

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

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I. PROCEDURAL BACKGROUND

1. On 25 June 2021, the Trial Panel issued the Second Decision on the appointment of expert(s).¹ It instructed the VPO to submit a list of further expert(s) for its consideration, and enquire about the short notice availability of specific experts.²
2. The VPO submitted its report with four annexes, containing further details of proposed experts and their availability, on 21 July 2021.³ The VPO emphasised in this report that the task of finding relevant expert(s) from outside of Kosovo with the requisite knowledge and experience had proved challenging because of the limited number of experts outside of Kosovo with the required knowledge and experience of the judicial system in Kosovo.⁴
3. Victims' and Defence Counsel were invited to make observations on the list of experts submitted by VPO and to propose questions that the expert(s) should address in their report by 20 August 2021.⁵

II. INTRODUCTION

4. On 14 June 2021, Victims Counsel filed their submission on the Trial Panel's decision on the appointment of expert(s) of 21 May 2021 ("first submission").⁶ In this first submission, in light of the victims' fundamental rights to access to justice and to an effective remedy, Victims' Counsel raised fundamental questions as to the option of referring the victims to civil litigation in other courts in Kosovo.

¹ KSC-BC-2020-05, F00140/RED, Public Redacted Version of Second Decision on the Appointment of Expert(s), 25 June 2021 (Hereafter: Second Decision).

² Second Decision, paras. 9-10, 12(a).

³ KSC-BC-2020-05, F00157, Registry Submission Pursuant to the Second Decision on the Appointment of Expert(s) with confidential and *ex parte* Annexes 1-4, 21 July 2021 (Hereafter: VPO Report).

⁴ VPO Report, para. 6.

⁵ Second Decision, para. 11 and 12(b).

⁶ KSC-BC-2020-05, F00134, Victims' Counsel Submission on the Decision on the appointment of expert(s), 14 June 2021.

5. These questions will not be revisited in these observations but they do provide the necessary background to the question of which experts are to be selected, if any.
6. These present observations firstly provide a list of substantive issues that any chosen expert(s) would need to address, as this is critical for the choice of expert(s). Subsequently, submissions on each of the proposed further experts will be provided.
7. Overall, it is submitted that the width and complexity of the questions to be addressed may require reports by more than one expert, before a fully informed decision is possible.

III OBSERVATIONS

Substantive issues to be addressed by any expert

8. The Trial Panel is aiming to identify an expert or experts with ‘an 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.’⁷ When discussing the suitability of any proposed expert, it is important to discuss the exact scope that any expert report should have.
9. The case before this Panel is unique in the context of Kosovo. Existing cases in relation to war crimes in Kosovo cannot serve as suitable comparators. It was precisely the challenges that these proceedings faced on ensuring proper witness protection that led, among others, to the establishment of the KSC. Whereas it is part of the acknowledged societal narrative in Kosovo that crimes against Albanian civilian population were committed, this narrative resists to acknowledge that some of these crimes may have been committed by KLA members against both majority and non-majority victims. The protective measures that the Pre-Trial

⁷ Second Decision, para. 8.

Judge and the Panel⁸ deemed necessary for the participating victims in this case provide some insight into the hostility and denial with which the victims are confronted. The societal background in which this case is placed will influence the operation of its judicial system. Any expert report will have to address this.

10. Next to this, there are questions of private law and on the operation of civil law suits in Kosovo that need to be answered. Quite a number of these questions were raised in the Victims' Counsel first submission on the appointment of an expert.

11. Thus, expert reports would necessarily have to tackle the following substantive issues, although this list as well as the specific questions submitted in the Victims' Counsel first submission should not be regarded as exhaustive:

- (i) Socio-legal questions (including questions of corruption, political interference, and dysfunctionality);
- (ii) Access to justice;
- (iii) Issues of anonymity, intimidation, and protection;
- (iv) Questions on the operation of the civil law system (such as evidence, statutes of limitation, appeals, length of proceedings, legal representation⁹);
and
- (v) International enforcement of judicial decisions, as Kosovo lacks judicial cooperation agreements or diplomatic ties in numerous jurisdictions, and relevant assets could still be held on those jurisdictions.

12. These issues, together with the issues identified in the Victim's Counsel first submission, have been listed in annex of this filing.¹⁰

⁸ KSC-BC-2020-05, F00075, First Decision on Victims' Participation, 10 February 2021; F00105/RED, Public Redacted Version of Second Decision on Victims' Participation, 30 April 2021; and F00126/RED/1, Public Redacted Version of Third Decision on Victims' Participation, 21 May 2021.

⁹ The fact that one of the participating victims expressly said that they do not want to be represented by a Kosovan lawyer raise the question of the possibility for victims to be represented by international lawyers in a civil case in Kosovo.

¹⁰ See Annex.

13. Given the total number of issues to be addressed and their variety, it is submitted that it is likely that more than one expert would need to be appointed in order to address them all properly.

Observations regarding the selection of experts

14. As to the proposed expert identified in Annex 2 of the VPO report, the expert has extensive practical and relevant experience of the Kosovo judicial system and war crimes trials in particular. The portfolio of activities and monitoring work will provide useful information on issues (i), (ii), and (iii) identified above. It is less clear to what extent the expert would be able to comment on more detailed questions as to the operation of the civil law system or the international enforcement of a Kosovan judicial order, as the expert seems to have engaged widely with criminal trials rather than civil law proceedings. Having said that, the expert's experience could provide valuable insights to assist the Panel in deciding on the question whether a referral of reparations claims would be at all appropriate.

15. As to the proposed expert identified in Annex 3 of the VPO report, the expert has conducted extensive research that seems highly relevant to inform the Panel on the specific difficulties faced in the Kosovan judicial system. How far this expert will be able to address the very specific private law questions arising (issues above under iv and v) cannot be evaluated based on the information provided.

16. As to the proposed expert identified in Annex 4 of the Registry submission, the portfolio of activities and expertise is impressive. However, based on the submitted curriculum vitae, it is difficult to deduce experience of the Kosovo judicial system, which are critical for the questions at hand.

Conclusion

17. In conclusion, it is submitted that it seems extremely difficult to identify one suitable expert alone. The experts identified in Annex 2 and 3 of the VPO report seem

best placed to answer some of the many questions arising that have been identified – although more questions may still arise - and are compiled for ease of reference in the annex to this submission.

18. In light of the victims' fundamental rights to access to justice and to an effective remedy, it is stressed again that it is highly preferable that the Panel decide on reparations within these proceedings. Reiterating that the participating victims in this case have waited for more than 22 years, this would serve the interests of justice best.

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At The Hague, the Netherlands