



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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 Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 31 August 2022

Language: English

Classification: Public

Public redacted version of

**Decision setting the agenda for the hearing on the closing statements
and related matters**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision setting the agenda for the hearing on the closing statements and related matters.

I. PROCEDURAL BACKGROUND

1. On 20 June 2022, the Panel issued the “Decision on the closing of the evidentiary proceedings and related matters”, in which it, *inter alia*: (i) scheduled the hearing on the closing statements for 13 to 15 September 2022, with 16 September 2022 as a reserve day, and with a total of 5.5 hours of hearing per day;¹ and (ii) ordered the Defence of Mr Salih Mustafa (Defence and Accused, respectively), the Specialist Prosecutor’s Office (SPO) and Victims’ Counsel to file submissions on the estimated time needed for their respective closing statements, including a breakdown of the time needed to address issues concerning the guilt or innocence of the Accused, sentencing and reparations (the latter topic limited to the Defence and Victims’ Counsel only), by 23 August 2022.²
2. On 23 August 2022, the Parties and Victims’ Counsel filed their respective submissions.³

II. SUBMISSIONS

3. The SPO estimates the total time of its closing statement to be 1 day (5.5 hours), of which 4.5 hours for issues concerning the guilt or innocence of the Accused, and

¹ Four sessions per day, as follows: 09:30-11:00; 11:30-13:00; 14:30-16:00; 16:30-17:30.

² KSC-BC-2020-05, F00439, Trial Panel I, *Decision on the closing of the evidentiary proceedings and related matters*, 20 June 2022, public, paras 22, 25.

³ KSC-BC-2020-05, F00464, Defence, *Defense Submissions on closing arguments* (Defence Submissions), 23 August 2022, public; F00465, Specialist Prosecutor, *Prosecution submissions on the estimated time for its closing statement* (SPO Submissions), 23 August 2022, public; F00466, Victims’ Counsel, *Victims’ Counsel’s Submissions on estimated time for closing statements* (Victims’ Counsel Submissions), 23 August 2022, public.

1 hour for issues concerning sentencing.⁴ The SPO reserves its right to respond to any points made by the Defence in its closing statement.⁵

4. Victims' Counsel estimates the total time of her closing statement to be no more than 2 hours, of which 1 hour for issues concerning the guilt or innocence of the Accused and sentencing, and 1 hour for issues concerning reparations.⁶ Victims' Counsel also submits that a break of approximately 60 minutes after the SPO's closing statement would be needed for her to adjust her draft closing statement so as to avoid unnecessary repetition.⁷

5. The Defence estimates the total time of its closing statement to be 1 day (5.5 hours), of which 4.5 hours for issues concerning the guilt or innocence of the Accused and sentencing, and 1 hour for issues concerning reparations.⁸ The Defence indicates that the Accused will not exercise his right to speak last, pursuant to Rule 135(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).⁹

III. APPLICABLE LAW

6. The Panel notes Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 9(5) and 135 of the Rules.

⁴ SPO Submissions, paras 1-2.

⁵ SPO Submissions, para. 3.

⁶ Victims' Counsel Submissions, paras 2, 4.

⁷ Victims' Counsel Submissions, para. 3.

⁸ Defence Submissions, para. 2.

⁹ Defence Submissions, para. 3.

IV. ANALYSIS

A. AGENDA

7. Considering the submissions of the Parties and Victims' Counsel, the Panel sets the following agenda for the hearing on the closing statements, subject to changes decided by the Panel during the hearing, either *proprio motu* or at the request of a Party or Victims' Counsel, as appropriate:

