

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

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Public redacted version of Victims' Counsel further observations on reparations matters

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I. INTRODUCTION

1. Victim's Counsel hereby offers further observations related to reparations pursuant to the Trial Panel's Decision of 6 May and Oral Order of 12 May. The subsequent observations will address
 - a) how it is proposed [REDACTED] to ensure the realisation of the victims' rights under article 22(3) of the Law;¹
 - b) the proposed assessment of the financial compensation for the damage allegedly suffered by indirect victims;
 - c) the time required by the proposed expert on the calculation of material loss and damages.

II. PROCEDURAL HISTORY

2. On 4 February 2022, the Trial Panel (hereafter: Panel) rendered its 'Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information'. 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 earlier submissions², 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.³

¹ Ibid, para 11.

² Namely 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.

³ 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

3. In her submissions filed on 1 March 2022⁴, Victims' Counsel outlined that a medical expert could assist the Panel in establishing the extent of the immaterial damages through medical expertise.
4. During the court hearing on 21 March 2022, Victims' Counsel indicated that she would request the Panel to make an assessment of immaterial damages on an equitable basis, "having regard to statements of the victims themselves, the report of the medical expert, as well as standards which are emerging from international and national case law."⁵ Furthermore, she indicated that she would file submissions detailing the relevant case law, in order to assist the Panel with its reparations order.⁶
5. In her second report pursuant to the Oral Order of 21 March 2022, Victims' Counsel requested the Panel for an extension of time limits for the delivery of the medical reports of [REDACTED]⁷ In its decision of 6 May 2022, the Panel agreed to the request to extend the time limits. It also ordered Victims' Counsel submit inter alia [REDACTED].⁸
6. Also, the Panel requested in its Oral Order from 12 May 2022 that Victims' Counsel submit further information on how much time the proposed expert on the calculation of material loss and damages would require to produce a report, should he be appointed.

proposed material, indicating whether it relates to the establishment of the truth and/or reparations and necessary redactions (if applicable).

⁴ KSC-BC-2020-05/F00334, VC, Victims' Counsel submissions pursuant to the Third decision on the conduct of the proceedings, 1 March 2022.

⁵ KSC-BC-2020-05 Transcript of court hearing of 21 March 2022, p. 2544, line 23 and following.

⁶ KSC-BC-2020-05 Transcript of court hearing of 21 March 2022, p. 2545, line 1 and following.

⁷ KSC-BC-2020-05, F00398, Victims' Counsel, Victims' Counsel second report pursuant to the Oral Order of 21 March 2022 and response to the Oral Order of 11 April 2022, 28 April 2022, confidential

⁸ KSC-BC-2020-05/F00403, Decision on extension of time limit for submission of medical reports and requesting further observations of 6 May 2022.

III. APPLICABLE LAW

7. In accordance with Article 22(8) of the Law on Specialist Chambers and Specialist Prosecutor's Office, in the event that a Trial Panel or Court of Appeals Panel of the Specialist Chambers adjudges an accused guilty of a crime, it may make an order directly against that accused specifying appropriate reparation to, or in respect of, victims collectively or individually.
8. According to Article 44(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office, the Specialist Chambers may, in addition to imprisonment, "order only the convicted person to make restitution or pay compensation to a Victim or to Victims collectively, or may order the forfeiture of property, proceeds and any assets used for or deriving from the commission of the crime and their return to their rightful owner or sale and share between Victims under Article 22."

IV. SUBMISSIONS

a) Assessment of the damage and injuries [REDACTED]

9. [REDACTED] claims reparations for the injuries and harm suffered from torture and ill-treatment as charged in this case. The victim has provided extensive testimony as a dual-status witness. [REDACTED]⁹ [REDACTED].¹⁰ [REDACTED]¹¹ [REDACTED]¹². [REDACTED]. This evidence will be revisited in detail in the Victim Impact Statement pursuant to Rule 134(c) of the Rules of Procedure and Evidence (hereafter: the Rules).
10. The Panel will have to assess this evidence on the balance of probabilities as the applicable standard of proof. Article 21(3) of the Law establishes a

⁹ Transcript, 21 September 2021, p. 523, lines 12-13 and 18, p. 524, lines 6-7 and 12-16 and p. 538, lines 14-22.

