

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 request for clarification and reconsideration regarding the Oral Order of 9 March 2022 to appoint a medical expert to examine Victims 08/05, 09/05 and 10/05 and submissions

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I. INTRODUCTION

1. On 9 March 2022 the Trial Panel (hereafter: Panel) gave an Oral Order appointing the *Dutch Forensic Institute* to assess the medical and psychiatric condition of Victims 08/05, 09/05 and 10/05.¹ Victims' Counsel welcomes the appointment of an expert. However, some clarification and possibly reconsideration are required to ensure the appropriate expert examinations. Victims' Counsel requests the Panel to clarify which institute it intended to appoint. Insofar as the intention was to appoint the 'Nederlands Forensisch Instituut' (*Netherlands Forensic Institute*), Victims' Counsel respectfully requests the Panel to reconsider that appointment in light of her written submissions as detailed below.

II. PROCEDURAL HISTORY

2. In its 'Second decision on the conduct of the proceedings' dated 21 January 2022, the Panel ordered Victims' Counsel to file *inter alia* a list of proposed (expert) witnesses to be called by the Panel.² On 24 January 2022, Victims' Counsel requested the Panel to appoint an expert to medically assess three direct Victims' (Victims 08/05, 09/05 and 10/05) physical and psychological damage and injuries suffered because of torture, cruel treatment and arbitrary detention.³
3. On 4 February 2022, the Panel rendered its 'Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information' of 4 February 2022. In that decision, Victims' Counsel

¹ KSC-BC-2020-05, *In Court - Oral Order* issued on 9 March 2022, transcript pagination reference: Page 2519 Line 18 to Page 2521 to Line 24) ("Oral Order on the Presentation of Evidence Requested by the Victims' Counsel"), 10 March 2022 p. 2.

² KSC-BC-2020-05, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, para. 13 and 21.

³ KSC-BC-2020-05-F00297, Victims' Counsel, *Request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022*, 24 January 2022, par. 4, Chapter IV ('Request for the appointment of an expert on medical forensic evidence').

was given the opportunity to supplement her request of 24 January 2022.⁴ On 1 March 2022, Victims' Counsel filed her further submissions on the appointment of a medical expert by the Panel.⁵

4. The appointment of a medical expert was subsequently discussed in court on 8 and 9 March 2022. On 9 March 2022, the Panel gave following order on the subject:

“With regard to the second request of the Victims' Counsel, the Panel points the *Dutch Forensic Institute* to assess the psychiatric condition and to medically assess the physical and psychological damage and injuries suffered by Victims 08, 09, and 10, as a result of the alleged torture, cruel treatment, and arbitrary detention to which they were subjected, and to prepare a report accordingly [...]”.⁶

5. In subsequent email correspondence between Victims' Counsel and the Trial Panel via CMU, Victims' Counsel sought to clarify which institute had been appointed to conduct the expert examination, as it became clear subsequent to the hearing on 9 March 2022 that the order was ambiguous. On instruction of the Panel, Victims' Counsel was to raise any issues by 18 March 2022, or in court on Monday 21 March 2022 prior to the presentation by Victim 05/05 of his views and concerns.⁷ In response to this filing, Victims' Counsel respectfully submits the request for clarification and possibly reconsideration.

⁴ KSC-BC-2020-05-F00152, Trial Panel, *Decision on victim's procedural rights during trial*, 12 July 2021, public, (“Decision on Victims' Rights”), para 34-35.

⁵ KSC-BC-2020-05-F00334, Victims' Counsel, *Victims' Counsel submissions pursuant to the Third decision on the conduct of the proceedings*, 01 March 2022, Chap. IV (Submission).

⁶ Oral Order on the Presentation of Evidence Requested by the Victims' Counsel, 10 March 2022 p. 2. Emphasis added.

⁷ E-mail correspondence between Victims' Counsel and the Panel (via CMU) on 11 March 2022 (10:59), 15 March 2022 (10:17), 16 March 2022 (12:52) and 17 March 2022 (12:08).

