



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: 4 February 2022

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Public redacted version of
Decision on the application of Article 22(9) of the Law, setting further procedural
steps in the case, and requesting information

To be notified to:

Specialist Prosecutor

Jack Smith

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Registry

Registrar

Head of Victims' Participation Office

Victims' Counsel

Anni Pues

To be served on:

Ministry of Justice of Kosovo

TRIAL PANEL I (Panel) hereby renders this decision on the application of Article 22(9) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), setting further procedural steps in the case, and requesting information.

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 on whether the national courts in Kosovo offer a realistic avenue for the victims in this case to claim reparations and, if reparations would be granted in judgments issued by national courts in Kosovo, to have such judgments enforced.¹ The Panel also ordered the Defence for Salih Mustafa (Defence and Accused, respectively) and Victims' Counsel to submit their observations, if any, within ten days of notification of the filing by the VPO.²

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.³

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

¹ 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.

² Decision, para. 24(b).

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

be addressed by any appointed expert(s).⁴ 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 referred to in paragraphs 20 and 22 of the Decision.⁵ The Panel also ordered the Defence and Victims’ Counsel to submit their observations, if any, on the VPO’s submissions by 20 August 2021.⁶

5. On 12 July 2021, the Panel issued the “Decision on victims’ procedural rights during trial” (Decision on Victims’ Rights).⁷

6. 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.⁸

7. On 19 August 2021, Victims’ Counsel submitted the “Victims’ Counsel Submission on the Second Decision on the appointment of expert(s)”,⁹ including a list of questions for the consideration of the expert(s).¹⁰ The Defence did not submit any observations.

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

⁵ KSC-BC-2020-05, F00140, Trial Panel I, *Second decision on the appointment of expert(s)* (Second Decision), 25 June 2021, confidential, paras 9-10, 12(a). A public redacted version was filed on the same day, F00140/RED.

⁶ Second Decision, para. 12(b).

⁷ KSC-BC-2020-05, F00152, Trial Panel I, *Decision on victims’ procedural rights during trial*, 12 July 2021, public.

⁸ KSC-BC-2020-05, F00157, Registrar, *Registry Submission Pursuant to the Second Decision on the Appointment of Expert(s)* (Second VPO Submission), 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.

⁹ 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.

¹⁰ Annex 1 to Victims Second Submission.

8. On 3 September 2021, the Panel issued the “Third decision on the appointment of experts” (Third Decision on the Appointment of Experts), appointing three individuals as experts in the present case (Appointed Experts), instructing them to report on certain topics identified by the Panel by 22 November 2021, and instructing the Defence and Victims’ Counsel to make submissions on the report, if they so wish, within two weeks of its notification.¹¹

9. On 15 September 2021, in her opening statement, Victims’ Counsel, *inter alia*, requested the Panel to refrain from referring the victims she represents to civil litigation in Kosovo courts.¹²

10. On 20 September 2021, the Panel rejected a Victims’ Counsel request for reconsideration¹³ of the Third Decision on the Appointment of Experts.¹⁴

11. On 18 October 2021, Victims’ Counsel submitted the “Victims’ Counsel Submission on Reparations” (Victims’ First Submissions), reiterating her request for the Panel not to refer victims to civil litigation in Kosovo courts but, instead, to include a decision on damage, loss, and injury in its judgment.¹⁵

¹¹ KSC-BC-2020-05, F00184, Trial Panel I, *Third decision on the appointment of expert(s)*, 3 September 2021, confidential. A public redacted version was filed on the same day, F00184/RED.

¹² KSC-BC-2020-05, Transcript of Hearing, 15 September 2021 (15 September 2021 Transcript), public, p. 345, line 5 to p. 373, line 19.

¹³ KSC-BC-2020-05, F00190, Victims’ Counsel, *Victims’ Counsel motion for reconsideration of the Third decision on the appointment of expert(s)* (Reconsideration Request), 7 September 2021, public. The Defence did not respond to the Reconsideration Request.

¹⁴ KSC-BC-2020-05, F00209, Trial Panel I, *Decision on Victims’ Counsel request for reconsideration of the third decision on the appointment of expert(s)*, 20 September 2021, public.

¹⁵ KSC-BC-2020-05, F00239, Victims’ Counsel, *Victims’ Counsel Submission on Reparations*, 18 October 2021, public.

12. On 19 November 2021, upon request by the VPO¹⁶ and Victims' Counsel,¹⁷ the Panel extended the time limit for the submission of the experts' report(s) to 17 December 2021 and the time limit for any Defence and Victims' Counsel submissions thereon to 21 January 2022.¹⁸

13. On 13 December 2021, considering the advanced stage of the Specialist Prosecutor's Office (SPO) case, the Panel informed the Parties and Victims' Counsel of a tentative timeline for the next procedural steps in the case, for the sole purpose of giving notice of the preparatory steps to be undertaken, once the SPO case will be closed.¹⁹

14. On 17 December 2021, the Registrar transmitted²⁰ the Appointed Experts' respective reports to the Panel (First Report,²¹ Second Report,²² and Third Report,²³ respectively, and collectively "Expert Reports").

