



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 12 July 2021

Language: English

Classification: Public

Decision on victims' procedural rights during trial

To be notified to:

Specialist Prosecutor

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Registry

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Victims' Counsel

Anni Pues

Trial Panel I (Panel) hereby renders this decision on victims' procedural rights during trial.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, the Specialist Prosecutor's Office (SPO) submitted the Confirmed Indictment.¹

2. 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 1.²

3. On 20 May 2021, the Panel issued the "Decision on the appointment of expert(s)", determining that reparations proceedings had to be conducted concurrently with criminal proceedings in accordance with the applicable legal framework before the Kosovo Specialist Chambers (KSC).³

4. On 20 May 2021, the Panel issued the "Decision setting the dates for trial preparation conferences and requesting submissions", wherein it requested observations from the Victims' Counsel on, *inter alia*, issues concerning the presentation of evidence, questioning of witnesses, and the admissibility of non-oral evidence.⁴

¹ 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, F00019/A01.

² KSC-BC-2020-05, F00105/RED, Pre-Trial Judge, *Public Redacted Version of Second Decision on Victims' Participation*, 30 April 2021, public.

³ KSC-BC-2020-05, F000124, Trial Panel I, *Decision on the appointment of expert(s)* (Decision on the appointment of expert(s)), 20 May 2021, public. The filing was notified on 21 May 2021.

⁴ KSC-BC-2020-05, F000123, Trial Panel I, *Decision setting the dates for trial preparation conferences and requesting submissions*, 20 May 2021, public, with Annexes 1-2, strictly confidential and *ex parte*, para. 10, points 4.e, 5.c, 6; 14; 17(d).

5. On 21 May 2021, the Panel issued the “Third decision on victims’ participation”, in which it admitted four victims to participate in the proceedings, extended the deadline for victims to apply for participation, and established procedural rights for victims during trial proceedings.⁵

II. APPLICABLE LAW

6. The Panel notes Articles 22(3) and (5)-(6) and 23 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (Law) and Rules 80, 114, and 132 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

7. The Panel further notes Rule 4(1) of the Rules which provides that “the Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code” (KCPC).

III. ANALYSIS

A) GENERAL CONSIDERATION

8. At the outset, the Panel notes that the victims’ rights during trial proceedings are necessarily confined to the case the Panel has been seized of and therefore must be exercised within the limits of the Confirmed Indictment as transmitted by the Pre-Trial Judge to the Panel, in accordance with Rule 98(1) of the Rules, subject to any amendment to that Confirmed Indictment, in accordance with Articles 39(8) and 40(7) of the Law and Rule 90 of the Rules. This is confirmed by Rule 113(1) and (4) of the Rules which states that, in order to be admitted as a victim

⁵ KSC-BC-2020-05, F000126/RED, Trial Panel I, *Public redacted version of Third decision on victims’ participation* (Third Decision on Victims’ Participation), 21 May 2021, public.

participating in the proceedings, a person must provide *prima facie* evidence that he or she has suffered harm as a direct result of a crime in the indictment.

B) THE VICTIMS' PERSONAL INTERESTS AND RIGHTS

9. With regard to proceedings before the KSC, Article 22(3) of the Law refers to three distinct "personal interest and rights in the criminal proceedings": notification, acknowledgement, and reparation.

10. As a preliminary matter, the Panel notes that the Law does not explain the distinction it makes between the "personal interests" and the "rights" of the victims. The Panel understands in this context that the existence of "personal interests" allows victims to exercise procedural "rights" before the KSC.

11. In the view of the Panel, the fact that "notification" and "acknowledgement" are mentioned in addition to "reparation" means that victims' participation before the KSC is not limited to reparation for the harm suffered. Furthermore, the Panel is of the view that the protection of victims provided for in Article 23 of the Law should be added to the three aforementioned personal interests and rights, where paragraph 2 in particular gives the right to Victims' Counsel to make representations to any panel with regard to protective measures.⁶ The protection of the safety, physical and psychological well-being, dignity and privacy of the victims must be understood as an essential part of the personal interests and rights of victims, although it is not expressly mentioned in Article 22 of the Law.

12. "Reparation", as a victims' personal interest and right, is further developed in Articles 22(7) and (8) and 44(6) of the Law and Rule 168 of the Rules. With regard to reparations proceedings leading eventually to a Reparation Order in accordance with

⁶ See also Rule 80 of the Rules.