¹⁰ Transcript, 21 September 2021, p. 523, lines 12-17, p. 524, lines 17-24 and p. 540, lines 16-21.

¹¹ Transcript, 21 September 2021, p. 541, lines 5-12; see also p. 542 lines 17 et seq.

¹² Transcript, 22 September 2021, p. 645, lines 5 et seq (cross-examination by Defense counsel, with reference to SITF00296104.

standard of proof “beyond reasonable doubt” for a criminal conviction. For reparations, however, in international case law “the balance of probabilities” has evolved as the standard of proof applicable to reparations claims.¹³ As this case law shapes victims’ right to reparations, the Panel will have to adjudicate on the claims in the present case in accordance with this standard.¹⁴

11. The balance of probabilities requires [REDACTED] to show that it is more probable than not that he suffered harm as a consequence of one of the crimes for which the accused may be convicted.¹⁵ Although it is incumbent on Victims’ Counsel to present any evidence, including expert evidence, concerning the victims’ reparations claims¹⁶, the Panel will have to consider [REDACTED].
12. Victims’ Counsel has faced insurmountable difficulties in obtaining meaningful medical records. [REDACTED] the Panel must rely on the evidence before it and assess this in an equitable manner.
13. The Panel will have to consider what and how the Victim has described his experiences. [REDACTED].¹⁷ Additionally, it can draw on some general insights from the expert reports that the Panel will receive. Although these both address and discuss the injuries suffered by [REDACTED], they allow

¹³ ICC Appeals Chamber, 3 March 2015, *Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*, ICC-01/04-01/06-3129 (*The Prosecutor v. Thomas Lubanga Dyilo*), paras. 81-84; see also ICC Appeals Chamber, 3 March 2015, *Order for Reparations*, ICC-01/04-01/06-3129-AnxA (*The Prosecutor v. Thomas Lubanga Dyilo*), para. 65; see also ICC Trial Chamber II, 24 March 2017, *Order for Reparations pursuant to Article 75 of the Statute*, ICC-01/04-01/07-3728-tENG (*The Prosecutor v. Germain Katanga*), para 50. This standard of proof applies also to asylum cases, according to the ‘Note on Burden and Standard of Proof in Refugee Claims’, UNHCR, 16 December 1998, para. 11: “In assessing the overall credibility of the applicant’s claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant’s story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.”

¹⁴ Art 3(2)(e) of the Law.

¹⁵ See similarly ICC Trial Chamber II, 24 March 2017, *Order for Reparations pursuant to Article 75 of the Statute*, ICC-01/04-01/07-3728-tENG (*The Prosecutor v. Germain Katanga*), para 50.

¹⁶ *Ibid*, 12.

¹⁷ See for example Audio-Video Recording of SPO interview of 28 June 2019, Part 1 from 11:29, ERN061015b.

the Panel to expand its knowledge on the effects of torture and use these in its probability assessment.

14. Furthermore, it is well established that survivors of torture often suffer from, inter alia, post-traumatic stress symptoms, elevated rates of anxiety, depression, deep distrust of others.¹⁸ [REDACTED]. Already in 1993, the UN Special Rapporteur on Torture in 1993 remarked that “it is well established that for any victims of gross violations of human rights, the passage of time has no attenuating effect on the contrary, there is an increase in post-traumatic stress.”¹⁹ The Special Rapporteur concludes that this makes “material, medical, psychological and social assistance and support over a long period of time” necessary.²⁰ [REDACTED].
15. Considering the totality of evidence before it in this case, it is in Victims’ Counsel’s view more probable than not that [REDACTED].

b) Proposed assessment of the financial compensation for the damage allegedly suffered by indirect victims

16. The indirect victims have lost [REDACTED]. Their individual circumstances and the impact of the crime will be outlined in detail in the Victims’ Impact Statement pursuant to Rule 134(c) of the Rules. To avoid repetition, Victims’ Counsel will refrain from re-iterating the evidence before the Panel related to the harm suffered at this point of the proceedings.