¹⁶ KSC-BC-2020-05, F00252, Registry, *Request for Extension of Time Limit to Submit Expert Report(s)*, 15 November 2021, confidential. A public redacted version was filed on 17 November 2021, F00252/RED.

¹⁷ KSC-BC-2020-05, F00259, Victims' Counsel, *Victims' Counsel response to Request for Extension of Time Limit to Submit Expert Report(s) dated 15 November 2021 (F00252)*, 18 November 2021, public.

¹⁸ KSC-BC-2020-05, F00260, Trial Panel I, *Decision on requests for extension of time limit to submit expert report(s) and related submissions*, 19 November 2021, confidential. A public redacted version was filed on the same day, F00260/RED.

¹⁹ KSC-BC-2020-05, Transcript of Hearing, 13 December 2021, public, p. 1919, line 2 to p. 1920, line 16.

²⁰ KSC-BC-2020-05, F00287, Registrar, *Transmission of Expert Reports with four confidential and two public Annexes*, 17 December 2021, public, with Annexes 1, 3, 5-6, confidential, and Annexes 2-4, public.

²¹ KSC-BC-2020-05, F00287/A01, Registrar, *Report submitted by [REDACTED]*, 17 December 2021, confidential. A public redacted version was filed on the same day, F00287/A02.

²² KSC-BC-2020-05, F00287/A03, Registrar, *Report submitted by [REDACTED]*, 17 December 2021, confidential. A public redacted version was filed on the same day, F00287/A04.

²³ KSC-BC-2020-05, F00287/A06, Registrar, *Report submitted by [REDACTED]*, 17 December 2021, confidential. The English translation of the report was filed on 14 January 2022, in confidential (F00287/A06/eng) and public redacted form (F00287/A06/eng/RED).

15. On 20 January 2022, upon Victims' Counsel's request,²⁴ the Panel extended the time limit for any Defence and Victims' Counsel submissions on the Expert Reports to 25 January 2022.²⁵

16. On 21 January 2022, the Panel issued the "Second decision on the conduct of the proceedings" (Second Conduct of Proceedings Decision), *inter alia*, ordering Victims' Counsel to file by 11 February 2022 a list of proposed (expert) witnesses to be called by the Panel and relevant non-oral material she wishes the Panel to order the submission of related to the establishment of the truth.²⁶

17. On 24 January 2022, Victims' Counsel, *inter alia*, requested the Panel to appoint an expert to medically assess the physical and psychological damage suffered by three of the direct victims in the present case (Victims' 24 January Submissions).²⁷

18. Also, on 24 January 2022, Victims' Counsel and the Defence filed their respective submissions on the Expert Reports (Victims' Second Submissions²⁸ and Defence Submissions,²⁹ respectively).

²⁴ KSC-BC-2020-05, F00291, Victims' Counsel, *Victims' Counsel motion for extension of time limit to file her submissions on the experts reports*, 20 January 2022, public.

²⁵ KSC-BC-2020-05, F00292, Trial Panel I, *Decision on motion for extension of time limit for submissions on expert reports*, 20 January 2022, confidential. A public redacted version was filed on the same day, F00292/RED.

²⁶ KSC-BC-2020-05, F00296, Trial Panel I, *Second decision on the conduct of the proceedings*, 21 January 2022, public, para. 21(g).

²⁷ KSC-BC-2020-05, F00297, Victims' Counsel, *Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022*, 24 January 2022, confidential. A public redacted version was filed the same day, F00297/RED.

²⁸ KSC-BC-2020-05, F00298, Victims' Counsel, *Victims' Counsel Observations on the Export Reports regarding a Referral of Reparations Proceedings to National Courts in Kosovo*, 24 January 2022, confidential. A public redacted version was filed on the same day, F00298/RED.

²⁹ KSC-BC-2020-05, F00299, Defence, *Defence submission regarding Reports of Appointed Experts*, 24 January 2022, public.

II. SUBMISSIONS

19. In her opening statement and the Victims' First Submissions, Victim's Counsel submits that the practice of national and international courts to date as well as findings of the International Organisation for Migration reveal that referring victims to national courts to claim compensation – in instances where this is legally possible – is not an effective option, due to the fact that factors, such as domestic legislation, the institutional framework, political practice, and availability of resources, determine whether victims have actual access to redress, with the consequence that some victims may obtain compensation, while others may not.³⁰ Therefore, international tribunals, including the Specialist Chambers (SC), should fully exhaust their competencies to implement victims' rights to reparation, rather than referring them to civil litigation in national courts.³¹ Victims' Counsel further submits that referring victims to civil litigation in Kosovo courts may violate their rights, noting, *inter alia*, that: (i) reparations for victims is currently an unknown area in war crime trials in Kosovo, as it is currently unclear whether the Kosovan crime victim compensation law covers victims of war crimes;³² (ii) as opposed to criminal proceedings, civil proceedings do not provide for any legal mechanism to protect victims' identities, with the consequence that victims cannot and will not claim compensation in such proceedings because of the risk of exposure;³³ and (iii) the existing compensation and restitution mechanisms in the countries of the former Yugoslavia do not cover everyone in need of redress.³⁴ Therefore, Victims' Counsel requests the Panel to consider the

³⁰ 15 September 2021 Transcript, p. 359, line 11 to p. 363, line 22; Victims' First Submissions, paras 14-23. *See also* 15 September 2021 Transcript, p. 364, lines 14-17.