III. APPLICABLE LAW

6. According to Article 22(3) of the Law, a Victim's personal interests and rights in the case are "notification, acknowledgement and reparation". The Panel has further defined these interests in its Decision on Victim's Rights, outlining *inter alia* that participating victims can present evidence on what allegedly happened to them for the establishment of the truth.⁸
7. Rule 114 (5) of the Rules of Procedure and Evidence provides that if evidence was not produced by the Parties or the produced evidence does not adequately address the impact the alleged crimes have on the personal interests of victims, Victims' Counsel may request the Panel to order the submission of relevant evidence or call witnesses to testify.
8. Besides this the Panel itself may also invite the submission of or *proprio motu* call additional evidence not produced by the Parties, including expert evidence, where it considers it necessary for the determination of the truth. This is enshrined in Rule 132 of the Rules.
9. On 4 February 2022, the Panel held that in case of a conviction, it will issue a Reparations Order pursuant to Articles 22(8) and 44(6) of the Law.⁹ Should that occur, Rule 168 enables the Panel to then "appoint experts to assist it in determining the scope of any damages to, or in respect of victims and to suggest options concerning appropriate individual or collective reparations from the convicted person".

IV. REQUEST FOR CLARIFICATION

10. In her request dated 24 January 2022, Victims' Counsel proposed two possible medical experts to examine the victims in question.

⁸ KSC-BC-2020-05-F00152, Trial Panel, *Decision on victim's procedural rights during trial*, 12 July 2021, public, ("Decision on Victims' Rights"), para 13-18.

⁹ KSC-BC-2020-05-F00152, Trial Panel, *Decision on victim's procedural rights during trial*, 12 July 2021, public, ("Decision on Victims' Rights"), par. 40.

11. The first was the *Netherlands Institute for Human Rights and Medical Examination* (in Dutch: 'Instituut voor Mensenrechten en Medisch Onderzoek'; iMMO). Alternately, she proposed that [REDACTED].¹⁰ For reasons laid out in the submission of 24 January 2022, Victims' Counsel expressed her preference for the appointment of iMMO.¹¹
12. In its order of 9 March 2022, the Panel appointed the *Dutch Forensic Institute* to conduct the examinations of the victims in question.
13. Victims' Counsel is uncertain whether in doing so, the Panel meant to appoint iMMO as proposed in the request from 24 January, or whether it meant to appoint a different Dutch institute.
14. Victims' Counsel is aware of another institute in the Netherlands called the *Netherlands Forensic Institute* (in Dutch: 'Nederlands Forensisch Instituut'; NFI). Insofar as this is the institute the Panel intended to appoint, Victims' Counsel offers further written submissions below.
15. Victims' Counsel respectfully requests the Panel to clarify this matter. This clarification would greatly help in taking the next necessary steps.

V. SUBMISSIONS

16. With regard to the iMMO, Victims' Counsel refers the Panel to her submissions on the background and expertise of this institution as detailed in her 24 January 2022-request.¹² The iMMO is an independent institute founded

¹⁰ KSC-BC-2020-05-F00297, Victims' Counsel, *Request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022*, 24 January 2022, par. 24-25.

¹¹ KSC-BC-2020-05-F00297, Victims' Counsel, *Request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022*, 24 January 2022, par. 26.

¹² KSC-BC-2020-05-F00297, Victims' Counsel, *Request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022*, 24 January 2022, par. 24: "iMMO is a Dutch Foundation specializing in the assessment of suspected victims of torture and inhumane treatment. It is an independent institution that has specialised in the medical assessment of suspected victims of torture and inhumane treatment and thus has a significant and relevant experience and expertise in this field. iMMO conducts their assessments on the basis of the UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The Istanbul Protocol outlines international legal standards and sets out international guidelines for the assessment of alleged victims of torture and ill treatment".

in 2011. It is known to have extensive experience with torture-specific examinations with regard to both physical and psychiatric injuries, as well as the assessment of the credibility of reports of those injuries within the context of legal proceedings. Victims' Counsel has previously assured herself as to the availability and capacity of the iMMO to undertake the necessary physical and psychological examinations to allow the proceedings before this Panel to advance as expeditiously as possible.

