



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Dr Fidelma Donlon

Date: 9 April 2021

Language: English

Classification: Public

Public Redacted Version of

‘Second Registry Report to the Pre-Trial Judge on Victims’ Applications for Participation in the Proceedings’, filing KSC-BC-2020-05/F00099 dated 1 April 2021

Head of Victims’ Participation Office

Silke Studzinsky

I. INTRODUCTION

1. The Victims' Participation Office ("VPO") hereby files the second report ("Second Report") on victims' applications for participation in the proceedings pursuant to Rule 113(2) of the Rules.¹

2. With this Second Report, the VPO transmits to the Pre-Trial Judge five applications for the status of a participating victim in the proceedings and provides a recommendation on admissibility, grouping, common representation and protective measures.

II. PROCEDURAL HISTORY

3. On 12 June 2020, the Pre-Trial Judge confirmed the indictment against Mr Salih Mustafa ("the Accused").²

4. A public redacted version of the Confirmed Indictment was filed on 28 September 2020, following the arrest and transfer of the Accused to the Detention Facilities of the Specialist Chambers in The Hague, the Netherlands.³

5. On 27 November 2020, the Pre-Trial Judge issued the Framework Decision on Victims' Applications ("Framework Decision") setting out the requirements of the application process and the role of the VPO.⁴

6. On 9 December 2020, the VPO submitted the first report on victims' applications for participation in the proceedings to the Pre-Trial Judge ("First Report").⁵

7. From the filing of the First Report to date, the VPO has received five applications from persons wishing to apply for admission in the proceedings as participating victims. The applications were submitted with the direct assistance of the VPO.

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), KSC-BD-03/Rev3/2020, 2 June 2020.

² KSC-BC-2020-05/F00008, Decision on the Confirmation of the Indictment Against Salih Mustafa, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was filed on 5 October 2020.

³ KSC-BC-2020-05/F00019/A01, Annex 1 to Submission of Further Redacted Version of Confirmed Indictment, 28 September 2020, public.

⁴ KSC-BC-2020-05/F00055, Framework Decision on Victims' Applications, 27 November 2020, public.

⁵ KSC-BC-2020-05/F00062, F00062, First Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings, with strictly confidential and *ex parte* Annexes 1-4.

III. CLASSIFICATION

8. The VPO files this Second Report as confidential and *ex parte* in accordance with Rule 113 of the Rules. The VPO has no objection to the reclassification of the Second Report so that it can be disclosed to the Parties, as it contains no identifying information of the applicants. For the same reason, the VPO does not object to the reclassification of this Second Report as public. In the event that the Pre-Trial Judge decides to re-classify this Second Report, this Second Report also constitutes the Report to the Parties pursuant to Rule 113(2) of the Rules.⁶

9. Together with this Second Report, the VPO submits six confidential and *ex parte* Annexes. Annex 1 contains the table indicating the number and details of applicants recommended for admission (Group A).⁷ The remaining five annexes are summaries of the applications prepared by the VPO, along with basic information on the applicants, a summary of the alleged events and harm suffered, and any request for protective measures. The Annexes do contain identifying information and are therefore filed as confidential and *ex parte* pursuant to Rule 113(2) and Rule 82(1) of the Rules.

10. The application forms and supporting documentation have been disclosed only to the Pre-Trial Judge through Legal Workflow in accordance with Rule 113(1) of the Rules, which provides that application forms shall not be disclosed to the Parties.

⁶ See Framework Decision, para. 49.

⁷ See Framework Decision, para. 24(e)a.

IV. ASSESSMENT OF APPLICATIONS

11. The VPO has assessed the formal completeness of the application forms and the content of the applications in light of the requirements stemming from the definition of a participating victim under Article 22(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 113(1) of the Rules.

A. COMPLETENESS OF APPLICATION FORMS

12. In assessing the completeness of the applications, the VPO checked the applications against the criteria listed in the Framework Decision.⁸ In line with those requirements, all applications submitted with this Second Report can be considered as formally complete.

