



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:** 20 September 2021

**Language:** English

**Classification:** **Public**

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**Decision on Victims' Counsel request for reconsideration of the  
third decision on the appointment of expert(s)**

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**To be notified to:**

**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

**Registry**

Head of Victims' Participation Office

Silke Studzinsky

**Victims' Counsel**

Anni Pues

**TRIAL PANEL I** (Panel) hereby renders this decision on Victims' Counsel request for reconsideration of the third decision on the appointment of expert(s).

## I. PROCEDURAL BACKGROUND

1. On 20 May 2021, the Panel issued the "Decision on the appointment of expert(s)" (Decision), in which it ordered the Victims' Participation Office (VPO) to submit, by 4 June 2021, a list of three relevant experts who are available on short notice in order to prepare the report referred to in paragraphs 20 and 22 of the Decision.<sup>1</sup> The Panel also ordered the Defence for Salih Mustafa (Defence) and Victims' Counsel to submit their observations, if any, within ten days of the notification of the filing by the VPO.<sup>2</sup>
2. On 4 June 2021, the Registrar submitted the "Registry Submission Pursuant to the Decision on the Appointment of Expert(s)", in which the VPO identified three experts who "sufficiently meet the requirements" set out in the Decision.<sup>3</sup>
3. On 14 June 2021, Victims' Counsel submitted the "Victims' Counsel Submission on the Decision on the appointment of expert(s)", including a number of questions to be addressed by any appointed expert(s).<sup>4</sup> The Defence did not submit any observations.
4. On 25 June 2021, the Panel issued the "Second decision on the appointment of expert(s)", ordering the VPO to submit, by 21 July 2021, a list of further relevant experts from outside of Kosovo who are available on short notice to prepare the report

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<sup>1</sup> KSC-BC-2020-05, F00124, Trial Panel I, *Decision on the appointment of expert(s)*, 20 May 2021, public, para. 24(a). The filing was notified on 21 May 2021.

<sup>2</sup> Decision, para. 24(b).

<sup>3</sup> KSC-BC-2020-05, F00132, Registrar, *Registry Submission Pursuant to the Decision on the Appointment of Expert(s)*, 4 June 2021, public, with Annexes 1-3, confidential and *ex parte*.

<sup>4</sup> KSC-BC-2020-05, F00134, Victim's Counsel, *Victims' Counsel Submission on the Decision on the appointment of expert(s)*, 14 June 2021, public.

referred to in paragraphs 20 and 22 of the Decision.<sup>5</sup> The Panel also ordered the Defence and Victims' Counsel to submit their observations, if any, on the VPO's submissions by 20 August 2021.<sup>6</sup>

5. On 21 July 2021, the Registrar submitted the "Registry Submission Pursuant to the Second Decision on the Appointment of Expert(s)", in which the VPO identified three further relevant experts for the Panel's consideration.<sup>7</sup>

6. On 19 August 2021, Victims' Counsel submitted the "Victims' Counsel Submission on the Second Decision on the appointment of expert(s)",<sup>8</sup> including a list of questions for the consideration of the expert(s).<sup>9</sup> The Defence did not submit any observations.

7. On 3 September 2021, the Panel issued the "Third decision on the appointment of experts" (Impugned Decision), appointing three individuals as experts in the present case and instructing them to "endeavour to submit a joint report" on certain topics identified by the Panel by 22 November 2021.<sup>10</sup>

8. On 7 September 2021, Victims' Counsel submitted a request for reconsideration of the Impugned Decision (Request).<sup>11</sup>

9. The Defence did not file a response to the Request.

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<sup>5</sup> KSC-BC-2020-05, F00140/RED, Trial Panel I, *Public redacted version of Second decision on the appointment of expert(s)* (Second Decision), 25 June 2021, public, paras 9-10, 12(a).

<sup>6</sup> Second Decision, para. 12(b).

<sup>7</sup> KSC-BC-2020-05, F00157, Registrar, *Registry Submission Pursuant to the Second Decision on the Appointment of Expert(s)*, 21 July 2021, confidential, with Annexes 1-4, confidential and *ex parte*. A public redacted version of the main filing was submitted on 10 September 2021, F00157/RED.

<sup>8</sup> KSC-BC-2020-05, F00166, Victim's Counsel, *Victims' Counsel Submission on the Second Decision on the appointment of expert(s)* (Victims Second Submission), 19 August 2021, public, with Annex 1, public.

<sup>9</sup> Annex 1 to Victims Second Submission.

<sup>10</sup> KSC-BC-2020-05, F00184/RED, Trial Panel I, *Public redacted version of Third decision on the appointment of expert(s)*, 3 September 2021, public.

<sup>11</sup> KSC-BC-2020-05, F00190, Victims' Counsel, *Victims' Counsel motion for reconsideration of the Third decision on the appointment of expert(s)*, 7 September 2021, public.

## II. SUBMISSIONS

10. Victims' Counsel requests that the Panel reconsider the Impugned Decision pursuant to Rule 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules) and order the submission of independent expert reports rather than a joint report.<sup>12</sup> She argues that the Panel would be better assisted by individual reports prepared by the experts working independently, as the process of preparing a joint report would carry the risk that the experts, even unknowingly, influence each other's opinion and/or compromise on some answers.<sup>13</sup> This would result in a prejudice and injustice for the victims, as the Panel would not benefit from the experts' independent expertise on crucial matters relating to reparations.<sup>14</sup> Victims' Counsel further submits that only individual expert reports would allow the operation of Rule 149 of the Rules, should the admission of the expert reports into evidence and/or the experts' cross-examination be required.<sup>15</sup> Lastly, Victims' Counsel avers that, should the Request be granted, she has no objection for the experts to divide, amongst each other, the topics to be addressed in their individual reports and for the experts to address, individually, the same topics in their reports.<sup>16</sup>

## III. APPLICABLE LAW

11. The Panel notes Rules 79 and 149 of the Rules.

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<sup>12</sup> Request, paras 1, 6-7, 15.