Articles 22(8) and 44(6) of the Law,⁷ the Panel considers that those proceedings fall within the scope of Article 6(1) of the European Convention on Human Rights (ECHR). Therefore, victims enjoy the procedural rights under that article with regard to their reparation claims.⁸ This includes the right to submit any observations and evidence that the victims would consider relevant to support their claims for reparations and the corresponding Panel's duty to conduct a proper assessment of the arguments, submissions, and evidence adduced by the victims in this regard.⁹

13. While the Law offers some clarification as to the meaning of "reparation", the same is not true for "notification" and "acknowledgement" for which the Law does not provide any definition.

14. With regard to "notification", the Panel is of the view that this refers to the victims' personal interest and right to receive information about the proceedings before the KSC, in order to allow them to participate in those proceedings. Such a right is provided for in several international legal texts.¹⁰

15. In this regard, while the Victims Participation Office (VPO) within the Registry is in charge of providing information regarding proceedings in the different cases before the KSC to victims in general in accordance with its mandate provided for in Rule 23(5) of the Rules,¹¹ Victims' Counsel shall keep his or her clients informed of relevant developments in the case in accordance with Rule 114(3) of the Rules.

⁷ See Decision on the appointment of expert(s), para. 9.

⁸ ECtHR, *Perez v. France* [GC], no. 47287/99, [Judgment](#) (*Perez v. France* [GC]), 12 February 2004, para 71.

⁹ ECtHR, *Perez v. France* [GC], para. 80. See also ECtHR, *Van de Hurk v. the Netherlands*, no. 16034/90, [Judgment](#), 19 April 1994, para. 59.

¹⁰ UN General Assembly, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (UN Declaration of Basic Principles of Justice), U.N. Doc. A/RES/40/34, 29 November 1985; para. 6(a); [Recommendation No. R \(85\) 11 of the Committee of Ministers of the Council of Europe to Member States on the Position of the Victim in the Framework of Criminal and Procedure](#), 28 June 1985, para. 9. See also the reference to this Recommendation by the ECtHR in *Perez v. France* [GC], paras 27, 72.

¹¹ See also Article 22 of the Law.

16. With regard to “acknowledgement”, in the view of the Panel it must be understood, in the context of criminal proceedings before the KSC concerning the determination of the charges in the Confirmed Indictment against the Accused,¹² as the victims’ personal interest and right to have the harm they allegedly suffered recognised and, to that end, to contribute meaningfully, through the modalities of their participation, to the recognition of such harm and of the responsibility of those at the origin of it.

17. This interpretation is in line with – firstly – the findings of the Specialist Chamber of the Constitutional Court that victims have a fundamental right “to independent and effective investigation under the procedural heads of Articles 25 and 27 of the Constitution and Articles 2 and 3 of the Convention”¹³ and – secondly – the finding of the Grand Chamber of the European Court of Human Rights, in its judgment in the *El-Masri* case.¹⁴ The Grand Chamber underlined the importance of the right to truth not only for the victim and his family but also for other victims in similar cases and the general public who had the right to know what happened.¹⁵ It concluded that the applicant was deprived “of being informed of what had happened, including getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal” and that therefore, there had been a violation of the

¹² See also, but as a form of satisfaction for the victims by a public apology, including acknowledgment of the facts and acceptance of responsibility, UN General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), U.N. Doc. A/RES/60/147, 16 December 2005, para. 22(e).

¹³ See KSC-CC-2020-11, F00015, Specialist Chamber of the Constitutional Court, [Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo](#), 26 November 2020, public, paras 69, 75. The “Convention” refers to the ECHR.

¹⁴ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, [Judgment](#) (*El-Masri v. The Former Yugoslav Republic of Macedonia* [GC]), 13 December 2012.

¹⁵ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], para. 191. See also ECtHR, *Abu Zubaydah v. Lithuania*, no. 46454/11, [Judgment](#) (*Abu Zubaydah v. Lithuania*), 31 May 2018, para. 610.

procedural head of Article 3 of the ECHR.¹⁶ The Panel is of the view that acknowledgment of serious breaches of human rights and international humanitarian law is a form of remedy that is as important, or even more important than, the right to compensation.¹⁷

18. The aforementioned interpretation is also in line with the Rules. In this regard, Victims' Counsel, unlike the Parties, does not have an independent right to submit evidence but, in accordance with Rule 114(5) of the Rules, may only request the Panel to order the submission of relevant evidence or call witnesses to testify. The exercise of the Panels' power to order the submission of evidence, in accordance with Rule 132 of the Rules, is in turn contingent on the Panel finding it "necessary for the determination of the truth". Therefore, the Rules also necessarily make the victims' right to participate in the proceedings and to present evidence contingent on the establishment of the truth with regard to what allegedly happened to them and the responsibility of those involved therein. That being said, the Panel will apply Rules 114(5) and 132 of the Rules in order to ensure that victims can meaningfully exercise such a right during trial proceedings.

