

**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

**Date:** 24 January 2022

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**Public Redacted Version of Victims' Counsel Observations on the Export Reports  
regarding a Referral of Reparations Proceedings to National Courts in Kosovo**

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## I. INTRODUCTION

1. These submissions are filed by Victims' Counsel pursuant to the decision of the Trial Panel of 19 November 2021 in which the Panel instructed Victims' Counsel to make submissions on the reports filed by the experts concerning the question whether other courts in Kosovo provide an appropriate legal avenue for the victims.<sup>1</sup>

## II. PROCEDURAL BACKGROUND

2. On 21 May 2021, the Trial Panel 1 ("Panel") issued its decision on the appointment of experts, in which it ordered the Victim' Participation Office ("VPO") to submit, by 4 June 2021, a list of three experts available to provide an expert report to clarify whether national courts in Kosovo offer a realistic avenue for victims to claim reparations.<sup>2</sup> It also invited the Defence and Victim's Counsel 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.

3. On 4 June 2021, the VPO submitted the requested list of experts.<sup>3</sup>

4. On 14 June 2021, Victims' Counsel filed her submission, in accordance with the Panel's decision of 21 May 2021. Victims' Counsel raised fundamental questions as to the option of referring the victims to civil litigation in other courts in Kosovo.<sup>4</sup> According to Victims' Counsel, such a referral cannot be reconciled with the victims' fundamental rights to access to justice and to an effective remedy and reparations.

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<sup>1</sup> KSC-BC-2020, F00260/RED, Public redacted version of Decision on requests for extension of time limit to submit expert report(s) and related submissions, 19 November 2021, para. 10.

<sup>2</sup> KSC-BC-2020-05, F00124, Decision on the appointment of expert(s), 20 May 2021.

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

<sup>4</sup> KSC-BC-2020-05, F00134, Victims' Counsel Submission on the Decision on the appointment of expert(s), 14 June 2021, para. 21-36.

5. Following the invitation by the Panel to propose questions that the expert(s) should address in their report, Victims' Counsel filed a list of substantives issues on 19 August 2021.<sup>5</sup> These issues included those raised in Victims' Counsel submission of 14 June 2021.
6. On 3 September 2021, the Panel appointed three experts and instructed them to file their report by 22 November 2021. It also instructed the Defence and Victims' Counsel to make submissions on the report, if they so wish, within two weeks of the notification of the report.<sup>6</sup>
7. On 15 November 2021, the VPO submitted, on behalf of the three experts a request for extension of the time limit to submit the expert report(s) ("VPO's Request").<sup>7</sup>
8. On 18 November 2021, Victims' Counsel filed a response to the VPO's Request, in which she also requested an extension of time to file her submissions, should the VPO's Request be granted ("Victim's Counsel Request").<sup>8</sup>
9. On 19 November 2021, the Panel granted the VPO's Request and Victims' Counsel's Request and instructed the experts to submit their report(s) by 17 December 2021 and the Defence and Victims' Counsel to make submissions on the report(s), if they so wish, by 21 January 2022.<sup>9</sup>

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<sup>5</sup> KSC-BC-2020-05, F00166, Victims' Counsel Submission on the Second Decision on the appointment of expert(s), 19 August 2021.

<sup>6</sup> KSC-BC-2020-05, F00184/RED, Public redacted version of Third decision on the appointment of expert(s), 3 September 2021.

<sup>7</sup> KSC-BC-2020-05, F00252/RED, Public Redacted Version of Request for Extension of Time Limit to Submit Expert Report(s), filing F00252, dated 15 November 2021, 17 November 2021.

<sup>8</sup> KSC-BC-2020-05, F00259, Victims' Counsel response to Request for Extension of Time Limit to Submit Expert Report(s), dated 15 November 2021 (F00252), 18 November 2021.

<sup>9</sup> KSC-BC-2020-05, F00260/RED, Public redacted version of Decision on requests for extension of time limit to submit expert report(s) and related submissions, 19 November 2021.

10. On 17 December 2021, the VPO transmitted three expert reports to the Panel.<sup>10</sup> The English version of one of the three reports was made available to Victims' Counsel on 14 January 2022.<sup>11</sup>
11. On 20 January 2022, Victims' Counsel filed a motion for extension of time limit to file her submissions on the experts reports.<sup>12</sup>
12. On 20 January 2022, the Panel granted the Victims' Counsel motion to vary the time limit and extend the deadline to Tuesday 25 January 2022.<sup>13</sup>

### III. APPLICABLE LAW

13. Article 22 (7) of the Law determines that a Trial Panel may include a decision on the scope and extent of any damage, loss and injury to, or in respect of, Victims in its judgement.
14. Furthermore, article 22 (9) of the Law provides that where appropriate, the Specialist Chambers may refer the Victims to civil litigation in the other courts of Kosovo.
15. Article 6 (1) of the European Convention of Human Rights (ECHR) sets out that 'In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

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<sup>10</sup> KSC-BC-2020-05, F00287, Transmission of Expert Reports with four confidential and two public Annexes, 17 December 2021.