³¹ 15 September 2021 Transcript, p. 364, line 10 to p. 365, line 1, p. 368, lines 15-19; Victims' First Submissions, para. 25.

³² 15 September 2021 Transcript, p. 365, lines 4-18; Victims' First Submissions, para. 27.

³³ 15 September 2021 Transcript, p. 365, lines 19-24; Victims' First Submissions, para. 28.

³⁴ 15 September 2021 Transcript, p. 365, line 25 to p. 366, line 6; Victims' First Submissions, para. 30.

participating victims' claims in full and to determine the scope and extent of any damage and injury suffered in accordance with Article 22(7) of the Law.³⁵

20. In the First Report, the expert (First Expert) submits that, should victims of crimes within the jurisdiction of the SC request compensation before civil courts in Kosovo, they may face a number of both legal and practical difficulties.³⁶ Specifically, the First Expert submits, *inter alia*, that: (i) a certain level of corruption and interference exists within the legal system in Kosovo;³⁷ (ii) the duration of civil cases in Kosovo is concerning;³⁸ (iii) whilst war crimes are not statute-barred, statutes of limitations may still apply to the civil claims advanced by the victims of such crimes;³⁹ (iv) anonymity procedures have not been applied to civil cases, as Law No. 04/L-015 on Witness Protection (Witness Protection Law) is confined to criminal cases and therefore does not apply to civil cases, and currently there is no legal basis for the protection of victims who may request compensation following a criminal judgment;⁴⁰ (v) Law No. 05/L-036 on Crime Victim Compensation (Law on Crime Victim Compensation) does not apply to victims of crimes under the jurisdiction of the SC and no victims of war crimes have ever benefitted from compensation from the fund established under the aforementioned law;⁴¹ (vi) Kosovo has only entered two bilateral agreements in the field of international legal cooperation in civil matters, which have not yet entered into force, and has not acceded to any of the Hague Conference Conventions governing matters of international legal cooperation in civil matters;⁴² and (vii) execution of an award issued by Kosovo courts against assets

³⁵ 15 September 2021 Transcript, p. 366, lines 7-10, p. 367, lines 5-12, p. 368, lines 20-22, p. 369, lines 5-8, p. 373, lines 2-3; Victims' First Submissions, paras 31, 37.

³⁶ First Report, pp. 44-45.

³⁷ First Report, pp. 3-12.

³⁸ First Report, pp. 9, 13-14, 31-34.

³⁹ First Report, pp. 30-31.

⁴⁰ First Report, pp. 21-24, 27.

⁴¹ First Report, pp. 14-16, 19, 24-25, 27-28, 46.

⁴² First Report, pp. 37-39.

located outside the territory of Kosovo would require the interested party to seek recognition and enforcement of the Kosovan award from the courts of the relevant state, under the applicable laws of such state.⁴³ As regards legal aid, the First Expert enumerates a number of entities which could potentially provide support to victims referred to in decisions of the SC.⁴⁴

21. In the Second Report, the expert (Second Expert) submits that the level of corruption among court staff in Kosovo is difficult to measure and may actually be lower than perceived by the general public; nevertheless, factors such as the mere existence of a rhetoric of corruption and the prolonged deficit of accountability measures may encourage the adoption of such practices.⁴⁵ The Second Expert further submits that a number of factors can be considered by the Panel in deciding on the appropriate forum for the issuance of a potential reparations order, including, *inter alia*, that: (i) legislation in Kosovo does not provide measures for anonymous civil claims, therefore, if the victims are not willing to proceed with their civil claims in Kosovo while having their identities revealed, any other discussion regarding the judicial system in Kosovo may not be of any practical use;⁴⁶ (ii) the current legal framework in Kosovo does not provide for witness protection in civil cases and the technical equipment required for the implementation of such measures may, in any case, not always be available;⁴⁷ (iii) the applicable legal framework gives discretion to the national courts to decide on the applicable statute of limitations based on the individual circumstances of the case and, while it may be highly unlikely for courts to bar any civil procedures arising from a SC judgment, direct discussions between Kosovan judicial authorities and the SC may be required in order to decide on the

⁴³ First Report, pp. 36-37.

⁴⁴ First Report, pp. 17-19.

⁴⁵ Second Report, paras 18-30.

⁴⁶ Second Report, paras 39-40.