19. In the view of the Panel, such a conclusion on the victims' rights in criminal proceedings before the KSC does not in any way affect the fact that it remains entirely incumbent on the SPO to prove to the requisite standard the different elements of the crimes contained in the Confirmed Indictment and the criminal responsibility of the Accused.

¹⁶ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], paras 192-194. See also ECtHR, *Abu Zubaydah v. Lithuania*, para. 620.

¹⁷ See also ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para. 6.

C) VICTIMS' PROCEDURAL RIGHTS IN IN CRIMINAL AND REPARATION PROCEEDINGS

20. Article 22(5) and (6) of the Law underlines that victims can only participate in proceedings before the KSC through Victims' Counsel, therefore precluding self-representation, and refers to the Rules for the determination of the modalities of such participation.

21. Rule 114 of the Rules provides, without elaborating on them in many details, for the following modalities with regard to victims' participation in proceedings, through Victims' Counsel: making opening and closing statements in accordance with Rules 126(3) and 135 of the Rules; presence during trial proceedings; access to confidential material; making oral and written submissions; asking questions of witnesses; and requesting the Panel to order the submission of relevant evidence or to call witnesses to testify.

22. The Panel is of the view that, in the present case, the victims' procedural rights require the issuance of further specific guidelines pursuant to Rule 114(4) of the Rules. In this regard, Rule 114(4) of the Rules, besides its reference to Article 22(3) and (6) of the Law, gives discretion to the Panel to set out such guidelines within the framework provided for in the Law and the Rules.

23. The Panel underlines however that the modalities of participation in the proceedings set out below remain, at all times, under the control of the Panel and may be amended in specific instances, if the victims' personal interests are not affected. Moreover, in accordance with Article 22(6) of the Law, the Panel must also ensure that the victims' participation in the proceedings is neither prejudicial to nor inconsistent with the rights of the accused.

24. The Panel first recalls its previous ruling where it already established the following three modalities for victims' participation in the proceedings.

1. Access to the Case File

25. Pursuant to Rule 114(3) of the Rules, Victims' Counsel shall have access to the entire case file, including all public, confidential, and strictly confidential filings, transcripts, and evidentiary material, excluding any *ex parte* items of the case file.¹⁸ By the same token, Victims' Counsel shall be notified of all distributed items in the case file, including all public, confidential, and strictly confidential filings, transcripts, and disclosures of evidentiary material, excluding any distributed *ex parte* items of the case file.¹⁹ Victims' Counsel shall keep the victims participating in the proceedings (VPPs) informed of relevant developments in the case in a manner which does not reveal non-public information.²⁰

2. Presence at Trial Hearings

26. Pursuant to Article 22(6) of the Law and Rule 114(2) of the Rules, and in order to ensure that the personal interests of the VPPs are appropriately represented at all times, Victims' Counsel shall be present at all trial hearings, whether held in public, closed or private session, excluding any *ex parte* hearings.²¹ To that effect, Victims' Counsel shall be notified of all hearings before the Panel.²² Victims' Counsel may also request to address the Panel during an *ex parte* hearing.²³

3. Oral and Written Submissions

27. Victims' Counsel shall be permitted to make oral and written submissions as set forth in Article 22(6) of the Law and Rule 114(4) of the Rules on any point of law or fact, and to file responses and replies to any submissions made to the Panel in

¹⁸ Third Decision on Victims' Participation, para. 38.

¹⁹ Third Decision on Victims' Participation, para. 38.

²⁰ Third Decision on Victims' Participation, para. 38.

²¹ Third Decision on Victims' Participation, para. 39.

²² Third Decision on Victims' Participation, para. 39.

²³ Third Decision on Victims' Participation, para. 39.

accordance with Rule 76 of the Rules.²⁴ In order to ensure a seamless and efficient modality of participation, Victims' Counsel shall not be required to submit any prior leave for making oral and written submissions.²⁵ Those submissions shall be related to the victims' personal interests as provided for in Article 22(3) of the Law.²⁶

28. In addition to the modalities set out above, the Panel will establish further guidelines regarding the presentation of evidence as ordered by the Panel, the questioning of witnesses by Victims' Counsel, and the submission of observations by Victims' Counsel on the admissibility of evidence presented by the Parties.

