

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: 01 March 2022

Language: English

Classification: Confidential with two strictly confidential, *ex parte* only annexes

Victims' Counsel submissions pursuant to the Third decision on the conduct of the proceedings

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I. INTRODUCTION

2. Victim's Counsel hereby offers the submissions ordered by the Trial Panel in its 'Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment' of 23 February 2022¹ and its 'Third decision on the conduct of the proceedings' of 9 February 2022.²

II. PROCEDURAL HISTORY

3. In its 'Second decision on the conduct of the proceedings' dated 21 January 2022 (hereafter: Second Decision), the Trial Panel (hereafter: Panel) set out a proposed calendar for the next procedural steps in the case against the Accused, Mustafa Salih.³ In paragraph 21(g) of that decision, Victims' Counsel was ordered to file by 11 February 2022: (i) 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, if any, including the information set out in paragraphs 34-35 of the Decision on Victims' Procedural Rights of 12 July 2021; and (ii) a request, if any, seeking the Panel's authorisation for victims she represents to present their views and concerns before the Panel (hereafter: First Order).⁴
4. In that same decision, the Panel also ordered Victims' Counsel to file, by 16 February 2022, written submissions as identified in paragraph 20 of the same decision, i.e., any matters concerning issues noted in Section III.D of the

¹ KSC-BC-2020-05, F00326, Trial Panel, *Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment*, 23 February 2022, confidential, para 43.

² KSC-BC-2020-05, F00318, Trial Panel, *Third decision on the conduct of the proceedings*, 9 February 2022, confidential, para 16, with reference to the submissions ordered in the KSC-BC-2020-05, F00296, *Second decision on the conduct of the proceedings*, 21 January 2022, para 21.

³ KSC-BC-2020-05, F00296, *Second decision on the conduct of the proceedings*, 21 January 2022, para. 13 and 21 ("Second Decision on the Conduct of Proceedings").

⁴ KSC-BC-2020-05, F00296, *Second decision on the conduct of the proceedings*, 21 January 2022, para. 13 and 21 ("Second Decision on the Conduct of Proceedings").

Second Decision, and any matters not covered therein (hereafter: Second Order).⁵

5. On 24 January 2022, in compliance with the Panel's First Order, Victims' Counsel requested the Panel to appoint an expert on medical forensic evidence for the purpose of individual reparations and truth-finding and, additionally, to authorize one participating victim, Victim 05/05, to directly address the Panel to present views and concerns (hereafter: Victims' Counsel's Request of 24 January 2022).⁶
6. On 4 February 2022, the Panel rendered its 'Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information' of 4 February 2022 (hereafter: Article 22(9)-decision). In paragraph 40 of that decision, the Panel held that in case of a conviction, it will issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law. In paragraph 50(c), it offered Victims' Counsel the opportunity to supplement her Request of 24 January 2022, 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.⁷ (hereafter: Third Order)
7. On 9 February 2022, following the Defence's notice of intent to file a Rule 130(1)-motion to dismiss any or all charges in the indictment⁸, the 'Third

⁵ Second Decision on the Conduct of Proceedings, para. 20 and 21.

⁶ KSC-BC-2020-05, F00297/RED, Public Redacted Version of *Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022, 24 January 2022* ("VC Request of 24 January 2022").

⁷ KSC-BC-2020-05-F00152, Trial Panel, *Decision on victim's procedural rights during trial*, 12 July 2021, public, ("Decision on Victims' Rights"), para 34-35. Submissions ordered were: [para 34] list of proposed (expert) witnesses to be called by the Panel, and specification of the extent to which the testimonies of expertise of the proposed witnesses relate to the personal interests and rights of the victims, i.e., the establishment of the truth and/or reparations; and [para 35] indication of whether Victims' Counsel wishes the Panel to order the submission of relevant non-oral evidence relating to the victims' personal interests and rights and a list of such proposed material, indicating whether it relates to the establishment of the truth and/or reparations and necessary redactions (if applicable).