B. CRITERIA OF ADMISSIBILITY AND STANDARD OF PROOF

1. Standard of proof

13. In assessing the applications and making its recommendation in this Second Report, the VPO applied the *prima facie*⁹ standard for all requirements as well as any supporting evidentiary material.

2. Criteria of Admissibility

14. The VPO based the assessment on the same general principles and criteria as in the First Report,¹⁰ following the guidelines and requirements set out in the Framework Decision.¹¹ The VPO has based its assessment and recommendation to the Pre-Trial Judge on the following requirements:

⁸ See Framework Decision, para. 22.

⁹ See Rule 113 (4) of the Rules. *Prima facie* means that the Pre-Trial Judge reviews the submitted information and supporting material on a case-by-case basis, taking into account: (i) all relevant circumstances as apparent at first sight; and (ii) the intrinsic coherence of the application. See Framework Decision, para. 28.

¹⁰ See First Report, paras. 16-19.

¹¹ See Framework Decision, paras. 29-38.

(a) **Natural person**

15. The VPO notes that the applications do not raise questions regarding the requirement for an applicant to be a “natural person”. All applicants submitted a valid ID card as proof of identity.

(b) **Alleged crimes**

16. The VPO assessed whether acts described in the applications appear to constitute crimes within the scope of the Confirmed Indictment, namely arbitrary detention, cruel treatment, torture, murder; and whether the alleged events have taken place in a detention compound located in Zllash/Zlaš between approximately 1 April 1999 and around the end of April 1999.¹²

17. The applicants alleged the following crimes: imprisonment/illegal or arbitrary arrest and detention, cruel treatment/other inhumane acts, torture and murder.

18. All the crimes alleged in the applications are crimes listed in the Confirmed Indictment that fall within the temporal and geographical scope of the Confirmed Indictment.

(c) **Harm**

19. In reviewing the applications, the VPO assessed physical and mental harm, which is described sufficiently in detail in all applications and in some cases supported by evidentiary material.¹³

20. Regarding the requirement that harm has to be suffered *personally*, three applicants can be considered direct victims, and two applicants can be considered indirect victims [REDACTED].

21. For indirect victims, the VPO assessed whether the applicants have alleged that the harm they have suffered arises from the harm suffered by the direct victim and whether the harm is a result of a personal relationship with the direct victim.¹⁴

¹² See KSC-BC-2020-05, F00019/A01, paras 34-35.

¹³ See above para. 13.

¹⁴ See Framework Decision, para. 33

22. When mental and/or material harm has resulted from the killing of a direct victim, the VPO assumed that the harm of close family members of the direct victim can be presumed and does not need to be separately supported.¹⁵ In particular, first-degree relatives may be presumed to have a special bond of affection with the direct victim.¹⁶

23. [REDACTED].

(d) Direct result

24. The VPO assessed whether there is evidence of a causal link between harm and crime.¹⁷ The VPO assessed that all applicants meet this requirement on a *prima facie* basis.

3. General description of the applications

25. [REDACTED]. Applicant Victim 06/05 claims to have suffered physical and mental harm, and Victim-05/05 alleges mental harm. Neither submitted any supporting documentation on harm.

26. Applicants Victim-07/05, Victim-08/05 and Victim-09/05 are of Albanian ethnicity and claim to be direct victims of unlawful detention, cruel treatment and torture in Zllash/Zlaš detention compound within the relevant period. They all claim to have suffered mental harm, and Applicants Victim-08/05 and Victim-09/05 also claim to have suffered physical harm. They did not submit any supporting documentation on harm.

¹⁵ See ECCC, *Kaing Guek Eav alias Duch*, Appeal Judgement, F28, 3 February 2012, para. 448.

¹⁶ See STL, *Prosecutor v. Salim Jamil Ayyash et al*, Pre-Trial Judge, Decision on Victims' Participation in the Proceedings, F0236, 8 May 2012, para. 84.