<sup>13</sup> Request, para. 10.

<sup>14</sup> Request, paras 7, 9-10.

<sup>15</sup> Request, paras 11-13.

<sup>16</sup> Request, para. 8.

#### IV. ANALYSIS

12. The Panel notes that reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if necessary to avoid injustice. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment.<sup>17</sup>

13. As concerns the first limb of the test for reconsideration, the Panel notes that Victims' Counsel does not argue and therefore failed to demonstrate that the Panel committed a clear error of reasoning in the Impugned Decision. The first limb of the test has therefore not been met.

14. As concerns the second limb of the test for reconsideration, Victims' Counsel advances two main arguments: (i) the purported risk of the experts losing their independence, (unknowingly) influencing each other, and providing different information to the Panel than if they were working independently;<sup>18</sup> and (ii) the purported non-conformity with Rule 149 of the Rules of a report authored by more than one expert.<sup>19</sup>

15. With regard to the first argument, the Panel notes that, pursuant to the Impugned Decision, the experts are not obliged to submit a joint report. Whilst, in the interest of the expeditious conduct of the proceedings, they shall "endeavour" to do so, nothing prevents one or more of the experts from filing separate report(s), if they so wish.<sup>20</sup> This could be the case, for example, where one or more of the

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<sup>17</sup> KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 14. Similarly, e.g., ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-468, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), 15 June 2016, para. 4; *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-1085, [Decision on Kilolo Defence Request for Reconsideration](#), 15 July 2015, para. 4.

<sup>18</sup> Request, paras 7, 10.

<sup>19</sup> Request, paras 11-13.

<sup>20</sup> The Panel notes in this respect that, e.g., in the case of *Prosecutor v. Ntaganda*, the four appointed experts on reparations had been similarly instructed to "endeavor to submit a joint report" (ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2528-Red, [Public redacted version of 'Decision appointing experts on](#)

experts would consider him- or herself more knowledgeable in one or more of the topics identified by the Panel, where cooperation between the experts would prove to be difficult due to logistical or any other reasons, or where one or more of the experts would be of a different opinion and/or reach different conclusions on one or more of the questions to be addressed in the report. Moreover, the Panel notes that, pursuant to the Impugned Decision, even in the case of a joint report, this report may contain sections on some of the questions identified by the Panel that are authored only by one or by some of the experts.<sup>21</sup>

16. As concerns the purported risk that, by collaborating for the purpose of filing a joint report, the experts could (unknowingly) influence each other, the Panel notes that all three appointed experts are professionals in their field and have been selected on the basis of, *inter alia*, their background and extensive professional experience. Therefore, any purported risk of influence is purely hypothetical and speculative. Considering further the importance of combining expertise and resources for the purposes of addressing complex research questions, as emphasised by Victims' Counsel herself,<sup>22</sup> the Panel finds Victims' Counsel's submission in this respect to be without merit.

17. With regard to the second argument raised by Victims' Counsel, the Panel notes that Rule 149 of the Rules does not prohibit the production of a joint report by several experts, which is moreover common practice at other courts and tribunals.<sup>23</sup> The fact that the application of Rule 149(2) and (4) of the Rules would

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[reparations'](#), 14 May 2020, para. 11), following which three of them submitted a joint report (ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2623-Anx1-Red2, [Expert Report on Reparation](#), 3 November 2020), while one expert submitted a separate report, focusing on certain specific areas (ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2623-Anx2-Red2, [Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare](#), 3 November 2021).

<sup>21</sup> Impugned Decision, para. 16.

<sup>22</sup> Victims Second Submission, para. 7.

<sup>23</sup> The Panel notes that Rule 94 *bis* of the ICTY Rules of Procedure and Evidence, dealing with the testimony of expert witnesses, refers – similarly to Rule 149 of the Rules – to “expert witness” (singular)

require the questioning of more than one expert, with all related logistical implications,<sup>24</sup> does not detract from the aforementioned finding. Victims' Counsel's argument in this respect is therefore without merit.

18. In light of the foregoing, Victims' Counsel failed to demonstrate that reconsideration of the Impugned Decision to the extent that the appointed experts have been instructed to endeavour to submit a joint report is necessary to avoid injustice. The second limb of the test for reconsideration has therefore also not been met.

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under its paragraphs (a)-(c) and was found not to prevent the admission into evidence of expert reports authored by more than one expert: *see, e.g., ICTY, Prosecutor v. Mladić, IT-09-92-T, [Decision on Defence Motion to Admit Into Evidence Subotić and Poparić's Expert Reports and Related Documents](#), 9 June 2016, paras 8, 18, admitting into evidence identified portions of four reports co-authored by two experts. See also ICC, Prosecutor v. Ongwen, [ICC-02/04-01/15-T-174-ENG](#), Transcript of hearing, 4 May 2018, p. 7, line 11 to p. 8, line 19, where the relevant trial chamber admitted into evidence a joint report co-authored by four experts.*

<sup>24</sup> Request, para. 12.

V. DISPOSITION

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

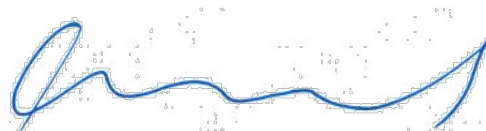
- a. **REJECTS** the Request; and
- b. **INSTRUCTS** the Registry to transmit the Request and the present decision to the experts appointed pursuant to the Impugned Decision.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Monday, 20 September 2021  
At The Hague, the Netherlands.