17. The expertise of the NFI however, is limited to an examination of *physical* injuries; the NFI itself has confirmed this. Given that the main issues that need examining with the victims in question are psychiatric/psychological, it would seem that the NFI therefore lacks the requisite expertise.
18. Furthermore, Victims' Counsel has been unable to verify availability of NFI experts at short notice.
19. Victims' Counsel is aware that the Netherlands is also home to yet another forensic institute, the *Netherlands Institute for Forensic Psychiatry and Psychology* (in Dutch: 'Nederlands Instituut voor Forensische Psychiatrie en Psychologie'; NFIP).
20. As far as Victims' Counsel was able to investigate, the NFI can apparently draw on the NFIP for psychological examination of the victims. The NFIP is, however, a separate institution. Hence, an expert examination by the NFI would be complicated through the necessary involvement of two different institutions, possibly requiring different examinations. Considering the protective measures in place in this case, this would require hugely complex logistical efforts and possibly trigger extra costs.
21. Victims' Counsel stresses that any examination of the victims should be limited as much as possible, in light of the real risk of secondary (re)traumatization. For that reason alone it would be highly preferable if the victims can be examined by a single institute, rather than two separate ones.

22. Another reservation Victims' Counsel has is the approaches to investigation taken by the iMMO and the NFI. It is known that the iMMO conducts its examinations holistically, based on the Istanbul Protocol.¹³ This protocol was drafted precisely for the purpose of forensic investigations of this kind. The NFI does not use the Istanbul Protocol, but conducts its investigation according to a (Bayesian) probability model. In Victims' Counsel's view this presents a shortcoming to the NFI's method of investigation and reporting, particularly given the nature and context of the victims' injuries.¹⁴
23. Victims' Counsel would also like to raise the concern that the NFI is part of the Dutch Ministry of Justice and Security (this applies equally to the NFIP). It appears as somewhat problematic if a Kosovo institution such as the KSC would draw on a *governmental* body of the host state, rather than opt for an independent institute such as the proposed iMMO.
24. Finally, Victims' Counsel would like to reiterate in light of her request from 24 January that she had already made several inquiries about the process of obtaining expertise reports from the iMMO. This included indications as to their availability, the information required to conduct the envisioned medical examination and the possibility of [REDACTED]. Though Victims' Counsel has tried to make similar inquiries with the NFI, both online and via telephone, this has not yielded any specific results so far.
25. Regarding the classification of this filing as 'strictly confidential' according to Rule 82, Victims' Counsel notes that medical information about the victims is mentioned. Also, it is discussed that [REDACTED]. Protective measures are in place for the victims and any information that might give an indication as to [REDACTED] should be available to as limited a group of recipients as

¹³ Istanbul Protocol, the United Nations' *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

¹⁴ E.g. the District Court of the Hague compared the approaches taken by both institutions in its verdict of 15 May 2019. See ECLI:NL:RBDHA:2019:4940, par. 11-12 and 20. The decision is available via <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:4940> (in Dutch).

possible. Finally, given the profile of this case in Kosovo and the hostility towards the KSC, Victims' Counsel is of the view that it would not be [REDACTED] if their communication with Victims' Counsel be known to a wider group of recipients.

VI. CONCLUSION

26. Victims' Counsel respectfully requests the Panel to clarify which institution it intended to appoint to conduct the medical and psychiatric examinations of Victims 08/05, 09/05 and 10/05.
27. Insofar as the Panel intended to appoint the *Netherlands Forensic Institute* (NFI) in its Oral Order of 9 March 2022, Victims' Counsel respectfully requests that the Panel reconsiders its decision in light of the above submissions.
28. In closing Victims' Counsel would note that she stands prepared – if necessary – to make further inquiries and provide oral submissions on this issue in court on Monday 21 March 2022.¹⁵

Word count: 2164



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Victims' Counsel

18 March 2022

At The Hague, the Netherlands

¹⁵ The Panel has given leave to do so via email on 17 March 2022 at 12:08.