¹⁷ See Framework Decision, para. 37. More details on meeting the criteria of the "direct result" requirement can be found in the description of the events in the application forms and the application summaries annexed to this Second Report.

C. RECOMMENDATION ON ADMISSIBILITY

27. The VPO recommends to the Pre-Trial Judge to admit all five applicants as participating victims.¹⁸

V. GROUPING OF VICTIMS AND COMMON LEGAL REPRESENTATION

A. RECOMMENDATION ON GROUPING

28. In making the recommendation to the Pre-Trial Judge on grouping, the VPO considered the criteria set out in Rule 113(8) of the Rules, taking into account the individual circumstances of each applicant and the composition of the group as a whole. The VPO also considered the relevant jurisprudence of other courts and tribunals.

1. General observations

29. In the Framework Decision, the Pre-Trial Judge indicated that dividing applicants into more than one group should only be done in exceptional circumstances, e.g., “when the situation or the specificity of the victims is so different that their interests are irreconcilable, making their common representation impracticable”.¹⁹ In this regard, the Pre-Trial Judge provided a non-exhaustive list of considerations that might warrant the need to divide applicants into more than one group, such as different forms of harm, different crimes, different ethnicities, different places of residence, different languages spoken, different political views, etc. The Pre-Trial Judge stated that these considerations may not automatically warrant separate representation, but that where several of these considerations overlap, the division into more than one group may be warranted.²⁰ In making the recommendation on grouping for this Second Report, the VPO has taken into account all of the considerations set out by the Pre-Trial Judge in the Framework Decision.

¹⁸ The recommendation is based on the *prima facie* standard. See para. 13 above.

¹⁹ See Framework Decision, para. 42.

²⁰ See Framework Decision, para. 42.

30. Language and geographical location of victims are important considerations, since establishing trust between Victims' Counsel and his or her clients by being able to communicate effectively and meet clients regularly is essential for effective representation.

31. In this regard, the VPO also took into consideration any logistical barriers to accessing some of the victims that may justify their separate representation. Namely, the role of Victims' Counsel is, *inter alia*, to keep the victims informed about the proceedings, which can be undertaken individually or in group meetings. Concerns regarding access to victims, that the VPO considered included possible difficulties of travel to Kosovo and the capability of contacting clients by different means of communication when meeting in person would be impracticable.

2. Jurisprudence of the International Criminal Court ("ICC")

32. The VPO conducted research of the jurisprudence of other courts and tribunals, in particular the jurisprudence of the ICC, which is the most relevant.

33. In the *Bemba* case,²¹ the Chamber followed the Registry's proposal to group the victims in four geographical groups reflecting the geographical locations of the alleged crimes. The Chamber was of the view that this grouping would allow for families in the same community to be represented by the same legal representative and facilitate communication between victims and their representatives. It is of relevance that the number of applicants at the time was 135, with the grouping also to apply to an anticipated further 1,200 applicants.²²

34. In the *Katanga and Ngudjolo Chui* case,²³ the Chamber grouped the victims in two groups, one composed of child soldiers, who participated in the attack on the Bogor

²¹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Decision on common legal representation of victims for the purpose of the trial", No. ICC-01/05-01/08-1005, 10 November 2010, paras 18-20.

²² *Ibid.*, para. 6.

²³ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, "Order on the organisation of common legal representation of victims", No. ICC-01/04-01/07-1328, 22 July 2009, paras 6, 12-13.

village, and another of all other victims of the attack. The Chamber followed the Registry's view that there exists a potential conflict of interest between these two groups. In this case, the interest of the victims were manifestly opposed to the extent that the appointment of different legal teams was not only appropriate but necessary.

