

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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**Victims' Counsel motion for reconsideration of the
Third decision on the appointment of expert(s)**

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I. INTRODUCTION

1. Victims' Counsel respectfully requests the Trial Panel to reconsider its Third decision on the appointment of expert(s) dated 3 September 2021 ("Impugned Decision") pursuant to Rule 79 of the Rules of Procedure and Evidence ("Rules")¹ and order the submission of independent expert reports rather than a joint report.

II. PROCEDURAL BACKGROUND

2. On 25 June 2021, the Trial Panel issued the Second decision on the appointment of expert(s).² It instructed the VPO to submit a list of expert(s) for its consideration and enquire about the short notice availability of specific experts by Wednesday, 21 July 2021.³ It also ordered Victims' and Defence Counsel to submit their observations, if any, on the VPO's submissions by Friday, 20 August 2021.⁴

3. On 21 July 2021, the VPO submitted its report with four annexes, containing further details of three proposed experts and their availability for the Panel's consideration.⁵

4. On 19 August 2021, Victims' Counsel filed submissions on the Second decision on the appointment of expert(s).⁶ She submitted a list of questions for the consideration of the expert(s) and reiterated, nonetheless, that it was "highly preferable that the Panel decide on reparations within these proceedings".⁷

5. On 3 September 2021, the Panel issued the Impugned Decision. It appointed three experts and instructed them to "endeavour to submit a joint report" and to

¹ KSC-BC-2020-05, F00184/RED, Public redacted version of Third decision on the appointment of expert(s), 3 September 2021.

² KSC-BC-2020-05, F00140/RED, Public Redacted Version of Second Decision on the appointment of expert(s), 25 June 2021 ("Second Decision").

³ Second Decision, paras. 9-10 and 12(a).

⁴ Second Decision, paras. 11 and 12(b).

⁵ KSC-BC-2020-05, F00157, Registry Submission Pursuant to the Second Decision on the Appointment of Expert(s) with confidential and *ex parte* Annexes 1-4, 21 July 2021.

⁶ KSC-BC-2020-05, F00166, Victim's Counsel Submission on the Second Decision on the appointment of expert(s), 19 August 2021 ("Second Submissions").

⁷ Second Submissions, para. 18.

submit their report by Monday, 22 November 2021.⁸ It also instructed the Victims' and Defence Counsel to make submissions on the report, if they so wish, within two weeks of the notification of the report.⁹

III. SUBMISSION

6. Rule 79(1) of the Rules allows the Trial Panel to reconsider its decisions where reconsideration is necessary to avoid injustice.

7. In the Impugned Decision, the Panel held that "experts should endeavour to submit a joint report" and that the report "may contain sections on some of the questions identified by the Panel that are authored only by one or by some of the experts".¹⁰ For the reasons below, Victims' Counsel submits that the filing, by the experts, of a joint report would result in a prejudice and injustice for the Victims. Consequently, Victim's Counsel requests the Panel to reconsider the Impugned Decision and to order the experts to file individual reports.

8. Victims' Counsel highlights that should this motion be granted, she has no objection for the experts to divide, amongst each other, the topics to be addressed in their individual reports, since it is unlikely that each expert is in a position to answer all topics referred to in the Impugned Decision. Moreover, Victims' Counsel does not have objections for the experts to address, individually, the same topics in their reports.

1. Independent reports will better assist the Trial Panel

9. The Panel hold that it needs an expert report to clarify whether the national courts in Kosovo offer a realistic avenue for the victims of the alleged crimes to claim reparations and, if reparations are granted by judgement issued by national courts in

⁸ Impugned Decision, paras. 16 and 19(c).

⁹ Impugned Decision, paras. 17 and 19(c).

¹⁰ Impugned Decision, para. 16.

Kosovo, to have such judgements enforced.¹¹ These questions are of paramount importance for the Victims in this case and, therefore, it is crucial for them that the Panel be assisted by objective, independent and knowledgeable experts in making this determination.

10. Victims' Counsel submits that the Panel would be better assisted in its determination of these questions if it was to receive individual reports prepared by experts working independently and addressing these questions based on their own expertise and knowledge. If the experts were to collaborate and file a joint report, they would lose their independence from each other and could, although unknowingly, influence each other's opinion, compromise on some answers or provide different information to the Panel than if they were working independently from each other. This is particularly a concern as the experts will mostly likely report, at least in part, on the same issues. This would result in a prejudice and injustice for the Victims, as the Panel would not benefit from the experts' independent expertise on crucial matters relating to reparations.

2. Only individual expert reports will allow the operation of Rule 149 of the Rules of Procedure and Evidence.

11. Rule 149 of the Rules of Procedure and Evidence sets out the procedure to be followed for evidence provided by expert witnesses. The rule does not provide for joint reports but only refers to the "final report of any expert witness" in paragraph one as well as the subsequent paragraphs. The mechanism provides for the possibility for the acceptance of the whole or parts of the report or the cross-examination of an expert witness (paragraph two).

12. It would be arduous to identify which expert(s) provided specific information in the sections of the report authored by more than one expert. An answer from possibly

¹¹ KSC-BC-2020-05, F00124, Decision on the appointment of expert(s), 20 May 2021, para. 20; Impugned Decision, para. 13.

all three experts would be required, and the Panel would then be subject to the availability of the experts, on short notice, to provide further assistance.

13. A joint report would also impede the possibility for that report to be admitted into evidence, should the experts be called as witnesses, or should their report be admitted into evidence, which are possibilities that cannot be excluded at this early stage of the proceedings. The fact that the report would be common to three individuals would have an impact on the admissibility of its content into evidence, as the clear ownership of the statements by each expert contained therein would be unclear, rendering it impossible to identify which information are based on each expert's personal knowledge and expertise. Thus, experts should be instructed to file their report individually.

14. Lastly, Victims' Counsel notes that the Panel instructed the Victims' and Defence Counsel to file their submissions on the report, if they wish so, within two weeks of the notification of the report. In view of the width and complexity of the topics identified in the Impugned Decision,¹² the possible necessity for Victims' Counsel to conduct additional research and consult with additional experts, and the court hearings scheduled within this two weeks' time limit, Victims' Counsel wishes to notify the Panel that she might ask for a variation of this time limit at a later stage.

IV. RELIEF REQUESTED

15. For these reasons, Victims' Counsel respectfully requests the Trial Panel to:
- Reconsider the Impugned Decision; and
 - Instruct the three experts to file individual reports.

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¹² Impugned Decision, paras. 13-15.



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At The Hague, The Netherlands