<sup>11</sup> The notification of the filing of the English translation of the third expert report was received by Victims' Counsel by email at 19:44.

<sup>12</sup> KSC-BC-2020-05, F00291, Victims' Counsel motion for extension of time limit to file her submissions on the experts reports, 20 January 2022.

<sup>13</sup> KSC-BC-2020-05, F00292/RED, Public Redacted Version of Decision on motion for extension of time limit for submissions on expert reports, 20 January 2022.

16. It is further reiterated that victims' rights in international law include effective access to justice as well as adequate, effective and prompt reparation for harm suffered.<sup>14</sup>

17. Lastly, the Trial Panel shall adjudicate in accordance with the ECHR and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.<sup>15</sup>

#### IV. OBSERVATIONS

18. Victims Counsel observes that the expert findings in the three reports – albeit in detail diverging – clarify overall that the national courts in Kosovo do not offer a realistic avenue for the victims of the alleged crimes charged in this case to claim reparations and have such judgments enforced. In the following, Victims' Counsel will highlight and discuss the key findings of the three reports which evidence why no such realistic avenue exists.

19. It shall be noted that the report, for ease of reference will refer to the three experts in the subsequent discussion as follows:

[REDACTED] is referred to as Expert 1 (E1).

[REDACTED] is referred to as Expert 2 (E2).

[REDACTED] is referred to as Expert 3 (E3).

#### *Efficiency and length of proceedings*

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<sup>14</sup> UN 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, Section VII. 11.(a) and (b).

<sup>15</sup> Art 3(2)(e) of the Law.

20. The reports make clear that the judicial system in Kosovo is overburdened. All three experts conclude that the administration of justice is slow and suffers from a growing backlog of cases.

21. E3 reports observes that the adjudication of cases in the domestic system is slow and suffers from a build-up of pending cases, with newly received cases adding to the increasing backlog.<sup>16</sup> Based on officially published data by the courts, E3 observes that “the number of pending cases has been increasing from year to year.”<sup>17</sup> Similarly, E2 reports that “[t]he overall administration of justice continues to be slow, inefficient, and vulnerable to undue political influence.”<sup>18</sup>

22. E1 also confirms difficulties with the length of proceedings, although in general seeing some improvements compared to the situation in 2017.<sup>19</sup> That year, the National Audit Office observed long waiting times for citizens to have their cases reviewed and forecast that the judiciary may collapse should no measures be taken. Although E1 does see some improvement, problems have remained.<sup>20</sup> However, yet to be determined is the level of disruption caused by the global pandemic COVID-19, causing significant delays and increases in the number of unresolved cases. E1 expects COVID-19 to have consequences in the coming years negatively “affecting the overall efficiency of the judicial system.”<sup>21</sup>

23. Further difficulties affecting the length of proceedings in national courts could stem from the climate of hostility towards the KSC observed by the experts. E2 frankly observes that “the length of proceedings, access to legal aid, and other procedural matter may be negatively affected if an order to proceed with civil claims in Kosovo is issued by the KSC.”<sup>22</sup> E3 confirms the danger of such difficulties.<sup>23</sup>

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<sup>16</sup> Report submitted by E2, p. 19.

<sup>17</sup> Report submitted by E3, p. 29.

<sup>18</sup> Report submitted by E2, p. 19.

<sup>19</sup> Report submitted by E1, p. 12.

<sup>20</sup> Report submitted by E1, p. 12.

<sup>21</sup> Report submitted by E1, p. 13.

<sup>22</sup> Report submitted by E2, p. 21.

<sup>23</sup> Report submitted by E3, p. 19.

24. Victims' Counsel observes that a referral of the victims' reparations claims to the national courts would only add the victims' cases to the ever-growing number of pending cases. The prospect of having their cases heard within a *reasonable* time, as required by article 6(1) of the ECHR, is therefore very low.

25. The reasonableness of the length of proceedings must be determined in 'light of the circumstances of the case', taking into account criteria such as the complexity of the case, and what is at stake for the claimants.<sup>24</sup> The European Court of Human Rights (ECtHR) uses these criteria for its determination of a reasonable length *ex post*. However, the Trial Panel will have to determine whether it would be appropriate to refer reparations claims to the national courts on an *ex ante* basis, which will involve a prognosis to be made on the basis of the expert findings. Only if the Trial Panel can safely determine that the obligation to guarantee that a claim will be heard without violating article 6(1) of the ECHR, may it be appropriate to refer a case to the national courts.

