

**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:** 25 March 2022

**Language:** English

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**Victims' Counsel Submission pursuant to the Response of the Ministry of Justice of  
Kosovo on Compensation and Request to seek further clarification**

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## I. PROCEDURAL HISTORY

1. In its decision of 4 February 2022,<sup>1</sup> the Trial Panel decided 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.
2. In addition, it ordered the Registrar to transmit this decision to the Ministry of Justice of Kosovo and requested the Ministry of Justice of Kosovo to provide the Panel by 16 March 2022, with answers to the questions referred to in paragraph 47 of its decision.
3. In short, the questions put by the Trial Panel to the Ministry of Justice of Kosovo concerned the possibility of compensation for the Victims in this case pursuant to a Reparation Order by the Trial Panel, and maintaining anonymity.
4. On 14 March 2022, the office of the Ministry of Justice of the Republic of Kosovo (hereafter: the Ministry of Justice) submitted its response<sup>2</sup> (hereafter: the Response), which was distributed on 17 March 2022. According to rule 7 (1) and (2) of the Rules, any response needs to be provided within ten working days from first working day after notification, hence by 28 March 2022.
5. In this submission Victims' Counsel submits her views on the Response provided by the Ministry of Justice on the matter of compensation for the Victims. It is Victims' Counsel view that the Ministry of Justice has not answered in full the questions posed by the Panel. She requests the Panel to seek further clarification with the Ministry of Justice with a view to getting a full answer to all the questions.

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<sup>1</sup> KSC-BC-2020-05/F00310, Trial Panel, 'Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information', 4 February 2022.

<sup>2</sup> KSC-BC-2020-05/F00344, Ministry of Justice, Republic of Kosovo, 'Response to your document', 14 March 2022.

## II. APPLICABLE LAW

6. Relevant to this submission are 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.
7. Also relevant is Article 54 of the Constitution of the Republic of Kosovo (hereafter: Constitution), which provides everyone with the right to an effective legal remedy if it is found that any right guaranteed by this Constitution or by law has been violated or denied.
8. Furthermore, Article 22 of the Constitution provides that human rights and fundamental freedoms guaranteed, *inter alia*, by the Universal Declaration of Human Rights (hereafter: UDHR), the European Convention on Human Rights (hereafter: ECHR), the International Covenant on Civil and Political Rights (hereafter: ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: CAT) are guaranteed by the Constitution and directly applicable in the Republic of Kosovo.
9. Articles 6 and 13 of the ECHR provide for the right to access to a court and the right to an effective remedy (in the same vein: Articles 2(3)(a) and 14(1), ICCPR).
10. Finally, 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 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, and importantly, 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 obligations. States should also provide effective mechanisms for the enforcement of reparation judgments under their national laws.

### **III. SUBMISSIONS PURSUANT TO THE RESPONSE OF THE MINISTRY OF JUSTICE**

#### *Questions posed by the Trial Panel*

11. In its decision of 4 February 2022, the Panel considered the need to ensure the victims' effective right to reparations. It also stated that it was mindful of its obligation to ensure the protection of victims throughout the entirety of the judicial process, including the reparations proceedings.
12. It was against this background that the Panel found it necessary to receive further information from the Ministry of Justice on possible avenues available to victims, if any, in case of a conviction of the Accused and should he be unable to pay any reparations ordered by the Panel, to benefit from compensation whilst remaining anonymous.
13. The Panel posed four questions, which Victims' Counsel summarises as follows:
  - (1) whether the Victims 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;
  - (2) whether they could benefit from this Fund or any programme whilst remaining anonymous;

- (3) 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 this Fund or from any programme on the victims' behalf; and
- (4) whether, in case Victims 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.

*Answers provided by the Ministry of Justice*

14. The Ministry of Justice has not provided a direct answer to any of the questions posed by the Panel.
15. What it has done is give an overview of the existing law. Some answers to the questions of the Panel can be deduced from this overview. These answers are concerning from the point of view of the Victims' rights and interests. Although this is not an exhaustive analysis of the provided answer, Victims' Counsel would like to point out the following aspects in the applicable law as cited by the Ministry of Justice.
16. With regard to the first question of the Panel, Victims' Counsel observes that it remains uncertain whether the Victims in this case would fall under the Law on Crime Victim Compensation (hereafter: LVC). In its Response, under '2. Compensable criminal offences', the Ministry of Justice lists the categories of crimes that are eligible for compensation (as listed in paragraph 1 of Article 6

LVC). Notably, inhumane treatment and torture (committed during armed conflict) are not part of this list.