⁴⁷ Second Report, paras 42-43. *See also* para. 60.

applicable legal framework and ensure uniformity;⁴⁸ (iv) the Law on Crime Victim Compensation does not apply to victims of crimes under the jurisdiction of the SC;⁴⁹ and (v) victims may be negatively affected by the length of civil proceedings in Kosovo.⁵⁰ Lastly, the Second Expert also refers to a number of entities which could provide support to victims as concerns legal aid.⁵¹

22. In the Third Report, the expert (Third Expert) submits that the existing judicial practice in Kosovo and the attitude towards the SC do not suggest that the judicial or administrative authorities will be willing to compensate the victims who may be granted such status in judgments rendered by the SC.⁵² Specifically, the Third Expert points out, *inter alia*: (i) the poor performance of the judicial authorities with regard to the exercise of the right to compensation in war crimes cases, despite the existence of relatively well-developed laws pertaining to this issue;⁵³ (ii) the backlogs and delays prevalent in the area of civil law;⁵⁴ and (iii) the fact that, whilst it is difficult to assess their prevalence in practice, both corruption in judicial institutions and political interference with their work, including in so-called high profile cases, are widely discussed by the public in Kosovo.⁵⁵ The Third Expert also submits that: (i) whilst legal aid would be available for victims before Kosovo courts, the existing funds do not have sufficient resources to ensure that legal aid is continuously provided;⁵⁶ and (ii) execution of an award issued by Kosovo courts against assets located in the territory of a country which lacks judicial cooperation agreements or diplomatic ties

⁴⁸ Second Report, para. 46.

⁴⁹ Second Report, paras 47, 67.

⁵⁰ Second Report, paras 48-49.

⁵¹ Second Report, para. 50.

⁵² Third Report, pp. 20-21.

⁵³ Third Report, pp. 20, 23, 49-50. *See also* pp. 8-20.

⁵⁴ Third Report, pp. 21, 24, 30-33, 41-42, 52-53.

⁵⁵ Third Report, pp. 24, 30, 36. *See also* pp. 30-35, 37-40.

⁵⁶ Third Report, pp. 23-24. *See also* pp. 42-45.

with Kosovo would not be possible.⁵⁷ As regards matters pertaining to the protection of victims, the Third Expert avers that: (i) the current legal framework in Kosovo does not allow for the submission and/or enforcement of anonymous civil claims;⁵⁸ (ii) the Witness Protection Law only regulates the procedure for the protection of witnesses in criminal cases;⁵⁹ and (iii) while the relevant legal provisions suggest that a person who submits a civil claim may request the application of certain protective measures on the basis of good cause, court practice to date and the research conducted by the Third Expert indicate that this has never occurred in practice.⁶⁰ As regards the possibilities of obtaining compensation from an indigent convicted person, the Third Expert submits that: (i) victims of crimes within the SC's jurisdiction could benefit from restitution from the Victim Compensation Fund referred to in paragraph 15 of the Third Decision on the Appointment of Experts or other compensation programme;⁶¹ however there is no information indicating that victims of war crimes have ever contacted the aforementioned fund;⁶² and (ii) the Law on Crime Victim Compensation specifies the offences for which a victim may request compensation and does not specifically include war crimes; however, Article 6(2) thereof provides the relevant committee certain flexibility concerning victims' claims relating to other serious criminal offences.⁶³

23. In the Victims' Second Submissions, Victims' Counsel submits that the Appointed Experts' findings clarify overall that the national courts in Kosovo do not offer a realistic avenue for the victims of the alleged crimes charged in the present case to claim reparations and to have such judgments enforced.⁶⁴ In this respect, Victims'

⁵⁷ Third Report, p. 57.

⁵⁸ Third Report, pp. 21, 25, 29, 47-48.

⁵⁹ Third Report, pp. 13, 47.

⁶⁰ Third Report, pp. 25, 47.

⁶¹ Third Report, pp. 28, 50.

⁶² Third Report, pp. 19, 23, 50.

⁶³ Third Report, pp. 14-15, 29, 50.

⁶⁴ Victims' Second Submissions, paras 18, 42.

Counsel points out that: (i) the Expert Reports make it clear that the judicial system in Kosovo is overburdened; the administration of justice is slow and suffers from a growing backlog of cases⁶⁵ and that therefore, a referral of victims' reparations claims to the national courts would highly likely violate their right under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to have their cases heard within a reasonable time;⁶⁶ (ii) legal aid is only available to a limited extent in Kosovo and leaves the danger that victims are left without proper assistance;⁶⁷ (iii) the Expert Reports leave little doubt that anonymity and/or other protective measures are not available for private law claims, meaning that the safety and well-being of victims could not be ensured in civil litigation before Kosovo courts;⁶⁸ (iv) all Expert Reports indicate uncertainty as to any statute of limitation that may bar private law claims by the victims in Kosovo national courts;⁶⁹ (v) limited international enforcement options would be available to the victims following the issuance of an award by Kosovo national courts and existing options would further add to the level of difficulty and the length of the proceedings;⁷⁰ and (vi) the Appointed Experts agree that a level of political interference and corruption within judicial institutions does exist.⁷¹ Therefore, Victims' Counsel requests that reparations proceedings leading eventually to a Reparation Order in accordance with Articles 22(8) and 44(6) of the Law be conducted before the Panel.⁷² Alternatively, should the Panel continue to consider a referral, Victims' Counsel requests to

⁶⁵ Victims' Second Submissions, paras 20-23, 41.

⁶⁶ Victims' Second Submissions, paras 24-26, 41.

⁶⁷ Victims' Second Submissions, para. 28.

⁶⁸ Victims' Second Submissions, paras 29-35, 41.

⁶⁹ Victims' Second Submissions, para. 36.

⁷⁰ Victims' Second Submissions, para. 38.

⁷¹ Victims' Second Submissions, paras 39-41.

