



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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: Fidelma Donlon

Date: 20 May 2021

Language: English

Classification: **Public**

Decision on the appointment of expert(s)

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Registry

Head of Victims' Participation Office

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel),¹ pursuant to Article 22(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rule 167 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, the Specialist Prosecutor's Office (SPO) submitted the Confirmed Indictment.²
2. The SPO alleges in this case that Salih Mustafa, together with other members of the Kosovo Liberation Army (KLA), committed war crimes against persons who they detained and accused of having collaborated with the Serbian authorities, and/or not supporting the KLA.³
3. On 30 April 2021, the Pre-Trial Judge issued the "Second Decision on Victims' Participation", admitting five victims to participate in this case and directing the Registrar to assign by Friday, 7 May 2021, a Victims' Counsel to those victims represented as Group 1.⁴

¹ KSC-BC-2020-05, F00114, President, *Decision Assigning Trial Panel I*, 5 May 2021, public.

² KSC-BC-2020-05, F00011/A02, Specialist Prosecutor, *Indictment*, 19 June 2020, confidential. A public redacted version of the Confirmed Indictment was filed on 28 September 2020 (KSC-BC-2020-05, F00019/A01, Specialist Prosecutor, *Public Redacted Version of Indictment* (Public Redacted Version of the Confirmed Indictment), 28 September 2020, public).

³ Public Redacted Version of the Confirmed Indictment, para. 29.

⁴ KSC-BC-2020-05, F00105/RED, Pre-Trial Judge, *Public Redacted Version of Second Decision on Victims' Participation*, 30 April 2021, public.

II. APPLICABLE LAW

4. Article 22(3) of the Law, first sentence, provides that “(a) victim’s personal interest and rights in criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation”.

5. Article 22(9) of the Law and Rule 167 of the Rules give the possibility to a Trial Panel, where appropriate, to refer the victims to civil litigation to the other courts in Kosovo.

6. Article 54 of the Constitution of the Republic of Kosovo (Constitution) states that: “Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”

7. Article 22 of the Constitution provides that human rights and fundamental freedoms guaranteed, *inter alia*, by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are guaranteed by the Constitution and directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions.

8. The ECHR and the ICCPR provide for the right to access to court and to an effective remedy (Articles 6(1) and 13 of the ECHR and 2(3) and 14(1) of the ICCPR). Article 14 of the CAT provides that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”.

III. ANALYSIS

9. With regard to trial proceedings before the Kosovo Specialist Chambers (KSC), the Panel will make a distinction between criminal proceedings *stricto sensu* concerning the determination of the charges presented against the Accused in the Confirmed Indictment, and reparations proceedings leading eventually to the issuance of a reparation order, as provided for in Articles 22(8) and 44(6) of the Law.

A. THE TIMING OF REPARATIONS PROCEEDINGS UNDER THE KSC LEGAL FRAMEWORK

10. Article 22(7) of the Law states that “[i]n its judgment, the Trial Panel may, either upon request or on its own motion in exceptional circumstances, include a decision on the scope and extent of any damage, loss and injury to, or in respect of, Victims, and will state the principles on which it is acting. Alternatively, if such a decision would unduly prolong the criminal proceedings, a Trial Panel may limit its decision to the identity of Victims of any crimes established in its judgment”. In the view of the Panel, this provision clearly indicates that in case a Trial Panel chooses to issue a decision on the damage, loss or injury suffered by the victims and the establishment of the principles on reparations to such victims, such a decision must be an integral part of the judgment referred to in Article 43 of the Law.

11. Furthermore, Article 22(8) of the Law states that “[i]n the event that a Trial Panel or a Court of Appeals Panel of the Specialist Chambers adjudges an accused guilty of a crime, it may make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims collectively or individually”. Correspondingly, Article 44(6) of the Law states that “[i]n addition to imprisonment, the Specialist Chambers may order only the convicted person to make restitution or pay compensation to a Victim or to Victims collectively, or may order the forfeiture of property, proceeds and any assets used for or deriving from the commission of the

crime and their return to their rightful owner or sale and share between Victims under Article 22 (“a Reparation Order”). No further proceedings before the Trial Panel are provided for in the Law after the decision on sentencing. Article 46(9) of the Law states that “[t]he Court of Appeals may also hear appeals against judgement by a Trial Panel by Victims’ Counsel but only in respect of a Panel’s decision on Victims Status or a Reparation Order. During appellate proceedings, Victim Claimants shall be collectively represented as one group by Victims’ Counsel assigned by the Registry”. In the view of the Panel, these provisions clearly indicate that any such Reparation Order must also be part of the judgment issued by the Panel.

12. As regards the procedure related to reparations, Article 22(3) of the Law states that “[t]he Specialist Chambers’ Rules of Procedure and Evidence shall include provisions relating to the reasonable reparation to Victims from an accused who has pled or been adjudged guilty of a crime(s) which has directly resulted in harm to the Victims”. In this regard, Rule 168 of the Rules only provides that “[i]f the Panel makes an order pursuant to Article 22(8) of the Law against the convicted person, upon request by Victims’ Counsel, the convicted person or *proprio motu*, a Panel may appoint experts to assist it in determining the scope of any damage to, or in respect of victims and to suggest options concerning appropriate individual or collective reparations from the convicted person. The Panel may invite Victims’ Counsel and the convicted person to make observations on expert reports”. This rule however does not provide any specific timeframe for the appointment of those experts, the submission of their report, the eventual observations to be presented by Victims’ Counsel and the convicted person, and the issuance of the decision by the Panel following this process. Although it refers to observations from “the convicted person”, which suggests that those observations are to be submitted after a decision on conviction has been issued, it does not provide for any additional procedure after conviction or after sentencing for the purposes of deciding on reparations for victims.