17. Paragraph 2 of the same article provides that:

“[...] the Committee [Government Committee for Crime Victim Compensation] may review and decide on other applications received by individuals who claim to have been victims of other violent crimes, which due to their nature and the consequence caused may justify the compensation according to this Law, in particular if the victim is a vulnerable victim”.

18. The Ministry of Justice confirms this when it writes:

“This suggests that the list of criminal offences is not exhaustive and the Committee is given the power to review and decide on applications for compensation received by other persons who claim to be victims of other violent crimes and who provide reasons for such claims.”

19. This finding is confirmed by the Third Expert Report, referred to in the Panel’s decision of 4 February 2022,<sup>3</sup> which states that “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.”

20. Victims’ Counsel concludes that whether the Victims in this case will be eligible for compensation is subject to the discretionary competence of the Committee

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<sup>3</sup> KSC-BC-2020-05/F00310, Trial Panel, ‘Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information’, 4 February 2022, para 22.

that will examine their applications. This is unacceptable as it leaves the Victims with a serious risk that their claim will be denied.

21. With regard to the second question posed by the Panel, the Response does not discuss how Victims may be able to maintain anonymity. Rather it is the Victims' Counsel's understanding of the Response that information needs to be provided about the identities and/or locations of the people who apply for compensation, as for example, illustrated in article 7 LVC.
22. Also, on the point of anonymity, Article 10 paragraphs 1 and 2 LVC state that the Victims have a legal obligation to "request initially compensation from the defendant in accordance with the Criminal Code". That means that if the Accused is convicted, the Victims can only file compensation claims with the Ministry of Justice on the basis of this LVC if they have first tried to enforce the decision against the Accused. This may imply that Victims still have to deal with the Accused directly at first. Not only is this something they will definitely want to avoid, it also directly affects their anonymity.
23. Questions 3 and 4 of the Panel are not explicitly answered by the Ministry of Justice.
24. Victims' Counsel wishes to point to some additional aspects of the law applicable to compensation, as cited by the Ministry of Justice.
25. In its answer, the Ministry of Justice makes it clear that no legal aid is available for the purpose of filing the application for compensation and that it shall not reimburse any attorney's costs.<sup>4</sup> Victims' Counsel raised her concern on this point in her observations on the Expert Reports of 24 January 2022.<sup>5</sup> She pointed out

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<sup>4</sup> Art. 29, LVC.

<sup>5</sup> KSC-BC-2020-05/F00298, Victims' Counsel, 'Victims' Counsel Observations on the Expert Reports regarding a Referral of Reparations Proceedings to National Courts in Kosovo', 24 January 2022, para 28.

the importance of legal aid, noting that legal aid – according to the Experts – is only available to a limited extent in Kosovo. This reality leaves the danger that victims are left without proper assistance.

26. Another serious concern is the statute of limitations applicable to claims for compensation by the Victims. The Trial Panel touched upon this in its decision of 4 February 2022. Under '6. Deadlines for submitting an application for compensation' of its Response, the Ministry of Justice clarifies that these deadlines appear to be six months. When exactly this time period starts remains unclear, but the time period clearly raises serious concerns in the context of the case of the Victims.
27. Finally, Victims' Counsel notes that it would have been helpful if the Ministry of Justice had provided an English translation of the entire Law on Crime Victim Compensation ('LVC'). The Response quotes only parts of articles of the LVC. This makes it hard to determine if and how they would apply in this case.

#### **IV. REQUEST TO SEEK FURTHER CLARIFICATION**

28. The Response of the Ministry of Justice seems to justify the conclusion that the Panel's questions 1-3 should be answered negatively or, at a minimum, leave room for uncertainty. The Ministry of Justice has not given an outright answer to the questions.
29. Question 4 – whether a fund could be established, financed by the Kosovo budget or otherwise, to which the Registrar could apply for compensation on the victims' behalf – is entirely left unanswered. This question is even more important if – indeed – the answers to questions 1-3 are negative.



30. In its Response, the Ministry of Justice writes that it is available to provide any additional clarifications regarding this issue.
31. For these reasons Victims' Counsel requests that the Panel seek further clarification with the Ministry of Justice with a view to getting a full answer to all the questions.

## V. RELIEF

32. Victims Counsel requests that:
  - a. the Trial Panel reminds the Ministry of Justice of Kosovo 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.
  - b. the Trial Panel reiterates its request to the Ministry of Justice of Kosovo, detailed in its decision of 4 February 2022 and demands that the Ministry of Justice responds to it in full.

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

25 March 2022

At The Hague, the Netherland