⁷² Victims' Second Submissions, p. 12.

cross-examine the Appointed Experts in accordance with Rule 149(2)(c) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).⁷³

24. The Defence avers that it has no submissions regarding the Expert Reports, however it wishes to cross-examine the Appointed Experts (Defence Request).⁷⁴

III. APPLICABLE LAW

25. The Panel notes Articles 22(3) and (7)-(9), 23, 40(2), 44(6), and 53(1) of the Law and Rules 80, 116(1), and 167-168 of the Rules.

26. The Panel further notes that Article 54 of the Constitution of the Republic of Kosovo (Constitution) states that: "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".

27. Article 22 of the Constitution provides that human rights and fundamental freedoms guaranteed, *inter alia*, by the Universal Declaration of Human Rights (UDHR), the ECHR, the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are guaranteed by the Constitution and directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions.

28. The UDHR prescribes, under Article 8, that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. Similarly, the ECHR and the ICCPR provide for the right to access to a court and the right to an effective remedy (Articles 6(1) and 13(1) of the ECHR and Articles 2(3)(a) and 14(1) of the ICCPR). Specifically,

⁷³ Victims' Second Submissions, para. 43 and pp. 12-13.

⁷⁴ Defence Submissions, paras 5-6.

Article 13(1) of the ECHR and Article 2(3)(a) of the ICCPR state that everyone whose rights or freedoms set out in the ECHR and the ICCPR, respectively, are violated “shall have an effective remedy”. Furthermore, Article 14 of the CAT provides that: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”.

29. Article 53 of the Constitution states that human rights and fundamental freedoms guaranteed by the Constitution shall be interpreted consistent with the decisions of the European Court of Human Rights (ECtHR).

30. With regard to the right to an effective remedy under Article 13 of the ECHR, the ECtHR has held that the obligation of States under the aforementioned article also encompasses a duty to ensure that such a remedy is enforceable, as awarding a remedy without guaranteeing its enforceability would be incompatible with the principle of the rule of law.⁷⁵

31. The United Nations 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 also provide that, in case of gross violations of international human rights law and serious violations of international humanitarian law, victims’ right to remedies includes, under international law, equal and effective access to justice, and adequate, effective and prompt reparation for the harm suffered; furthermore, States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their

⁷⁵ ECtHR, *Kenedi v. Hungary*, no. 31475/05, [Judgment](#), 26 August 2009, para. 47; *Kaić and Others v. Croatia*, no. 22014/04, [Judgment](#), 17 October 2008, para. 40; *Z and Others v. the United Kingdom*, no. 29392/95, [Judgment](#), 10 May 2001, paras 110-111.

obligations; moreover, States should provide effective mechanisms for the enforcement of reparation judgments under their national laws.⁷⁶

IV. ANALYSIS

A. PRELIMINARY MATTER

32. The Panel takes note of the Defence's indication that it wishes to cross-examine the Appointed Experts.⁷⁷ In this respect, the Panel notes that the Appointed Experts were instructed by the Panel⁷⁸ and not by the Parties⁷⁹ or Victims' Counsel. The Panel further notes that such instruction took place following the identification by the VPO,⁸⁰ upon the Panel's order,⁸¹ of potential experts for the Panel's consideration and that the Defence had the opportunity to make observations on the lists of proposed experts identified by the VPO on two separate occasions.⁸² However, the Defence did not avail itself of this opportunity. Moreover, following the notification of the Expert Reports, the Defence indicated that it has no submissions regarding the Expert Reports⁸³ and did not otherwise substantiate its request to cross-examine the Appointed Experts.

33. The Panel further recalls that it considered it necessary to instruct the Appointed Experts to clarify whether Kosovo courts offer a realistic avenue for the victims of the crimes charged in the present case to claim reparations and, if

⁷⁶ 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, paras 11(a)-(b), 16, 17.

⁷⁷ Defence Submissions, para. 6.

⁷⁸ See Third Decision on the Appointment of Experts.

⁷⁹ Cf. Rule 149 of the Rules, pertaining to evidence of expert witnesses called by a Party.

⁸⁰ First VPO Submission and Annexes 1-3 thereto; Second VPO Submission and Annexes 1-4 thereto.

⁸¹ Decision, para. 24(a); Second Decision, paras 9-10, 12(a).

⁸² Decision, para. 24(b); Second Decision, para. 12(b).

⁸³ Defence Submissions, para. 5.

reparations would be granted by judgments issued by Kosovo courts, to have such judgments enforced.⁸⁴ The sole purpose of the Expert Reports is therefore to assist the Panel in its decision as to whether, in case of a conviction, it should refer victims to civil litigation in Kosovo courts pursuant to Article 22(9) of the Law and Rule 167 of the Rules, or rather issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law. The impact of the Expert Reports, and consequently of the present decision, on the rights of the Accused is therefore minimal, if any, as the question at stake concerns the identification of which judicial forum will eventually be deciding on reparations claims in case of a conviction, but not the assessment of the civil liability of the Accused, if any. The latter question is premature at this stage.

