

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

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, Duty Victims' Counsel

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Victims' Counsel Submission on the Decision on the appointment of expert(s)

Specialist Prosecutor's Office

Jack Smith

Registry

Head of Victims' Participation Office

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

I. PROCEDURAL BACKGROUND

1. On 30 April 2021, the Pre-Trial Judge issued the Second Decision on Victims' Participation, granting five victims the right to participate in the proceedings and ordered anonymity, including withholding the identity from the parties, as part of the protective measures.¹
2. On 21 May 2021, the Trial Panel issued the Third Decision on Victims' Participation, granting four victims the right to participate in the proceedings and ordered anonymity, including withholding the identity from the parties, as part of the protective measures.²
3. On 21 May 2021, the Trial Panel issued its decision on the appointment of experts. In this decision, it ordered the VPO to provide the details of experts available at short notice to provide an expert report to clarify whether the national courts in Kosovo offer a realistic avenue for victims to claim reparations by 4 June 2021.
4. The VPO submitted its report with three annexes, containing the names and details of proposed experts, on Friday 4 June 2021.
5. Defence and Victims' Counsel were invited to make observations on the list of experts submitted and to propose questions that the expert(s) should address in their report, within ten days of the VPO's filing.

II. APPLICABLE LAW

6. Art 22 (3) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law) specifies that a 'Victim's personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation.'

¹ *Prosecutor v Salih Mustafa*, Second Decision on Victims' Participation, KSC-BC-2020-05/F00105, 30 April 2021, para 45.

² *Prosecutor v. Salih Mustafa*, Third decision on victims' participation, KSC-BC-2020-05/F00126, 21 May 2021, para 30.

7. Article 22 (8) of the Law states that the Panel may make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims collectively or individually.
8. Article 22 (9) provides that where appropriate, the Specialist Chambers may refer the Victims to civil litigation in the other courts of Kosovo.
9. Art 13 of the European Convention on Human Rights (ECHR) provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

III. OBSERVATIONS

10. The following observations are divided into three broader sections. In the first part, general objections will be raised against the possibility of referring victims to civil litigation in other courts of the Kosovo. This is followed with brief observations on the choice of experts. The third part will address specific questions that would need to be addressed in any expert report.

General objection

11. The Trial Panel interprets the Law in such way that the KSC framework would require the Trial Panel to issue a reparations order within the trial judgment or, latest, and only if issued separately, in a sentencing decision. Whether this is indeed the only interpretation of the Law is an open question, as the use of the distinct phrase 'reparations order' suggests a distinct position in the procedural framework of the Court. At this point, however, this question is not decisive for the purpose of this submission.

12. It is welcome that the Panel is aware of the possibility that it might be violate the victims' rights to reparation, if referred to the Kosovo civil claims system.

13. The Law generally provides the Panel with some scope for judicial discretion, as article 22 (8) ('may make an order') and (9) ('Where appropriate, the Specialist Chambers may refer...') of the Law indicate. This discretion, however, is not entirely unfettered but limited through the foundational principles in article 3 of the Law, which require the Panel to adjudicate and function in accordance with international human rights law including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights.³ International human rights law⁴ as well as article 22 (3) of the Law provide victims with a right to reparations. For that reason, it may not only be a question of appropriateness, whether a civil lawsuit for reparations in the Kosovo system may be acceptable, but a question of safeguarding victims' internationally recognized human rights.

14. The ECHR guarantees the right to an effective remedy in article 13. The European Court of Human Rights (ECtHR) has found for victims of torture that the entitlement to an effective remedy two different aspects, (a) a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure and (b) the payment of compensation where appropriate.⁵ For the assessment of the right to an effective remedy, a realistic assessment is required that takes account of the general legal and political context.⁶ If no effective remedy or combination of different remedies can be made accessible within a reasonable time, this violates article 13 of the ECHR.⁷

15. The participating victims have had no access to an effective remedy for 22 years. Neither domestic nor international authorities acting in the Kosovo have provided

³ Art 22(2)(e) of the Law.

⁴ See with ample references Clara Sandoval 'International Human Rights Adjudication' in Anne Peters (ed) *Reparations for Victims of Armed Conflict* (CUP 2020) 180.

⁵ *Çelik and İmret v Turkey*, Application no. 44093/98, Judgement, 26 October 2004, para 59.

⁶ *Akdivar and Others v. Turkey*, Application no. 21893/93, 1996, Judgement, 16 September 1996, para 69; *A.B. v. the Netherlands*, Application no. 37328/97, Judgement, 29 January 2002, para 98.

⁷ *Kudła v Poland*, Application no. 30210/96, Judgement, 26 October 2000, paras 157-159.

access to any effective remedy. Investigations were either absent or hugely ineffective, not providing any results. These circumstances alone violate their human rights as guaranteed in article 13 of the ECHR. This violation can only be mitigated through the proceedings before the KSC. Any further delay caused through the decision of the Panel to refer any reparations claims to the Kosovo civil law system would perpetuate the violation of their right to an effective remedy. In that case, the Chamber would adjudicate in violation of article 3 (2) (e) of the Law.