26. Considering the expert findings, it seems highly likely that overall the length of proceedings would be unreasonably long. Added to the general observations above is that the Victims would only have a chance to make a claim for reparations in private law proceedings on the basis of a guilty verdict. Any assessment on the potential length of proceedings would therefore have to consider that claims for damages could only be brought after criminal proceedings have been completed,<sup>25</sup> which would most likely include an Appeals procedure. Victims first issued their claim in September 2021 before this Trial Panel, at the first opportunity that they had safe and effective access to justice. Combining the duration of the proceedings before the KSC with the average duration of the courts in Prishtina of up to eight years<sup>26</sup> removes any doubt that this cannot be considered as reasonable. As E1 notes, '[a]lthough the law on

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<sup>24</sup> *Frydlender v. France*, ECtHR [GC], 27 June 2000, para 43.

<sup>25</sup> Report submitted by E3, p. 49.

<sup>26</sup> Report submitted by E1, p. 30-31.

contentious procedure has set deadlines for the processing of civil cases, the practical reality is extremely bitter.<sup>27</sup>

27. Further, the Trial Panel will need to consider that the claimants have been waiting for justice for more than 22 years now, which is an extraordinary aspect weighing heavily in favour of ensuring that the quickest route to having their claims reviewed is taken – this route is adjudication by the Trial Panel.

#### *Only limited access to legal aid*

28. Legal aid is only available to a limited extent in Kosovo and leaves the danger that victims are left without proper assistance. E3 explains that the existing funds for legal aid do not have sufficient resources to ensure that legal aid is continuously provided. “For the time being, legal aid is mostly provided to individuals on welfare and those with below-average income.”<sup>28</sup> Considering the diverse difficulties that the experts identify in their reports, it is most likely that those victims who may not be entitled to legal aid will therefore not even try to bring any claim within the national courts. These victims would run the danger of having to shoulder high costs for legal representation in a situation where any successful claim would be very uncertain.

#### *Issues of anonymity and protection*

29. The high level of threat faced by all victims participating in the proceedings has led to extensive protective measures in this case. Being left without such measures in any subsequent private law claims before the national courts would undermine the effectiveness of protection. Yet, victims’ rights in international law require access to justice in such way that ensures safety from retaliation and intimidation ‘before,

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<sup>27</sup> Report submitted by E1, p. 30.

<sup>28</sup> Report submitted by E3, p. 24.



during and after judicial, administrative, or other proceedings that affect the interests of victims.<sup>29</sup>

30. The expert reports leave little doubt that anonymity of claimants in civil litigation is unknown and most likely not be possible.

31. According to the findings of E2, no legislation in Kosovo exists that would allow anonymous civil claims.<sup>30</sup> Furthermore, no practice in national courts exists that would allow protective measures in civil litigation initiated by private claims in Kosovo, as far as the research conducted by E3 has shown.<sup>31</sup> Indeed, the 'civil law in Kosovo does not recognize the procedure of anonymity.'<sup>32</sup>

"It is even difficult to imagine that the system for enforcing court decisions which is currently in use would accept to process cases in which restitution is sought by anonymous persons."<sup>33</sup>

32. On the contrary, various provisions of the Laws on Civil Procedure and Contested Procedures may result in the victims being forced to reveal their identity over the course of the proceedings. Article 99 Civil Procedure Law defines the written form of an application to be submitted to the court, requiring among other information the first and last name of the claimant and the claimant's signature.<sup>34</sup> Articles 355, 356 and 357 of the Law of on Contested Procedure may trigger the obligation to appear before the court or an appointed expert, which may lead to revelations about the victims' identities.<sup>35</sup>

33. In-court redaction are not provided in the relevant Law on Contested Procedure to allow anonymity of the claimants.<sup>36</sup>

34. Any other protective measures, for example appearance via video-link, voice and face distortion, or physical protection are not facilitated in the current judicial

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<sup>29</sup> Section VIII.12.(b) UN Basic Principles.

<sup>30</sup> Report submitted by E2, p. 22.

<sup>31</sup> Report submitted by E3, p. 46.

<sup>32</sup> Report submitted by E1, p. 26 and similarly at p 21.

<sup>33</sup> Report submitted by E3, p. 28.

<sup>34</sup> Report submitted by E3, p. 24.

<sup>35</sup> Report submitted by E1, p. 26.

<sup>36</sup> Report submitted by E1, p. 23 (footnote omitted).

system for private law claims – if they exist at all, they focus on criminal law proceedings.<sup>37</sup>

35. Its clear from the above that effective protection measures to ensure continued health, safety and wellbeing of the victims cannot be ensured in civil litigation before other courts in Kosovo.