34. In these circumstances, considering, in particular, that: (i) the Defence did not avail itself of the opportunity to make observations on the lists of experts proposed by the VPO; (ii) the Defence expressly indicated that it has no submissions regarding the Expert Reports and did not otherwise substantiate its request to cross-examine the Appointed Experts; and given (iii) the subject matter of the Expert Reports, the Panel does not consider it necessary to call the Appointed Experts for the purpose of cross-examination by the Defence. The Panel therefore rejects the Defence Request.

B. WHETHER, IN CASE OF A CONVICTION, THE PANEL WOULD REFER VICTIMS TO CIVIL LITIGATION IN KOSOVO COURTS PURSUANT TO ARTICLE 22(9) OF THE LAW OR ISSUE A REPARATION ORDER PURSUANT TO ARTICLES 22(8) AND 44(6) OF THE LAW

35. Regarding the right to effective legal remedies and their enforceability before Kosovo courts, the Panel firstly notes that the Appointed Experts all point out

⁸⁴ Decision, para. 20.

certain shortcomings of the Kosovo judicial system which may affect the victims of the crimes seeking reparations in the present case, should the Panel, in case of a conviction, refer them to civil litigation in Kosovo courts. According to the Appointed Experts, these shortcomings include: (i) the likely existence of a certain level of corruption and interference within the Kosovo legal system and the lack of efficient accountability structures for the judiciary;⁸⁵ (ii) the length of civil proceedings;⁸⁶ (iii) potential problems concerning the execution of awards issued by Kosovo courts against assets located in the territory of a country which lacks judicial cooperation agreements or diplomatic ties with Kosovo;⁸⁷ (iv) the fact that existing funds for the provision of legal aid may not have sufficient resources to ensure that legal aid is continuously provided;⁸⁸ and (v) the uncertainty with regard to the application of statutes of limitations, if any, to civil claims advanced by victims of war crimes.⁸⁹

36. The Panel does not take a position on the aforementioned potential shortcomings, as it opines the following factor to be decisive for its decision.

37. The Panel notes that, based on the information provided by the Appointed Experts, it appears that the current legal framework in Kosovo does not provide for anonymous civil claims and/or the possibility of protective measures in civil cases more generally.⁹⁰ While the Third Expert submits that the relevant legal provisions suggest that a person who submits a civil claim may request the application of certain protective measures upon showing of good cause, according to the same expert, on the basis of court practice to date and the research

⁸⁵ See First Report, pp. 3-12; Second Report, paras 18-30; Third Report, pp. 24, 30, 36.

⁸⁶ See First Report, pp. 9, 13-14, 31-34; Second Report, paras 48-49; Third Report, pp. 21, 24, 30-33, 41-42, 52-53.

⁸⁷ First Report, pp. 36-39; Third Report, p. 57.

⁸⁸ Third Report, pp. 23-25.

⁸⁹ First Report, pp. 30-31; Second Report, para. 46.

⁹⁰ See First Report, pp. 21-24; Second Report, paras 39-40, 42-43; Third Report, pp. 13, 21, 25, 29, 47-48.

conducted for the purposes of the Third Report, this has never occurred in practice.⁹¹ Moreover, with regard to the practical experience of national Kosovo courts with regard to compensation claims in war crimes cases,⁹² the Panel also notes that, according to the Third Expert, there has not yet been a single confirmed case in Kosovo of a victim initiating proceedings for compensation following the rendering of a final judgment in a war crimes case.⁹³ According to the same expert, this may have been caused, *inter alia*, by the fact that such victims, after having benefitted from anonymity or other protective measures in criminal proceedings, may not wish to publicly request compensation from convicted KLA members, also considering the widespread public disapproval of such trials.⁹⁴

38. The above information is in stark contrast to the possibilities available and measures implemented before the SC. The Panel recalls that the victims in the present case were granted some of the most extensive protective measures available under the SC's legal framework, including the full range of in-court protective measures to protect their identities from the public during their testimonies.⁹⁵ These protective measures were granted following the Pre-Trial Judge's finding that [REDACTED].⁹⁶ Moreover, although not expressly mentioned in Article 22(3) of the Law, the protection of the safety, physical and psychological well-being, dignity and privacy of the victims provided for in Article 23 of the Law must be understood as an essential part of the victims' personal interests and

⁹¹ Third Report, p. 47.

⁹² See Third Decision on the Appointment of Experts, para. 13.

⁹³ Third Report, p. 19.

⁹⁴ Third Report, pp. 19-20.

⁹⁵ The in-court protective measures adopted are: assignment of pseudonyms and identification as such throughout the proceedings; redaction of the names and identifying information from the SC's public records; non-disclosure to the public of any identifying records; testimony with face and voice distortion; and closed or private sessions for any identifying in-court discussion or testimony. See [REDACTED].