⁸ KSC-BC-2020-05, F00309, Defence, *Defence Rule 130(1) Notice to Panel of Defence's intention to file a motion to dismiss any or all charges of the Indictment*, 4 February 2022, public.

decision on the conduct of the proceedings⁹ (hereafter: Third Decision) was issued. In that Third Decision, the Panel established a new calendar for the next procedural steps requiring Victims' Counsel to file the material specified in paragraph 21(g) of the Second Decision (Second Order) and, if applicable, paragraph 50(c) of the Article 22(9)-decision (Third Order) by Tuesday 1 March 2022.¹⁰

8. On 23 February 2022, the Panel issued its 'Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment' (hereafter: Rule 130(1)- and ordered Parties and Victims' Counsel to adhere to the calendar set out in the Third Decision.¹¹
9. Pursuant to the Panel's orders, Victim's Counsel hereby offers her written submissions on the matters identified in the aforementioned decisions (Second and Third Orders).¹²

III. APPLICABLE LAW

10. According to Article 22(3) of the Law, a Victim's personal interests and rights in the case are "notification, acknowledgement and reparation". The Panel has further defined these interests in its Decision on Victim's Rights, outlining *inter alia* that participating victims can present evidence on what allegedly happened to them for the establishment of the truth.¹³
11. Regarding the establishment of the truth, Rule 127(2) determines that evidence shall be presented in the following sequence: (a) the SPO, (b) the Defence and (c) evidence called by the Trial Panel. Specifically, Rule 132

⁹ KSC-BC-20202-05, F00318, Trial Panel, *Third decision on the conduct of proceedings*, 9 February 2022, confidential.

¹⁰ KSC-BC-20202-05, F00318, Trial Panel, *Third decision on the conduct of proceedings*, 9 February 2022, confidential, para 13-15, 16.

¹¹ KSC-BC-20202-05, F00326, Trial Panel, *Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment*, 23 February 2022

¹² Second Decision on the Conduct of Proceedings, para. 20 and 21(i).

¹³ KSC-BC-2020-05-F00152, Trial Panel, *Decision on victim's procedural rights during trial*, 12 July 2021, public, ("Decision on Victims' Rights"), para 13-18.

determines that after hearing the Parties and, if applicable Victims' Counsel, the Panel "may invite the submission of or *proprio motu* call additional evidence not produced by the Parties, including expert evidence, where it considers it necessary for the establishment of the truth".

12. Regarding the impact of the alleged crimes on the victims, Rule 114(5) states that "where evidence was not produced by the Parties, or the produced evidence does not adequately address the impact the alleged crimes have on the personal interests of the victims participating in the proceedings", Victims' Counsel may request the Panel to order the submission of relevant evidence or call witnesses to testify. Furthermore, Rule 134(b) allows for the Panel to invite Victims' Counsel to file a statement on the impact of the alleged crimes on victims participating in the proceedings after the evidentiary proceedings are closed.
13. Regarding reparations, Rule 168 provides that in the event a Reparations Order is made against a convicted person,¹⁴ the Panel "may appoint experts to assist it in determining the scope of any damages to, or in respect of victims and to suggest options concerning appropriate individual or collective reparations from the convicted person".

IV. SUBMISSION

14. Victims Counsel will not propose any evidence beyond the request for a medical expert as outlined in the submission from 24 January 2022. Considering that the Panel has subsequently decided not to refer reparations proceedings to the Kosovo national courts, additional observations will be offered in this submission to inform the Panel's decision making on this matter.

¹⁴ Pursuant to Article 22(8) of the Law.

15. Victims' Counsel proposes that a report by a medical expert as requested may serve the establishment of the truth but - most importantly - can aid to establish the extent of the injuries for which reparations are sought.