13. This is further confirmed by other dispositions contained in the Rules. Rule 159(5) of the Rules states that “[i]f the Panel finds the Accused guilty of a crime, it may issue orders under Article 22(8) to (11) and 44(6) of the Law”. Rule 173(2) of the Rules states that “Victims’ Counsel may appeal a Judgment by the Trial Panel within the limits of Article 46(9) of the Law”. Rule 176(2) of the Rules only refers to a “Trial Judgment” or a “Sentencing Judgment”. No separate appeal for a separate Reparation Order is provided anywhere in the Rules.

14. In light of the aforementioned provisions, the only possible conclusion in the view of the Panel is therefore that a Reparation Order must be issued with the Trial Judgment (in case of a conviction) or, at the latest, in case the Accused is found guilty but the sentence is not pronounced together with the Trial Judgment, with the Sentencing Judgment.

15. This obliges the Panel, in case a referral to civil litigation to the national courts in Kosovo would, in its view, not be appropriate, to conduct criminal proceedings and reparations proceedings concurrently.

B. THE PARTIES TO REPARATIONS PROCEEDINGS BEFORE THE KSC

16. Rule 2(1) of the Rules provides that “unless the context otherwise requires”, the term “Party” refers to the “Specialist Prosecutor or the Defence”. Article 22 of the Law makes no reference to “Parties” or to the Specialist Prosecutor/SPO. With regard to those who can make representations in reparations proceedings, Article 22(11) of the Law refers to “the accused, Victims, other interested persons or other interested States”. Likewise, Rule 168 of the Rules, which concerns an eventual order for reparations against the convicted person, only provides for the convicted person and Victims’ Counsel to submit observations. It is therefore not foreseen in the Law or the Rules that the Specialist Prosecutor is a party to such proceedings. The Panel notes

that victims are referred to both in Article 22(11) of the Law and Rule 168 of the Rules; moreover, Article 46(9) of the Law and Rule 173(2) of the Rules provide that Victims' Counsel may appeal a Judgment of a Trial Panel in relation to a Reparation Order. It clearly follows from the above that victims must be considered as a Party with regard to reparations proceedings.

17. In light of the aforementioned provisions, the only possible conclusion in the view of the Panel is that the "Parties" in the context of the reparations proceedings must be understood to be the Defence and the Victims, represented through Victims' Counsel.

C. THE NEED TO ENSURE THE EFFECTIVENESS OF THE REMEDY WITH REGARD TO REPARATIONS TO VICTIMS

18. The Panel notes that Article 22(9) of the Law does not establish criteria to decide in which circumstances it would be appropriate to refer victims to civil litigation to the other courts of Kosovo or, alternatively, pursuant to Article 22(8) of the Law, "[i]n the event that a Trial Panel or Court of Appeals Panel of the Specialist Chambers adjudges an accused guilty of a crime", to "make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims, collectively or individually".

19. The Panel is of the view that it would not be appropriate, as mentioned in Article 22(9) of the Law, to refer victims to civil litigation in other courts in Kosovo, without first ascertaining whether the victims would have an effective remedy with regard to their compensation claims in accordance with the applicable legal texts mentioned in Part II of this decision.

20. The Panel is of the view 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 referred to in paragraph 2 of the present decision to claim reparations and, if

reparations would be granted by judgments issued by national courts in Kosovo, to have such judgments enforced. Depending on the conclusions of the expert report, the Panel will have to decide on the organisation of the reparations proceedings in this case which, as discussed above, could have an impact on the overall organisation of the trial proceedings. It is therefore urgent for the Panel to receive such a report in order to organise those proceedings expeditiously and receive the representations referred to in Article 22(11) of the Law in a timely manner.

21. The Panel notes that the Victims' Participation Office (VPO) is, in accordance with Rule 23(5) of the Rules, the entity within the Registry entrusted with administering the system of victim participation provided for in Article 22 of the Law, which refers both to the rights of victims to participation in the proceedings and to reparation.

22. The Panel therefore requests the VPO to submit by Friday, 4 June 2021, a list of three relevant experts, with an outline of their qualifications, who could prepare such a report for the benefit of the Panel. Such experts should have in-depth knowledge and/or solid experience in the functioning of the Kosovo judicial system as regards claims of compensation presented by victims in war crimes cases similar to the present case.

23. The Defence and Victims' Counsel will be invited, within ten (10) days of the VPO's filing, to make observations on the list of experts submitted and to propose questions that the expert(s), ultimately chosen by the Panel, should address in their report. The Panel will then proceed with the instruction of the chosen expert(s).


IV. DISPOSITION

24. For the above-mentioned reasons, the Panel hereby:

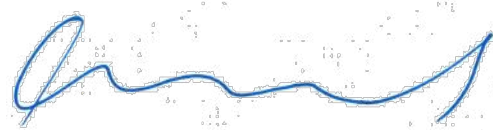
- a. **ORDERS** the VPO to submit by **Friday, 4 June 2021**, a list of three relevant experts who are available on short notice in order to establish the report mentioned in paragraphs 20 and 22 of the present decision;
- b. **ORDERS** the Defence and Victims' Counsel to submit their observations, within ten (10) days of the notification of the filing by the VPO, in accordance with paragraph 23 of the present decision.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 20 May 2021
At The Hague, the Netherlands.