⁹⁶ [REDACTED].

rights.⁹⁷ As a consequence, the Panel must ensure the protection of victims as provided for in Article 23 of the Law throughout the entirety of the judicial process, including the reparations proceedings, irrespective of the forum in which such reparations proceedings are conducted. Notably, the obligation to protect victims and their families continues even after the trial has been concluded before the Panel.⁹⁸ For these reasons, the ability to protect victims' identities, and consequently their and their families' safety and physical and psychological well-being, constitutes a key consideration for the Panel's assessment as to whether victims should be referred to civil litigation in Kosovo courts in case of a conviction. In this regard, the Panel also pays heed to the Second Expert's assessment that "if victims are not willing and ready to proceed with civil claims in Kosovo with their identity revealed, every other discussion regarding the judicial system in Kosovo may not be of any use in practical terms".⁹⁹

39. On the basis of the information before it, and having regard to all the relevant facts and circumstances, the Panel finds that referring victims to Kosovo courts bears the risk of infringing upon the measures taken by the SC to protect those victims in the present judicial proceedings, as it would not allow for adequate protection of their identities. Therefore, the Panel can only conclude that the national courts in Kosovo do not provide a realistic avenue for victims to claim reparations.

40. In light of the foregoing, the Panel considers that it would not be appropriate to refer victims to civil litigation in Kosovo courts pursuant to Article 22(9) of the Law and Rule 167 of the Rules. Rather, in case of a conviction, the Panel will issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law.

⁹⁷ Decision on Victims' Rights, para. 11.

⁹⁸ See Rule 81(1) of the Rules.

⁹⁹ Second Report, p. 23.

C. FURTHER PROCEDURAL STEPS

41. Having decided that, in case of a conviction, the Panel would not refer victims to civil litigation in Kosovo courts but issue a Reparation Order itself, the Panel recalls that reparations proceedings fall within the scope of Article 6(1) of the ECHR and that victims enjoy the procedural rights under the aforementioned article with regard to their reparation claims.¹⁰⁰ This includes, *inter alia*, the right to submit any evidence that the victims would consider relevant to support their claims for reparations,¹⁰¹ without requiring the Panel's leave for the presentation of such evidence and without having to request the Panel to order the production thereof.¹⁰² In these circumstances, the Panel considers it appropriate to set out a calendar for the next procedural steps regarding the presentation of evidence pertaining to reparations.

42. The Panel notes the Victims' 24 January Submissions, wherein Victims' Counsel requests, *inter alia*, for the Panel to appoint an expert to medically assess the physical and psychological damage suffered by three of the direct victims in the present case, for the purposes of both reparations and the establishment of the truth.¹⁰³ While Victims' Counsel's aforementioned request will be addressed by the Panel in due course, the Panel considers it appropriate to provide Victims' Counsel with the opportunity to supplement, by Friday, 11 February 2022, the Victims' 24 January Submissions with any further proposed (expert) witnesses and relevant non-oral material pertaining to reparations she wishes to present, if any, including, as applicable, the information set out in paragraphs 34-35 of the

¹⁰⁰ Decision on Victims' Rights, para. 12.

¹⁰¹ Decision on Victims' Rights, para. 12.

¹⁰² This is without prejudice to Victims' Counsel's right to request the Panel, in accordance with Article 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 (Decision on Victims' Rights, para. 38).

¹⁰³ Victims' 24 January Submissions, paras 4, 12-29, 31(a).

Decision on Victims' Rights. The Defence may respond to any such submissions by Wednesday, 16 February 2022, at noon, if it so wishes.

43. Moreover, in order to ensure the fairness and expeditiousness of the proceedings the Panel may hold a status conference to discuss and organise the presentation of evidence pertaining to reparations.¹⁰⁴ This status conference will be held jointly with the Defence Preparation Conference and the status conference on the presentation of evidence in relation to the establishment of the truth called by the Panel upon Victims' Counsel's request, on Thursday, 17 February 2022, starting at 09:30 hours, with Friday, 18 February 2022 as reserve day, starting at 09:30 hours. Thereafter, the Panel may determine the length and scope of the presentation of evidence pertaining to reparations, if any, including a starting date to hear such evidence.

44. In order to assist the Panel and expedite the submissions to be made in court, Victims' Counsel shall, by Wednesday, 16 February 2022, at noon, file written submissions on the issues listed in Section III.D of the Second Conduct of Proceedings Decision as concerns the presentation of evidence for the purposes of reparations.

D. QUESTIONS FOR THE MINISTRY OF JUSTICE OF KOSOVO

45. The Panel recalls that some of the questions put to the Appointed Experts concerned the options, if any, that victims would have in receiving compensation in the event that the Panel would decide not to refer them to civil litigation in Kosovo courts, and the Accused, if convicted, would be unable to pay any reparations ordered by the Panel.¹⁰⁵ In this respect, the Panel notes that, according to the information provided by the Appointed Experts: (i) victims of crimes within the SC's jurisdiction could benefit from restitution from the Victim Compensation

¹⁰⁴ Decision on Victims' Rights, para. 33.

¹⁰⁵ Third Decision on the Appointment of Experts, para. 15.