35. Similarly in the *Ntaganda* case,²⁴ the Single Judge followed the Registry's proposal to group the victims in two distinct groups, namely a group consisting of UPC/FPLC child soldiers and another consisting of victims of the UPC/FPLC attacks. The same approach was later adopted in the *Yekatom and Ngaissona* case.²⁵

36. In the *Banda and Jerbo* case,²⁶ however, victims were grouped in one single group. The Chamber took the view that speaking a different language or residing in a different country than the other victims in the case does not *per se* imply that the two victims have distinct interests that would warrant separate representation and that this can be tackled by forming a balanced legal team. The Chamber also found that there was no conflict of interest between the two Darfuri victims, who witnessed the killing and injury of the peacekeepers, and the other international victims.

37. A similar decision was taken in the *Ruto and Sang* case,²⁷ where the Single Judge followed the Registry's proposal that no distinct interests had arisen and no conflict of interest had been reported that would warrant the division into more than one group. The issues identified by the Registry were linked to ethnicity and political affiliation.²⁸

²⁴ ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, "Decision concerning the organisation of common Legal representation of Victims", No. ICC-01/04-02/06-160, 2 December 2013, paras 10, 23.

²⁵ ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, Pre-Trial Chamber II, "Decision on Legal Representation of Victims", No. ICC-01/14-01/18-205, 23 May 2019, para. 14.

²⁶ ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, Trial Chamber IV, "Decision on common legal representation", No. ICC-02/05-03/09-337, 25 May 2012, paras 34-46.

²⁷ ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", No. ICC-01/09-01/11-249, 5 August 2011, para. 65.

²⁸ ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Registrar, Annex 2 to Proposal for the common legal representation of victims, "Summary of information relevant to the grouping of victims", No. ICC-01/09-01/11-243-Anx2, 1 August 2011.

3. Particular circumstances of the applicants

38. Turning to the specific circumstances of the applicants, they are all of Albanian ethnicity, speak Albanian, and live in Kosovo. [REDACTED]. All of the victims allege that they are victims of crimes committed at the same crime site.

4. Recommendation on grouping

39. Taking into account the guidelines set out by the Pre-Trial Judge in the Framework Decision,²⁹ as well as the individual circumstances of the applicants and the interests of the group as a whole, the VPO has not identified any issues or differences in the applications that would warrant separate representation.

40. Accordingly, the VPO recommends to the Pre-Trial Judge to group the five Victim Applicants in one single group for the purposes of common representation.

B. COMMON LEGAL REPRESENTATION

41. As regards preferences on legal representation, the majority of applicants did not express any preferences. Only one applicant stated he would like to be represented by an international lawyer.

42. The VPO shall base its proposal for assignment of Victims' Counsel to the Registrar based on a range of criteria, such as a demonstrated relationship of trust with victims, a demonstrated commitment to working with vulnerable persons, as well as relevant litigation expertise/experience, etc.

43. The VPO shall also take into account the countries of origin of proposed Victims' Counsel and his or her Team Members, as well as the capacity of the Team Members to work in different languages, if relevant, together with any preferences expressed by the applicants to ensure the necessary balance and effective representation for all victims in the group.

²⁹ See Framework Decision, para. 42.

VI. PROTECTIVE MEASURES

A. PROTECTIVE MEASURES

44. In the Framework Decision, the Pre-Trial Judge listed the relevant protective measures at this stage.³⁰ The protective measures requested by the applicants can be summarized as follows:

- one applicant requested non-disclosure to the public;³¹
- two applicants requested non-disclosure to the public and the Accused;³²
- two applicants requested non-disclosure to the public, the Accused and Defence Counsel;³³

B. RECOMMENDATION

45. In making its recommendation on protective measures, the VPO has taken into consideration the legal test, as instructed by the Pre-Trial Judge in the Framework Decision.³⁴

46. The VPO notes that ensuring the safety and security of victims is extremely important for a successful system of victims' participation before the Specialist Chambers. Victims will only apply and participate in the proceedings if they will feel safe in doing so. Concerns over a dangerous climate of intimidation of witnesses and victims in Kosovo³⁵ and the fact that Kosovo is a small country, where people live in tight-knit communities and the Accused have immense influence, connections, resources, and support structures, affect all victims applying for participation. Applying for participation in the proceedings as a victim poses not only a risk of

³⁰ See Framework Decision, para. 44.