4. Presentation of Evidence as Ordered by the Panel

29. With regard to the sequence for the presentation of evidence at trial, Rule 127(2) of the Rules provides that, unless otherwise directed by the Panel, evidence for the Specialist Prosecutor shall be presented first, then evidence for the Defence, if any, and finally evidence called by the Panel *proprio motu* pursuant to Rule 132 of the Rules.

30. Nothing is specifically provided for the evidence called by the Panel at the request of Victims' Counsel pursuant to Rule 114(5) of the Rules. However, in this regard, the Panel notes Article 327 of the KCPC which provides that after the opening statements, evidence shall be presented in the following order: first, evidence by the state prosecutor, then evidence by the injured party, and finally evidence by the defendant. Likewise, Article 331(1) of the KCPC provides that the "presiding trial judge shall issue a schedule of the witnesses, beginning with the witnesses proposed by the state prosecutor, the witnesses proposed by the injured party or victim advocate, and then the witnesses proposed by the defendant or defence counsel". Interpreting the Rules, where appropriate, consonant with the KCPC pursuant to Rule 4(1) of the Rules, the

²⁴ Third Decision on Victims' Participation, para. 40.

²⁵ Third Decision on Victims' Participation, para. 40.

²⁶ Third Decision on Victims' Participation, para. 40.

Panel is of the view that, in the present case, victims should present their evidence, if any, as ordered by the Panel, after the Specialist Prosecutor, and before the Defence. Such sequence of presentation would also allow the Defence to respond during the presentation of its case both to evidence presented by the SPO, as well as by Victims' Counsel, if any.

31. The Panel however emphasises that, when a witness appears in court for the purpose of providing his or her testimony, both the Parties, as well as Victims' Counsel shall endeavour to put all questions they consider necessary to that witness, subject to the control of the Presiding Judge, so as to avoid having to recall that witness as part of their respective presentation of evidence.

32. Furthermore, the Panel is conscious that the Defence may, immediately after the closing of the Specialist Prosecutor's case, notify its intention to file a motion to dismiss any or all of the charges in the Confirmed Indictment, in accordance with Rule 130(1) of the Rules. In such a case, the Panel may first address such a motion before allowing the presentation of evidence by Victims' Counsel.

33. In order to ensure the fairness and expeditiousness of the proceedings, the Panel may decide to hold, at the end of the Specialist Prosecutor's case, a status conference in order to organise the presentation of: (i) evidence for the establishment of the truth by Victims' Counsel, as ordered by the Panel; and (ii) evidence presented for the purposes of reparations.

34. For this purpose, Victims' Counsel shall submit her list of proposed (expert) witnesses to be called by the Panel sufficiently in advance of the end of the Specialist Prosecutor's case. Victims' Counsel shall indicate to what extent the testimonies or expertise of the proposed witnesses relate to the personal interests and rights of the victims, i.e., the establishment of the truth and/or reparations. Furthermore, Victims' Counsel shall indicate when submitting her list: (i) the name and the pseudonym, if

applicable, of each witness; (ii) whether the proposed witnesses are victims she represents or other persons; (iii) a summary of the facts on which each proposed witness is expected to provide evidence; (iv) an indication whether the proposed witnesses will testify in person at the seat of the court or give evidence through other means as provided for by the Rules; (v) the estimated time required for the direct examination of each proposed witness and their proposed order of appearance; (vi) whether Victims' Counsel intends to use any material during the proposed witnesses' examination and if so, submit such material to the Panel; and (vii) whether any of the proposed witnesses will require protective measures, and, if applicable, proposed redactions to their material, including to any material to be used during their examination.

35. Victims' Counsel shall also indicate sufficiently in advance of the end of the Specialist Prosecutor's case whether she wishes the Panel to order the submission of relevant non-oral evidence relating to the victims' personal interests and rights. Likewise, Victims' Counsel will have to submit a list of such proposed material, indicating whether the material relates to the establishment of the truth and/or reparations, as well as whether redactions will be necessary and which ones.