¹⁸ See A.C. de Williams and J. van der Merwe, ‘The psychological impact of torture’, *British Journal of Pain* 2013;7(2):101-106, p. 103: “Other than post-traumatic stress symptoms, torture survivors have elevated rates of anxiety, depression, and adjustment problems, including outbreaks of anger and violence directed towards family members” [footnotes omitted] (source: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4590125/pdf/10.1177_2049463713483596.pdf [accessed 23-04-2022]).

See also e.g. A. Deutsch, ‘Consequences of torture on individuals, their families and society’, pp. 91-134 in *Comprehensive Attention to Victims of Torture in Cases under Litigation: Psychosocial contributions* (2009), Inter-American Institute of Human Rights (source: <https://www.corteidh.or.cr/tablas/26951.pdf> [accessed 23-04-2022]), see in particular pp. 110 *et seq.*

¹⁹ UN Special Rapporteur on Torture, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report (UN Doc. E/CN.4/Sub.2/1993), para 135.

²⁰ *Ibid.*

17. As indicated in previous submissions, Victims' Counsel is of the view that the Panel ought to assess the damage done based on the assessment of the evidence provided by the victims as to the impact of the crime as well as standards which are emerging from international and national case law. In the following, Victims' Counsel will provide a discussion of relevant case law, specifically drawing on the practice of the International Criminal Court (hereafter: ICC), the European Court of Human Rights (hereafter: ECtHR) and the Inter-American Court of Human Rights (hereafter: IACtHR), to outline the basis for an assessment of the financial compensation for the damage suffered by indirect victims.
18. The ICC considered that "there is an inherent difficulty in addressing and measuring monetary values for moral harm".²¹ In any case, according to the ICC, compensation should aim at addressing, in a proportionate and appropriate manner, the harm that has been inflicted.²² Furthermore, the amount of compensation for moral harm should be estimated without consideration of the economic situation of the victim.²³
19. The ECtHR determines the amount of compensation for moral damage on an equitable basis, taking case-law standards into account. In the ECtHR's case law, moral damages are awarded in situations where the applicant has "suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption of life, or real loss of opportunity".²⁴

²¹ ICC Trial Chamber VIII 17 August 2017, Reparations Order, ICC-01/12-01/15 (*Prosecutor v. Ahmad al Faqi al Mahdi*), para. 129.

²² ICC Trial Chamber I 7 August 2012, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06 (*Prosecutor v. Thomas Lubanga Dyilo*) para. 230.

²³ ICC Trial Chamber VIII 17 August 2017, Reparations Order, ICC-01/12-01/15 (*Prosecutor v. Ahmad al Faqi al Mahdi*), para. 43.

²⁴ ECtHR 18 September 2009, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (*Varvana and others v. Turkey*), para. 224.

20. For the IACtHR, the criteria for establishing amounts of compensation for moral damages are grounded on the “reasonable exercise of judicial discretion”²⁵ and on the “principle of equity.”²⁶ According to the IACtHR, reparation should include “the restoration of the prior situation, the reparation of the consequences of the violation, [...] including emotional harm.”²⁷ For the IACtHR, non-pecuniary damage is self-evident when the claimant is the victim or a close relative, because it is characteristic of human nature that anyone subjected to acts of aggression and abuse will experience moral suffering.²⁸
21. The ICC reviewed the practice of France, Belgium, the military courts in the DRC, the United Nations Compensation Commission and the Inter-American Court in order to establish the amount of compensation to be awarded for the psychological harm as a result of the death of a relative.²⁹ The ICC concluded that the psychological harm connected to the death of a near relative is reckoned *ex aequo et bono* at \$8,000 (USD) and psychological harm connected to the death of a more distant relative is reckoned *ex aequo et bono* at \$4,000 (USD).³⁰
22. In cases of torture and death, the ECtHR has awarded compensation for moral damages to close relatives. In the *Keenan v. the United Kingdom* case, the applicant’s mentally ill son committed suicide while he was imprisoned. The Court found that defects in the medical care to be provided to him constituted inhuman and degrading treatment. Moreover, the applicant’s son suffered significant stress, anxiety and feelings of insecurity resulting from the

²⁵ IACtHR 5 July 2004, series C, no. 109 (*19 Merchants v. Colombia*), para. 244.