³¹ Victim-07/05.

³² Victim-05/05 and Victim-06/05.

³³ Victim-08/05 and Victim-09/05.

³⁴ See Framework Decision, para. 46.

³⁵ The Pre-Trial Judge has also identified in other decisions in this case that the Accused has an incentive, means, and opportunity to interfere with victims and witnesses, and, consequently, obstruct the progress of criminal proceedings. See, e.g., KSC-BC-2020-05/F00008, para. 157; KSC-BC-2020-05, F000097/RED, Public Redacted Version of Decision on Arrest Warrants and Transfer Orders, 12 June 2020, para. 21.

stigma but also of retaliation and violence by other members of the community, in particular for those applicants living in Kosovo and the applicants that still have family in Kosovo.

47. This demonstrates that there are objectively justifiable risks to all applicants, without the need for applicants to specifically list concrete threats against them or their families.³⁶ Revealing identifying information, both of victim applicants and of victims admitted for participation, would therefore pose a security risk not only to the applicants and participating victims but also to their families. Furthermore, revealing the names of victims to the public could have a more far-reaching effect, as it could discourage victims from applying.³⁷

48. Therefore, the VPO requests the Pre-Trial Judge to grant protective measures to all applicants, namely: the redaction of names and identifying information from the Specialist Chambers' public records (Rule 80(4)(a)(i)); non-disclosure to the public of any records identifying the applicant (Rule 80(4)(a)(ii)); and the assignment of a pseudonym (Rule 80(4)(a)(vi)). These protective measures are intended to ensure that identifying information of victims is not shared with the outside world. The VPO considers that these protective measures are both necessary and proportionate.

49. In addition, the VPO requests the Pre-Trial Judge to grant to all applicants protective measures under Rule 80(4)(d) (Anonymity towards the Accused) and Rule 80(4)(e) (Anonymity towards Defence Counsel).

50. The VPO considers that the full range of protective measures is strictly necessary in light of the objectively justifiable and heightened risk to the applicants and their families living in Kosovo and that no less restrictive measures are sufficient or feasible to protect those applicants or their families, taking into account their individual

³⁶ See ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, "Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses'", 3 September 2013, ICC-01/09-01/11-902-Red2, para. 14.

³⁷ In its many outreach activities in Kosovo in the last three years, the VPO noticed a general reluctance and skepticism from victims towards participation in the proceedings because they feared for their safety and the safety of their families.

circumstances. Moreover, the VPO is of the view that the relevant protective measures are proportionate at this early stage of the proceedings.

51. The role and involvement of participating victims will develop throughout the proceedings, depending on the engagement of individual participating victims and subject to instructions on modalities of participation determined by the Panel. Some participating victims will testify on harm and suffering, for example, while others will be less involved, and it will be for the Panel to scrutinise carefully the precise circumstances and the potential prejudice to the Accused.³⁸

52. At this stage, non-disclosure of identities of Victims to the Accused and Specialist Counsel is a proportionate measure and would not irreversibly prejudice the rights of the Accused. By contrast, revealing the identities of the applicants at this stage would create an irreversible situation that cannot be corrected at a later stage. Such disclosure would unnecessarily expose the applicants and put them at risk.

53. Therefore, the VPO recommends that the Pre-Trial Judge grants the above-requested respective protective measures, as they are strictly necessary, appropriate and proportionate at this stage of the proceedings.³⁹

Word count: 3458



Dr Fidelma Donlon
Registrar

9 April 2021

At The Hague, the Netherlands

³⁸ See, e.g., ICC, *Prosecutor v Lubanga*, Trial Chamber, “Decision on victims’ participation”, ICC-01/04-01/06-1119, para. 13 (finding “that the greater the extent and the significance of the proposed participation, the more likely will be that the Chamber will require the victim to identify himself or herself”).

³⁹ See Framework Decision, para. 47.