36. With regard to reparations proceedings, the Panel recalls that it is incumbent on Victims' Counsel to present any evidence, including expert evidence, concerning the victims' reparations claims. In this regard, Victims' Counsel may also request the SPO to disclose any material or evidence in its possession which could substantiate such claims. As previously indicated, the Panel will have to allow Victims' Counsel to present any relevant evidence for the substantiation of the victims' reparations claims, thereby respecting the victims' rights under Article 6(1) of the ECHR.²⁷

²⁷ See *supra* para. 12.

37. Victims' Counsel may also request the Panel, sufficiently in advance of the end of the Specialist Prosecutor's case, to authorise victims she represents to directly address the Panel not as witnesses but in order to present their views and concerns.²⁸ The Panel recognises that this could be a way for victims to foster recognition of their harm, in accordance with Article 22(3) of the Law. Any such presentation of victims' views and concerns will not be subject to examination and cross-examination by the Parties and will not be considered as evidence by the Panel. Should the Panel consider that the information brought by the victim could be necessary for the establishment of the truth, it retains the power to call that victim as a witness, in accordance with Rule 132 of the Rules.

38. Finally, Victims' Counsel may request from the Panel, in accordance with Articles 39(13) and 40(6)(a) of the Law, the issuance of any order which may be of assistance for the preparation of her presentation of evidence.

5. Questioning of Witnesses by Victims' Counsel

39. The Panel notes that, although Rule 114(4)(b) provides for the possibility for Victims' Counsel, under the control of the Panel, to ask questions of witnesses, the Rules do not provide for the sequence in which such questioning of witnesses should take place or the type of questions that can be put to witnesses by Victims' Counsel, besides the reference to "whenever the personal interests of the victims participating in the proceedings are affected".

40. With regard to the type of questions that Victims' Counsel may put to witnesses, the Panel does not wish to limit those questions *a priori*. Moreover, Rule 114(4) of the Rules does not contain any specific limitation in this regard. However, the Panel underlines that the questioning of witnesses with regard to the establishment of the

²⁸ See UN Declaration of Basic Principles of Justice, para. 6(b).

constitutive elements of the crimes and the modes of liability charged in the Confirmed Indictment is first and foremost the responsibility of the SPO. Likewise, it is first and foremost the responsibility of Victims' Counsel to elicit from SPO and Defence witnesses any information relevant for reparations proceedings. Furthermore, in accordance with Rule 143(4) of the Rules, the Presiding Judge may at all times exercise control over the questioning of witnesses in order to avoid, *inter alia*, repetitive questioning.

41. With regard to the sequence for questioning witnesses, Rule 127(3) of the Rules provides that a witness shall first be examined by the calling Party and then cross-examined by the opposing Party, without indicating when Victims' Counsel is supposed to question witnesses called by the SPO or the Defence. The Panel is of the view that it is appropriate for witnesses called by the SPO to be questioned by Victims' Counsel after the examination by the SPO, in order for the Defence to be able to take into consideration answers given by the witnesses to the SPO *and* Victims' Counsel when conducting its cross-examination. With regard to witnesses called by the Defence, they shall first be cross-examined by the SPO as the opposing Party and then examined by Victims' Counsel. With regard to witnesses called by the Panel at the request of Victims' Counsel, they shall first be examined by Victims' Counsel, then by the SPO, and finally by the Defence. With regard to witnesses called by the Panel *proprio motu*, they shall first be questioned by the Panel, then by the SPO, then by Victims' Counsel, and finally by the Defence.

6. Observations on the Admissibility of Evidence Presented by the Parties

42. The Panel is of the view that, when the victims' personal interests are at stake, Victims' Counsel should be allowed to make observations in relation to the admissibility of the evidence presented by the SPO or the Defence, in the same way as she may request the Panel to order the submission of relevant evidence or to call

witnesses. Therefore, Victims' Counsel may request the Panel to exercise its power to rule on the admissibility of evidence whether presented by the SPO or the Defence in accordance with Article 40(6)(h) of the Law.

IV. DISPOSITION

43. For the above-mentioned reasons, the Trial Panel hereby:

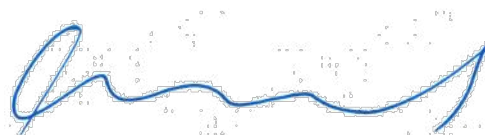
- a. **ADOPTS** the aforementioned definitions of the victims' interests and rights as established in paragraphs 9 to 19 above; and
- b. **ADOPTS** the victims' procedural rights during trial as established in paragraphs 25 to 42 above.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 12 July 2021
At The Hague, the Netherlands.