- a. 13 September 2022: Closing statement of the SPO (5.5 hours; of which 4.5 hours on the guilt or innocence of the Accused, and 1 hour on sentencing);
- b. 14 September 2022:
 - i. Closing statement of Victims' Counsel on the guilt or innocence of the Accused and on sentencing (1 hour);
 - ii. Closing statement of the Defence on the guilt or innocence of the Accused and on sentencing (4.5 hours);
- c. 15 September 2022:
 - i. Responses of the SPO (45 minutes) and Victims' Counsel (45 minutes) to the points made by the Defence on the guilt or innocence of the Accused and on sentencing;
 - ii. Comments of the Defence to the Responses of the SPO and Victims' Counsel (45 minutes);
 - iii. Questions from the Panel, if any (1 hour);
 - iv. Closing statement of Victims' Counsel on reparations (1 hour);
 - v. Closing statement of the Defence on reparations (1 hour);
- d. 16 September 2022 (only in case of need; Victims' Counsel and the Defence must be ready to proceed on 15 September if time allows):

- i. Response of Victims' Counsel on reparations (45 minutes);
- ii. Comments of the Defence to the Response of Victims' Counsel on reparations (45 minutes);
- iii. Questions from the Panel, if any (1 hour); and
- iv. Closing of the case.

B. QUESTIONS AND INSTRUCTIONS

8. With a view to making an informed determination in relation to the charges against the Accused and without prejudice to further questions to eventually be put by the Panel to Parties and/or Victims' Counsel during the hearing, the Panel seeks hereafter submissions and clarifications on certain issues of relevance to the case. The questions are without prejudice to the findings to be made in the judgement. Whereas some of the questions are primarily addressed to a specific Party or Victim's Counsel, this is without prejudice to the opposing Party and/or Victims' Counsel to make submissions thereupon.

9. When making submissions on any of the questions below, the Parties and Victims' Counsel may rely on evidence available to the Panel for its judgment, including photographic evidence.

1. Arbitrary Detention (Count 1); Question for the SPO

10. Which of the specific buildings located in what the SPO names Zllash/Zlaš Detention Compound,¹⁰ were allegedly used to detain, interrogate and/or mistreat individuals during the timeframe of the charges?

¹⁰ KSC-BC-2020-05, F00459/COR/A01, Specialist Prosecutor, *Corrected Version of Prosecution Final Trial Brief pursuant to Rule 134(b)* (SPO Final Trial Brief), 22 July 2022, confidential, para. 22, and the evidence referred to at pp. 12-13 of the SPO Final Trial Brief.

2. Determination of the Sentence, if any; Questions for the Parties and Victims' Counsel

11. Question 1: Under Article 44(2)(b) of the Law, is the Panel duty bound to apply “any subsequent more lenient sentencing range for the crime provided in Kosovo Law”? Or does the wording “shall take into account” in paragraph (2) of Article 44 of the Law suggest that the Panel should only be guided by such subsequent more lenient sentencing range, if any?

12. Question 2: Article 44(2)(b) of the Law refers to any subsequent more lenient sentencing range for “the crime” provided in Kosovo law. In case “the crime” of which the Accused is adjudged guilty is not provided in Kosovo law but only under customary international law – and thus does not correspond to any potentially more lenient sentencing range under Kosovo legislation – what other body of applicable law, if any, should the Panel consider to determine if there is a subsequent more lenient sentencing range for such crime?

13. Question 3: Based on Article 44(2)(c) of the Law, in what circumstances “the punishment of an act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b)” of the Article 44 of the Law?

14. Question 4: If the Panel is bound by Article 44(2)(b) of the Law, is Article 38 of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY Code) applicable and, if so, which paragraphs of this provision are applicable?

3. Reparations, if any; Instructions for Victims' Counsel

15. The Panel notes that Victims' Counsel has enumerated the following categories of harm applicable to the victims: (i) physical or mental harm; (ii) lost opportunities, including employment, education and social benefits; (iii) material damages and loss

of earnings, including loss of earning potential; and (iv) moral damage.¹¹ The Panel notes however that Article 22(1) of the Law mentions three types of harm, namely physical, mental and material harm.¹²

16. Question 1: With regard to [REDACTED], for what type(s) of harm (physical, mental and material harm) is Victims' Counsel seeking reparations? Victims' Counsel is instructed to frame for each victim the requests for reparations under the three types of harm mentioned above.

