, so that is

1 probably going to be clearer.

2 For the deadline for when you will be ordered to notify the SPO
3 of the alibi that you mentioned, I proposed Tuesday, 6 April. What
4 would be a day that would be possible, according to your
5 investigations, knowing that you will come back from Kosovo on the
6 5th?

7 MR. VON BONE: So, Your Honour, I think, for example, the 16th
8 or the 23rd April for the notification; preferably, the 23rd. And
9 for the pre-trial brief, 30 April. Currently, the pre-trial brief is
10 being set for the 16th. Currently, the notification is set for the
11 6th. So if I have -- if it would be the 23rd, and if there would be
12 any kind of protective measures, then one week earlier I could raise
13 that. For example, the 16th, I could seize that opportunity to see,
14 because most of it -- well, I think most of it will be done on the
15 5th, so we will have an evaluation of which people seek protective
16 measures.

17 I do not foresee it, as far as the alibi is concerned, but we
18 just want to be able to conclude that carefully. And, therefore, the
19 23rd for the notification would be the best date. It would move it
20 about two weeks.

21 JUDGE GUILLOU: Thank you, Mr. von Bone.

22 And you mentioned that at this stage you don't foresee any
23 request for protective measures; correct?

24 MR. VON BONE: That's right.

25 JUDGE GUILLOU: And this is true both for alibi-related

1 witnesses and non-alibi-related witnesses; correct?

2 MR. VON BONE: That is correct.

3 JUDGE GUILLOU: Thank you, Mr. von Bone.

4 Mr. Prosecutor, do you want to comment on this?

5 MR. MINICIS: Yes, Your Honour. We have a preference for the
6 alibi defence deadline to be set for 16 April. Also, because we
7 understand counsel will finish his mission at the beginning of April,
8 so we believe that leaves enough time to meet that 16 April deadline.
9 Thank you.

10 MR. VON BONE: Yes.

11 JUDGE GUILLOU: Mr. von Bone.

12 MR. VON BONE: It's not only the witnesses. It's, obviously,
13 also the material that we will try to put together. So obviously the
14 5th, I have a good idea about the witnesses, and it's really day by
15 day in the last mission. It's really every day. We didn't skip any
16 day at all. So that will give really a little bit of relief.

17 JUDGE GUILLOU: Thank you, Mr. von Bone.

18 Does any other party wish to add anything on this topic of the
19 calendar? No? Mr. von Bone?

20 At this point, I would like to ask the parties whether they have
21 any other issues that they would like to raise. And, as usual, I
22 remind the parties to give prior notice should any submission require
23 the disclosure of confidential information so that we can go into
24 private or closed session.

25 Mr. Prosecutor.

1 MR. MINICIS: Thank you, Your Honour. No, Your Honour, we don't
2 have any further matters to discuss.

3 JUDGE GUILLOU: Mr. von Bone.

4 MR. VON BONE: Yes, as a matter of fact, I do have an issue, and
5 I would like to do that in closed session, ex parte.

6 And just before concluding that, so the pre-trial brief, once
7 again, is requested on 30 April, so in that case we would be able to
8 complete that. And if it is necessary to adjust it at a later stage,
9 it's easy to work from that date on and so forth.

10 And for the Status Conference, if that would be somewhere in
11 May, I am very positive that people will try to attend. But
12 procedural-wise, there needs to be done a lot, I think, for them. So
13 that -- it would be useful that even with the client and everybody,
14 we can confirm that day. So, for example, I don't know, 7 May or
15 something like that, it may be a useful date.

16 JUDGE GUILLOU: Thank you, Mr. von Bone.

17 Before I break, I'd like to ask the SPO if it considers that
18 it's necessary to have another Status Conference in this case before
19 transmission of the case to the Trial Panel or not?

20 MR. MICHALCZUK: Your Honour, it's up to Your Honour and the
21 Defence. If you wish to have such a conference, for instance, later
22 on in April, we could, of course, consent to that. On our part, we
23 don't consider it necessary. But if my learned friend insists, we
24 would not oppose that.

25 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

1 Mr. Von Bone.

2 MR. VON BONE: It's just, Your Honour, that if there are issues
3 that are coming up during this, then I can inform both the Court and
4 the SPO about it, and then we can move on from there. So it's, to
5 me, a kind of a closing Status Conference as far as I am concerned.
6 But that is for any matter that can be raised, then it can be done
7 for -- on that part.