16. It is submitted that under the current circumstances the discretionary scope provided in the Law has been reduced through the application of international human rights law in such way that only one decision would be in accordance with international human rights law: the issuance of a reparations order – if the accused is found guilty - within the proceedings before the KSC.

17. It is therefore submitted that the Panel should reconsider its decision whether an expert report is necessary in this case, as such a referral cannot be reconciled with the victims' right to an effective remedy and reparations, no matter how swiftly the Kosovo judicial system might address any such claim.

Observations regarding the selection of experts

18. As to the proposed expert identified in Annex 1 of the Registry submission, the expert indicates considerable experience in leading and managing big projects of institutional reform. The portfolio of activities is impressive. However, the expert report requires less specific leadership and managerial skills, so that some of the skills seem less relevant. It is recognized, that the proposed expert has engaged in multiple institutional reform and evaluation projects. Based on the submitted curriculum vitae and professional portfolio alone, it cannot be determined, whether any conflict of interest may arise, if the proposed expert is called to evaluate rule of law issues that he has helped to implement.

19. As to the proposed expert identified in Annex 2 of the Registry submission, the portfolio of activities and expertise is, again, impressive. The expert seems to have specific in-depth experience in administrative proceedings. The Registry identified as particularly relevant the expertise related to legal aid. While it is agreed that this is of some relevance, it only encompasses a very small part of the private law questions that ought to be discussed.

20. As to the proposed expert identified in Annex 3 of the Registry submission, the portfolio of activities and expertise is diverse with relevant practical experience that could aid the production of an expert report. However, based on the submitted curriculum vitae, it is difficult to deduce relevant experience regarding reparations issues and general private law procedures.

Questions to be addressed in an expert report

21. The expert will have to address not only the theoretical legal framework in place but report on socio-legal questions that reflect on the law in action. In this regard, any expert report will have to address questions of corruption, political interference, and dysfunctionality.

22. By way of background, the Kosovo administrative and legal system has been struggling with systemic challenges such as corruption since the emergence of Kosovo as a state. In 2010, the International Crisis group observed:

On the civil law side, it is all but impossible for citizens and domestic and international corporations to enforce their rights in court. Property disputes are widespread, and since they cannot be reliably resolved in court, occasionally degenerate into violence. The dysfunctional civil law system, choked with a backlog of cases stretching back to 2000-2001, scares off investment. Demoralised and exhausted judges both struggle under the case backlog and are dogged by a reputation for corruption and favouritism. Plaintiffs endure baffling rounds of

appeals, remands and delays, often featuring deliberate errors. Bribery and even violence have become attractive means of extrajudicial dispute resolution.⁸

Five years on, in 2015, a report prepared for the EU Commission stated:

Many independent institutions and regulatory authorities are currently not operational or are negatively affected by delayed appointments of board members.... [T]he judiciary remains prone to political interference. Further efforts are required to ensure independence in law and in practice, to prevent and fight corruption within the judiciary, to recruit and train more qualified staff and to allocate adequate resources.⁹ Furthermore, the report specifies: '[T]he administration of justice is slow and there is insufficient accountability of judicial officials. Judicial structures are still prone to political interference. There are concerns that disputed appointments and unclear mandates have undermined the activities of key institutions such as the Kosovo Judicial Council, Kosovo Prosecution Offices, and the Office of the Chief State Prosecutor. Rule of law institutions suffer from a consistent lack of funding.¹⁰

23. As recent as October 2020, another European Commission report on the Kosovo noted some progress.¹¹ However, it still made the following critical observations:

However, administration of justice is slow and inefficient, and there is insufficient accountability of judicial officials. The judiciary is still vulnerable to undue political influence and rule of law institutions suffer from lack of funding and human resources [...]. However, corruption remains prevalent in many areas

⁸ International Crisis Group, 'The Rule of Law in Independent Kosovo', 19 May 2010, available at <https://www.crisisgroup.org/europe-central-asia/balkans/kosovo/rule-law-independent-kosovo>.

⁹ European Commission, 'KOSOVO* 2015 REPORT, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS', SWD (2015), 10 November 2015, p 4-5.

¹⁰ Ibid, p 12.

¹¹ European Commission, 'KOSOVO* 2020 REPORT, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS', SWD (2020), 6 October 2020.

and continues to be a very serious problem. A stronger political will to tackle this in a comprehensive manner is necessary.¹²

The report continues:

The Constitution and legal framework provide clear safeguards for the independence and impartiality of the judiciary. In order to ensure this in practice, more efforts are needed to effectively shield the judicial system from undue pressure and interference. ...Under the existing legal framework, judges and prosecutors cannot be transferred without their consent. The Regulation on Internal Organisation of Courts provides for random allocation of cases, which is available through the case management information system since mid-February 2020. However, *in practice cases are not always randomly assigned to either prosecutors or judges*. A random assignment of all cases through the case management information system is not yet possible as this system has yet to be fully introduced in the justice system. *High profile and sensitive cases are not always processed in a timely manner*.¹³

24. Against this background the following fundamental questions need to be addressed:

- Does any reliable data and statistics exist that would allow an assessment of the length of potential civil law proceedings in Kosovo's court system?
- How prevalent is corruption and political interference?
- If the expert concludes that issues such political interference are not prevalent, on what basis can such claim be made given the documented situation over the last decade?