#### *Uncertainty regarding the statute of limitations*

36. All expert reports indicate uncertainty as to any statute of limitation that may bar private law claims by the victims in the national courts of Kosovo. E 2 explains that “article 125.1 of the Law on Contested Procedure gives discretion to the court to decide on the time limit based on the individual circumstances of the case.”<sup>38</sup> E 1 suggests that “there can be no unique opinion on this issue,...it is difficult to give an explicit and correct opinion.”<sup>39</sup>

37. These findings on discretion and uncertainty indicate another element of the inherent difficulties that victims would be met with if their claims were referred to the national courts in Kosovo.

#### *Limited enforcement options of national court decisions*

38. A further factor indicating that effective access to justice would be severely restricted is the limited enforcement options of any award that would be available to the victims. Kosovo has only signed two bilateral agreements in the field of international legal cooperation in civil matters, with Northern Macedonia and Albania.<sup>40</sup> However, these agreements have to date not entered into force.<sup>41</sup> E1

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<sup>37</sup> Report submitted by E2; similarly Report submitted by E1, p. 22-23; Report submitted by E3, p. 47.

<sup>38</sup> Report submitted by E2, p. 25.

<sup>39</sup> Report submitted by E1, p. 30.

<sup>40</sup> Report submitted by E1, p. 36-37.

<sup>41</sup> Report submitted by E1, p. 36-37.

additionally points out that Kosovo has not acceded to any of the Hague Conference Conventions governing matters of international legal cooperation in civil matters.<sup>42</sup> Therefore, E1 suggests in his report that that any enforcement into assets of one of the parties located outside the territory of the Republic of Kosovo, victims would need to seek recognition and enforcement of that decision in the State in which the assets in question are located.<sup>43</sup> These findings highlight the level of difficulty and added length of the proceedings.

### *Corruption and political interference*

39. All three experts agree that a level of political interference and corruption within judicial institutions do exist. E1 speaks of corruption as “a perception and reality at the same time”<sup>44</sup> while “influence or interference” on the legal staff who “have been selected as part of the legal system” comes “mainly from Kosovo politics”.<sup>45</sup> E2 similarly found a strong belief in the existence of corrupt practices to such extent that “the role of the courts to this effect has been devalued to the point where not expecting a proper judicial process appears normal.”<sup>46</sup> E3 reports that “corruption in judicial institutions and political interference with their work, including even serious crimes cases (the so-called high-profile cases) are widely discussed in public.”<sup>47</sup>

40. The lack of efficient accountability structures, as reported by the experts, is inextricably linked with “corruption, poor performance and other inefficiencies within the judicial system”.<sup>48</sup>

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<sup>42</sup> Report submitted by E1, p. 38.

<sup>43</sup> Report submitted by E1, p. 35.

<sup>44</sup> Report submitted by E1, p. 2.

<sup>45</sup> Report submitted by E1, p. 5.

<sup>46</sup> Report submitted by E2, p. 15.

<sup>47</sup> Report submitted by E3, p. 29.

<sup>48</sup> Report submitted by E2, p. 18.

### *Conclusion*

41. Victims' counsel concludes that the expert reports highlight how many uncertainties and possible difficulties a private law suit by the victims would entail. These issues concern the lengths and efficiency of any proceedings before national courts, limitations on the access to legal aid which would leave a disproportionate risk of costs for the victims, a lack of provisions on anonymity which could guarantee the necessary protection for the victims participating in this case, uncertainty regarding the statute of limitations, limited international enforcement options of any national court decision, and not least the danger of undue political interference and corruption. Based on the experts' findings Victims' Counsel is highly concerned that any referral of reparations claims to the national courts in Kosovo bears the danger of violating victims' rights under article 6(1) of the ECHR.

42. For these reasons, Victims' Counsel submits that the national courts in Kosovo do not offer a realistic avenue for the victims of the alleged crimes charged in this case to claim reparations and have such judgments enforced.

43. However, should the Trial Panel continue to consider a referral, Victims' Counsel wishes to cross-examine all three experts in accordance with Rule 149 (2) (c) of the Rules of Procedure and Evidence. It would then be necessary to examine the findings of all three experts in depth in a trial hearing.

### III. RELIEF REQUESTED

For these reasons, Victims' Counsel respectfully requests the Trial Panel to:

- Decide to conduct reparations proceedings, leading eventually to a Reparation Order in accordance with articles 22(8) and 44(6) of the Law, before this Trial Panel.

Should the Trial Panel not grant the requested relief, Victims' Counsel requests further

- To cross-examine the expert witnesses according to Rule 149 (2) (c) of the Rules of Procedure and Evidence.

**Word count: 3277**

A handwritten signature in black ink, appearing to read 'Anni Pues', written in a cursive style.

**Anni Pues**  
**Victims' Counsel**

24 January 2022

At The Hague, the Netherlands