17. The Panel further notes that Victims' Counsel requests that the victims be awarded compensation as reparations and indicates sums of money to be given as a *minimum* without differentiating or specifying the types of harm to which these amounts specifically relate.¹³

18. Question 2: To assist the Panel in determining the scope and extent of damage, loss and injury suffered by the victims (Article 22(7) of the Law),¹⁴ what are the sums of money, for each type of harm (physical, mental and material harm), to be awarded to [REDACTED] to repair the harm inflicted to these victims? Victims' Counsel is

¹¹ KSC-BC-2020-05, F00444/COR, Victims' Counsel, *Corrected Version of Victims' Counsel specified and consolidated reparations request*, 4 July 2022 (date of original is 30 June 2022), strictly confidential (Victims' Counsel Reparations Request), para. 8. *See also* Victims' Counsel Reparations Request, paras 58-59.

¹² *See also* KSC-BC-2020-05, F00105, Pre-Trial Judge, *Second Decision on Victims' Participation* (Second Decision on Victims' Participation), 30 April 2021, confidential, paras 34-35, in which the Pre-Trial Judge has defined the three types of harm (a public redacted version was filed on the same day, F00105/RED). The Panel clarifies that mental harm includes both psychological and moral harm (Second Decision on Victims' Participation, para. 35. *See also* ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Trial Chamber VI, Reparations Order, 8 March 2021, para. 70 referring to ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3728-tENG, Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, 24 March 2017, para. 57, fn. 103).

¹³ [REDACTED] (*See* Victims' Counsel Reparations Request, paras 37-38; KSC-BC-2020-05, F00440/A01, Victims' Counsel, *Annex 1 to Victims' Counsel's Submission of report pertaining to economic loss*, 23 July 2022, confidential [Economic Loss Report]). [REDACTED] (Victims' Counsel Reparations Request, para. 43, emphasis added). [REDACTED] (Victims' Counsel Reparations Request, para. 48). [REDACTED] (Victims' Counsel Reparations Request, paras 57, 59).

¹⁴ *See in this regard*, ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Trial Chamber VI, Reparations Order, 8 March 2021, paras 96-98 and references therein.

instructed to indicate for each victim and for each type of harm the sum of money to be awarded, in case the Accused would be convicted.

19. The Panel notes Victims' Counsel's suggestion that the Panel make an assessment as to "immaterial damage" on an equitable basis having regard to standards in national and international law.¹⁵ Mindful of the fact that certain types of harm can be quantifiable in monetary terms whereas others do not lend themselves to precise calculation, the Panel instructs Victims' Counsel to nevertheless indicate, for the latter, sums of money that the victims find appropriate to repair the harm inflicted.

20. The Panel instructs Victims' Counsel to submit the requested information, set out in paragraphs 16-19 above, in writing instead of, or in addition to, the closing statements, by no later than **Wednesday, 7 September 2022**. In addition, the Panel instructs the Defence to submit observations in writing, if it so wishes, by **Monday, 12 September 2022, by noon**.

¹⁵ KSC-BC-2020-05, Transcript, 21 March 2022, public, p. 2544 line 23, to p. 2545 line 5. *See also* Victims' Counsel Reparations Request, paras 8, 14-23, 51-55.

V. DISPOSITION

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

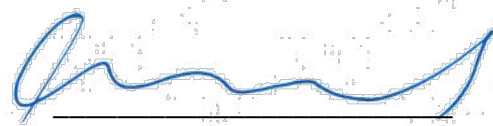
- a. **SETS** the agenda for the hearing on the closing statements as specified in paragraph 7; and
- b. **ORDERS** the Parties and Victims' Counsel to make submissions as set out in paragraphs 7-20 above.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Wednesday, 31 August 2022

At The Hague, the Netherlands.