Access to justice

25. Access to justice is costly and legal aid critical. Would legal aid be available for the participating victims in private law suits before other courts in Kosovo? Does the

¹² Ibid, p5.

¹³ Ibid, p 19. (Emphasis added.)

law provide legal aid to claimants regardless of their nationality or residency, may that be in Kosovo, in Serbia, or in third states?

26. If legal aid frameworks exist, is legal aid accessible in practice? Are sufficient funds available to ensure that legal aid is continuously provided?

Issues of anonymity and protection

27. The participating victims have been granted protective measures which provide them with participatory rights while remaining anonymous. The Panel found that anonymity was critical to ensure ‘the victims’ safety, physical and psychological well-being, dignity and privacy’ and considered ‘that disclosure both to the public and the Defence of any material or information leading to the identification ... poses an objectively justifiable risk to them and their family members.’¹⁴ Albeit this decision applies only to the current stage of the proceedings, it is difficult to envisage such fundamental shift in circumstances that the identified risks would cease to exist.

28. Against this background, it will be essential, how reparations may be claimed domestically while maintaining anonymity. To effectively secure the participating victims’ protection through anonymity in the long run, this would require any civil law claim to be brought anonymously. The anonymity would have to extend vis-à-vis the judge or panel called to adjudicate any civil law claim for reparations.

29. A comparative view into other domestic systems shows that anonymity of claimants in civil lawsuits may only be granted in very limited and exceptional circumstances. Protecting the identity of a claimant from the court called to adjudicate a specific claim, however, is seen as breaching fair trial provisions as provided for in article 6 of the ECHR. In *ABC v Google*, an English High Court found that ‘“designed to preserve both parties’ right to a fair trial in accordance with Article 6 [ECHR]”. It

¹⁴ *Prosecutor v. Salih Mustafa*, Third decision on victims’ participation, KSC-BC-2020-05/F00126, 21 May 2021, para 30. The quoted decision applies to four out of the nine currently participating victims. It is illustrative of the reasoning that applied for all victim participants, as all of them have been granted anonymity.

would not be consistent with such rights to allow the Claimant to continue to hide his identity from the Defendant and the Court. His identity would moreover be protected from further disclosure in the first instance by the anonymity order.’¹⁵

30. Against this background, would the Kosovo civil law system allow the submission of anonymous claims? Would this be a procedure in accordance with article 6 of the ECHR?

Questions of evidence and substantive matters

31. What are the evidentiary requirements for victims to submit claims in Kosovo’s civil courts? It is submitted that hurdles might *de facto* be so high that it would make it very difficult to submit a claim with a realistic chance of success. E.g., could a victim of torture serve as a witness to his or her own suffering? Would corroborating evidence be required?

32. Would a criminal judgement by the Kosovo Specialist Chambers suffice to substantiate reparations claims? If so, under what conditions? Could a claim already be brought while appeals proceedings might be ongoing before the KSC?

33. As to recognised modes of liability: Are modes of criminal liability such as JCEs or command responsibility recognised to trigger private law liability?

34. Which statutes of limitations do apply? Article 125.1 of the Kosovo Law on Contested Procedure states that if ‘the periods of time are not determined by law, they are prescribed by the court by taking into account the circumstances of the concrete case.’ Thus can it be concluded that any claim would depend on the discretion of the deciding judge, which time limit s/he sets for the prescription of the civil claim? Would it be correct to conclude that it is not foreseeable for the claimant, whether a statute of limitation would apply?

¹⁵ *ABC v Google*, [2019] EWHC 3020 (QB), 14 November 2019, para 43.

Issues on the length of private law proceedings

35. What is the length of private lawsuits on average in Kosovo civil courts? Does the length differ depending on the type of lawsuit, e.g., a notably longer duration of proceedings based on a criminal law claim than other forms of civil proceedings?

36. Does any data exist that identifies the statistical chances of specific groups within the population, such as ethnic minorities, to successfully pursue lawsuits in the Kosovo? In other words, does any research or data exist that captures biases against specific groups and the impact of these biases on the chances to succeed in private litigation?

Conclusion

37. In conclusion, it is submitted that the Trial Panel should reconsider the appointment of an expert to report on possible private law suits in Kosovo to obtain reparations for the harm suffered. Any expert appointed should rather be called to assist the Panel in preparing the issuance of reparations orders in this case. The participating victims' have suffered violations of their most fundamental human rights, the right to life as protect under article 2 of the ECHR and the right to be free from torture as protected in under article 3 of the ECHR. No effective remedy has been provided for 22 years. Hence, the Trial Panel is called address these violations and, should the accused be found guilty, issue reparations orders accordingly.

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Anni Pues
Victims' Counsel

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At The Hague, the Netherlands