Fund referred to in paragraph 15 of the Third Decision on the Appointment of Experts or other compensation programmes,¹⁰⁶ although there is no information indicating that victims of war crimes have ever benefitted from compensation from the aforementioned fund;¹⁰⁷ and (ii) the Law on Crime Victim Compensation does not apply as such to victims of crimes under the SC's jurisdiction,¹⁰⁸ whilst Article 6(2) thereof may provide the relevant committee certain flexibility concerning victims' claims relating to other serious criminal offences.¹⁰⁹

46. Considering the need to ensure the victims' effective right to reparations in accordance with Article 22(3) of the Law and the relevant international legal instruments referred to in Section III of this decision, should the Accused, if convicted, be unable to pay any reparations ordered by the Panel, the Panel considers it necessary to receive further information on possible avenues available to victims. Moreover, considering the Panel's obligation to ensure the protection of victims provided for in Article 23 of the Law throughout the entirety of the judicial process, including the reparations proceedings,¹¹⁰ the Panel finds it necessary to receive further information considering the possibilities, if any, for victims to benefit from compensation whilst remaining anonymous.¹¹¹

47. In these circumstances, and noting that the Ministry of Justice of Kosovo is the institution best placed to provide the sought information,¹¹² the Panel considers it

¹⁰⁶ Third Report, pp. 28, 50.

¹⁰⁷ Third Report, pp. 19, 23, 50.

¹⁰⁸ See First Report, pp. 15-16, 19, 46; Second Report, paras 47, 67; Third Report, p. 14, 29, 50.

¹⁰⁹ See Third Report, pp. 14-15, 29, 50.

¹¹⁰ See *supra* para. 38.

¹¹¹ In this respect, the Panel notes that the questions pertaining to the preservation of victims' anonymity referred to in paragraph 15 of the Third Decision on the Appointment of Experts were not addressed by the First Expert and the Second Expert, while according to the Third Expert, even if the SC itself were to adjudicate their compensation claims, enforcement of any such decision in Kosovo would most likely not allow for the preservation of the victims' anonymity (Third Report, p. 29).

¹¹² See First Report, p. 17 and footnote 28; Third Report, pp. 14, 16, 19, 23, 48. See also, albeit in relation to information pertaining to international cooperation, Second Report, para. 37. The Panel also notes that [REDACTED].

appropriate to request the Ministry of Justice of Kosovo to provide the Panel, by Wednesday, 16 March 2022, with answers to the following questions:

- Whether, in case of a conviction of the Accused and the issuance of a Reparation Order by the Panel, should the Accused be unable to pay any reparations ordered by the Panel, victims of crimes under the jurisdiction of the SC could benefit from restitution from the Victim Compensation Fund referred to in Articles 19(1), section 1.26, and 62(1), section 1.5, of the Kosovo Criminal Procedure Code, or from any other relevant compensation programme, including the one established under Law No. 05/L-036 on Crime Victim Compensation;
- Whether victims of crimes under the jurisdiction of the SC could benefit from restitution from the aforementioned Victim Compensation Fund or from any other relevant compensation programme whilst remaining anonymous following the issuance of a Reparation Order by the Panel;
- Whether, in order to preserve the victims' anonymity, the Registrar, with the assistance of the Ministry of Justice of Kosovo, as necessary, could apply for restitution from the aforementioned Victim Compensation Fund or from any other relevant compensation programme on the victims' behalf, following the issuance of a Reparation Order by the Panel; and
- Whether, in case victims of crimes under the jurisdiction of the SC could not benefit from restitution from any currently existing compensation programme, a fund could be established to this end, financed by the Kosovo budget or otherwise, to which the Registrar could apply for compensation on the victims' behalf, in order to preserve their anonymity. In this context, the Panel specifically notes that the financing of the defence of accused persons before the SC from the Kosovo budget has been made possible by means of Law No. 05-054 on Legal Protection and

Financial Support for Potential Accused Persons in Trials Before the Specialist Chambers.

48. The Ministry of Justice of Kosovo is reminded that, pursuant to Article 53(1) of the Law, all entities and persons in Kosovo shall co-operate and shall comply without undue delay with any request for assistance or order issued by the SC.

49. Pursuant to Rule 49(1) of the Rules, transmission of the public redacted version of the present decision to the Ministry of Justice of Kosovo shall be effected through the Registrar.

V. DISPOSITION

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

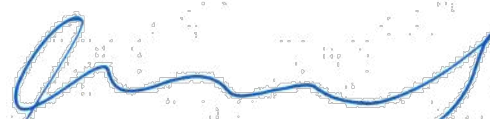
- a. **REJECTS** the Defence Request;
- b. **DECIDES** that, in case of a conviction, it will not refer victims to civil litigation in Kosovo courts pursuant to Article 22(9) of the Law and Rule 167 of the Rules, but issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law;
- c. **ORDERS** Victims' Counsel, should she so wish, to supplement, by **Friday, 11 February 2022**, the Victims' 24 January Submissions with any further proposed (expert) witnesses and relevant non-oral material pertaining to reparations she wishes to present, if any, including, as applicable, the information set out in paragraphs 34-35 of the Decision on Victims' Rights and the Defence to respond to any such submissions by **Wednesday, 16 February 2022, at noon**, if it so wishes;
- d. **REQUESTS** Victims' Counsel to file, by **Wednesday, 16 February 2022, at noon**, written submissions as specified in paragraph 44 above;
- e. **ORDERS** the Registrar to transmit the present decision, in its public redacted form, to the Ministry of Justice of Kosovo; and
- f. **ORDERS** the Ministry of Justice of Kosovo to provide the Panel, by **Wednesday, 16 March 2022**, with answers to the questions referred to in paragraph 47 of the present decision.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 4 February 2022
At The Hague, the Netherlands.