Establishment of the truth

16. Victims Counsel is of the view that the evidence provided by the dual-status witnesses to date is sufficient for the purpose of establishing the truth in that respect. They have delivered compelling, credible, and cross-corroborated testimony before the Panel. Medical expertise confirming the harm and damages suffered could, however, serve to further bolster the credibility of the dual-status witnesses, and as such the persuasiveness of the SPO's case.
17. Ultimately it is up to the Panel to assess the credibility of the witnesses and the reliability of their testimony to determine if the guilt of the Accused has been proven beyond reasonable doubt.
18. If, upon hearing the evidence provided by the Defence, the Panel feels it needs more information about a witness to best assess that evidence, the Rules allow for this. Indeed, with a view to establishing the truth the Panel can either invite the submission of, or *proprio motu* call for, additional (expert) evidence pursuant to Rule 132. In that respect, it can then order an expert medical report to determine the harm and damages suffered by the dual-status witnesses. Victims' Counsel notes that this would also be in accordance with the general order the legal framework, specifically Rule 127(2) of the Rules, provides for.
19. In this regard, Victims Counsel stresses the importance to minimise re-traumatisation and re-victimisation risks for Victims 10/05 (W03593), 09/05 (W01679) and 08/05 (W04669). Article 22 (1) of the Law requires the Court to effectively provide for the psychological well-being of any victims and witnesses. This includes, but is not limited to, protective measures, as applied for the dual-status witnesses in this case. Beyond such measures, the Panel

should seek to order any evidence in such order that the risks involved for the psychological well-being of the witnesses will be reduced to the minimum required. Any medical examination will, without doubt, expose victims to renewed confrontation with the events from which they have suffered and the harm they had to endure.

20. For that reason, the Panel ought to take the decision whether it requires a medical examination for truth seeking purposes guided by the above considerations. Exposure to any unnecessary examinations should be avoided. If the Panel were to acquit the Accused of (certain) charges in the indictment regardless of the compelling evidence provided by the witnesses and for reasons beyond the credibility of the aforementioned dual-status witnesses, any additional medical examination that they will have undergone to determine the truth would have been exposure to unnecessary harm.
21. However, Victims Counsel stresses that the witnesses do stand ready to undergo such examination if this will be of decisive help for the Panel to determine the truth.
22. Victims Counsel will further provide information in the *ex parte* annex to this submission the evidentiary difficulties Victims Counsel faces.
23. For the above reasons, for the purpose of determining the truth, it is suggested that any such examination should be ordered at the end of the Defence case as provided for in Rule 127 (2) of the Rules if the Panel deems this necessary. This will best protect the witnesses' dignity and well-being.

Reparations

24. A medical examination will also critically ensure that the Trial Panel will be enabled to fully establish the extent of the harm and injury suffered for the order of reparations.

25. Whilst any medical evidence necessary in a reparations dispute will typically be offered by the parties themselves – and for the purpose of the reparations proceedings the participating victims may be deemed parties – the victims in this trial face insurmountable hurdles to provide such evidence. If it were not for the required extensive protective measures in this case and applicable to all three aforementioned dual-status witnesses, an expert called by a Victims Counsel could draw on the transcripts throughout the trial hearings to inform their examination. Considering that the key parts of the testimony provided by the dual-status witnesses have been heard in private session, Victims Counsel would not be able to provide any expert with meaningful documentation to aid the examination.
26. It is with good reason that Rule 168 provides that, if the Panel makes an order pursuant to Article 22(8) of the Law against the convicted person, the Panel may appoint an expert, as proposed, to assist it in determining the scope of the damage and harm the victims have suffered. This rule allows the Trial Panel to take difficulties and limitations arising from the protective measures (see further the information contained in the *ex parte* only annex) into account and ensure that these do not lead to disadvantages on the part of participating victims.

Other observations

27. Considering the points raised in Section III.D(a)-(e) of the Second Decision, no further submissions are to be made.
28. Finally, should the accused be found guilty, Victims' Counsel is of the view that the Panel should determine the appropriate sentence to be imposed on the accused with the pronouncement of the Trial Judgment, pursuant to Rule 159(6), provided that the parties and Victims' Counsel are allowed to address

any matters relating to sentencing in their final written submissions and closing statements, pursuant to Rule 134.¹⁵

Word count: 2311



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01 March 2022

At The Hague, the Netherlands

¹⁵ Victims' Counsel notes that the Rules of the Kosovo Specialist Chambers do not provide expressly for matters relating to sentencing to be addressed during closing arguments, contrary to the Rules of other international tribunals where the sentence is pronounced simultaneously with the Trial Judgement; see Rules of the International Criminal Tribunal for the former Yugoslavia (Rule 86(c)), the International Criminal Tribunal for Rwanda (Rule 86(c)) and the International Residual Mechanism for Criminal Tribunals (Rule 103(C)).