²⁶ IACtHR 26 May 2001, series C, no. 77 (*Street Children*) (ser. C), para. 84.

²⁷ IACtHR 29 July 1988, series C, no. 4 (*Velásquez Rodríguez v. Honduras*), para. 26.

²⁸ IACtHR 27 November 1998, series C, no. 42 (*Loayza-Tamayo v. Peru*), para. 138.

²⁹ ICC Trial Chamber II 24 March 2017, Reparations order, ICC-01/04-01/07 (*Prosecutor v. Germain Katanga*), para. 230.

³⁰ ICC Trial Chamber II 24 March 2017, Reparations order, ICC-01/04-01/07 (*Prosecutor v. Germain Katanga*), para. 232.

disciplinary punishment prior to his death. The applicant suffered anguish and distress from the circumstances of his detention and her inability to pursue an effective avenue of redress. Bearing in mind that this was a case of suicide and not deliberate torture, the Court awarded the applicant £7,000 (GBP) for non-pecuniary damages in respect of her son, to be held by her for his estate, and £3,000 (GBP) in her personal capacity.³¹

23. The IACtHR has extensive practice with regards to awarding relatives compensation for non-pecuniary damage. The IACtHR may take into account circumstances such as the degree of closeness to the victim, the existence of an affective relationship and the concern for the victim's fate.³²
24. [REDACTED]³³
25. In another case, the IACtHR awarded \$66,000 (USD) in favour of a victim of forced disappearance, because "it is inherent in human nature that anyone subjected to forced disappearance experiences profound suffering, anguish, terror, feelings of powerlessness and insecurity".³⁴ The victim was confined at a military base, where he was subsequently executed. His remains were not found until almost thirty years later. His relatives, who suffered from the lack of justice and concealment of the truth which had caused them profound distress, intense psychological suffering, anguish and uncertainty, were awarded \$40,000 (USD) for non-pecuniary damages each.³⁵
26. The Victim's Counsel considers [REDACTED] Thus, the relatives must be compensated for non-pecuniary damage.

³¹ ECtHR 3 April 2001, no. 27229/95 (*Keenan v. The United Kingdom*), para. 138.

³² IACtHR 27 August 1998, series C, no. 39 (*Garrido and Baigorria v. Argentina*), paras 63-65.

³³ IACtHR [REDACTED].

³⁴ IACtHR 12 August 2008, series C, no. 186 (*Heliodoro Portugal v. Panama*), para. 238.

³⁵ IACtHR 12 August 2008, series C, no. 186 (*Heliodoro Portugal v. Panama*), para. 239.

c) Time needed by the expert

27. Regarding the time required for the delivery of an expert report on the calculation of economic loss and material damage, Victims' Counsel has consulted with the proposed expert, Stefan Lerz from the *Nederlands Rekencentrum Letselschade* (hereafter: NRL; best translated as the 'Dutch Center for the Calculation of Damages as a result of Personal Injury').
28. Overall, an expert report can be delivered within three to four weeks. Victims' Counsel would collate the necessary information related to the direct victims; once received, the expert would gather data related to the situation [REDACTED], conduct an economic analysis, and produce a report that outlines the overall material damages. To ensure swift delivery, the expert would make himself available as soon as appointed and work on a full-time basis on this report.

V. CONCLUSION

29. Victims' Counsel proposes that a reparations order may be issued in conjunction with the trial judgement. Within a foreseeable time, the Panel will be able to complete the factual basis for its assessment. As argued above, regarding [REDACTED], the Panel will benefit from the general expert knowledge and insights that the medical experts have offered regarding the other direct victims in this case. Furthermore, this submission offers an overview over the available case law on reparations for indirect victims offers good guidance for the Panel. Lastly, the appointment of an expert will not lead to any significant delays, as the gathering of all facts can be done within around four weeks.
30. Victims' Counsel will aim to provide a consolidated submission with specified amounts of reparations for all direct and indirect victims after the factual evidence gathering phase has concluded.

31. Given the nature of the information provided in these submissions, which include (medical) information concerning specific victims, Victims' Counsel files these submissions as confidential.

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Anni Pues

Victims' Counsel

23 May 2022

At The Hague, the Netherlands