8 JUDGE GUILLOU: And would you like me to schedule a Status
9 Conference before or after you file your pre-trial brief?

10 MR. VON BONE: After. After. That would be useful, I think.
11 If there would be any issue that would be related to that, then we
12 can discuss it.

13 JUDGE GUILLOU: Thank you, Mr. von Bone.

14 So we will do two things -- wait a second.

15 So before we break, we're going to reconvene after a short break
16 of ten minutes with the Defence for an ex parte and closed session,
17 then we'll have another break and we will reconvene in a public
18 session with both parties and I will issue a couple of oral orders at
19 the end of this hearing. But now we have a ten-minute break and we
20 will be back in closed session with the Defence only, as requested.

21 The hearing is adjourned.

22 --- Recess taken at 11.32 a.m.

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1 --- On resuming at 12.25 p.m.

2 JUDGE GUILLOU: Having heard the parties on the proposed
3 calendar, I hereby issue an oral order with the following procedural
4 calendar:

5 By Friday, 16 April 2021, the Defence is ordered to notify the
6 SPO of its alibi and to disclose any relevant material pursuant to
7 Rule 104(1) (a) of the Rules. Should the Defence need to seize the
8 Pre-Trial Judge with a request for protective measures in relation to
9 such material, it should do so by Thursday, 8 April 2021.

10 By Thursday, 8 April 2021, the Defence is also ordered to file
11 any request for protective measures for non-alibi witnesses.

12 In accordance with the Framework Decision on Disclosure and in
13 order to allow the SPO to expeditiously respond to any such requests,
14 the Defence shall submit simultaneously a strictly confidential and
15 *ex parte* as well as a confidential redacted version of any request
16 for protective measures concerning alibi and non-alibi witnesses.

17 The SPO may respond, if it so chooses, within five days from
18 notification of the confidential redacted version of any such
19 request.

20 The Witness Protection and Support Office shall submit its risk
21 assessments with regard to any witnesses for whom the Defence seeks
22 protective measures within five days of notification of such request.

23 As the Defence investigations progress, the Defence may seize
24 the Pre-Trial Judge or the Trial Panel, as the case may be, with
25 further requests for protective measures.

1 By Friday, 30 April 2021, the Defence is invited to file its
2 pre-trial brief and related material under Rule 95(5) of the Rules
3 without prejudice to any subsequent amendment thereof.

4 And subject to the resolution of any outstanding matters, the
5 transmission of the case file to the Trial Panel is hereby
6 anticipated to take place on or around Friday, 7 May 2021.

7 Further, I would like to organise matters in relation to the
8 next review of detention by issuing the following oral order:

9 The Defence for Mr. Mustafa shall provide submissions on whether
10 reasons for continued detention still exist by Thursday, 11 March
11 2021.

12 The SPO shall respond to these submissions by Wednesday,
13 17 March 2021.

14 Any reply should follow the timeline set out in Rule 76 of the
15 Rules.

16 Before we conclude and further in relation to the oral order I
17 issued earlier today for the Registrar to prepare a lesser redacted
18 version of the transcript of the third Status Conference held on
19 14 December 2020, I hereby clarify that the closed session for the
20 14 December 2020 hearing is lifted save for the redactions mentioned
21 earlier on the record.

22 I inform the parties that should they consider it necessary to
23 hold a further Status Conference in this case, they are invited to
24 submit a request to this end.

25 At this point, I would like to ask the parties whether they have

1 any other issues they would like to raise?

2 Mr. Prosecutor.

3 MR. MICHALCZUK: Your Honour, we don't have any outstanding
4 issues.

5 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

6 Mr. von Bone.

7 MR. VON BONE: Yes, Your Honour. We don't have any further
8 issues.

9 JUDGE GUILLOU: Thank you, Mr. von Bone.

10 This concludes today's hearing. I thank the parties and the
11 Registry for their attendance. I also wish to thank the
12 interpreters, stenographer, audio-visual technicians, security
13 personnel for their assistance.

14 The hearing is adjourned.

15 --- Whereupon the Status Conference adjourned at 12.30 p.m.

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