

In: KSC-CA-2023-02
The Prosecutor v. Salih Mustafa

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Victims' Counsel

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**Victims' Counsel Response to
Defence request for certification to Appeal the Decision on Modalities of Victim
Participation in Appellate Proceedings (F00013)**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. By judgment of 16 December 2022, Trial Panel I found Salih Mustafa guilty of the war crimes of arbitrary detention, torture and murder. That judgment is currently on appeal.¹
2. On 15 February 2023, the Panel of the Appeals Chamber (hereafter: the Appeals Panel) rendered its Decision on the Modalities of Victim Participation in Appellate Proceedings (hereafter: the Appeals Panel Decision).²
3. On 22 February 2023, the Defence filed a 'Request for Certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings' (hereafter: the Defence Request) with the ultimate aim of excluding victim participation at the appeals stage.³ Because the Request fundamentally challenges the possibility for victims to participate in this case as a way to safeguard their interests, Victims' Counsel will in the following provide her response to this motion. It is argued that no interlocutory appeal is available against the Appeals Panel Decision and that the conditions for an interlocutory appeal are not met.

II. APPLICABLE LAW

4. Victims' Counsel refers to Articles 45 and 46 of the Law on the Specialist Chambers and Specialist Prosecutor's Office (hereafter: the Law), Rules 77 and 170 of the Rules of Procedure and Evidence (hereafter: the Rules), as well as article 6 of the European Convention on Human Rights (hereafter: ECHR).

¹ [KSC-CA-2023-02-F00006/RED2](#) (public), *Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of the Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022*, 13 February 2023 (confidential version filed on 2 February 2023).

² [KSC-CA-2023-02-F00011](#) (public) *AC Decision on Modalities of Victim Participation in Appellate Proceedings*, 15 February 2023, chap. I ('Background').

³ [KSC-CA-2023-02/F00013](#) (public) *Defence Request for Certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings*, 22 February 2023.

III. SUBMISSIONS

Interlocutory Appeals against Appeal Panel decisions not permitted

5. The Law does not provide for interlocutory appeals against decisions by an Appeals Panel.
6. Article 45 of the Law is limited to decisions relating to the detention of the Accused, and preliminary motions challenging the jurisdiction of the Specialist Chambers. Article 45(2) of the Law clarifies that leave must be sought regarding any issue ‘which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the *trial* and for which, in the opinion of the *Pre-Trial Judge or Trial Panel*, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.’⁴ This provision is exhaustive and does not provide for interlocutory appeals against Appeal Panel decisions. It is limited to the pre-trial and trial stages - the wording makes this clear.
7. A systematic reading of the Law further clarifies that Article 45 does not apply to second instance appellate proceedings. Article 46 is the relevant provision setting out the conduct of proceedings at this stage with no cross-reference to the possibility of interlocutory appeals.
8. A review of the Rules supports this interpretation – and in Victims’ Counsel view, the only possible understanding of the Law. Rule 77, which regulates interlocutory appeals that require certification, provides in paragraph two that the *Court of Appeal* is the decision-making body charged with resolving issues as required to ‘materially advance the proceedings’.⁵ This rule corresponds with article 33(1)(c) of the Law and shows that the Supreme Court has no role in deciding on interlocutory appeals.

⁴ Emphasis added.

⁵ Emphasis added.

9. Analysis of the object and purpose of the remedy of interlocutory appeals further supports the position that this remedy is not available for Appeal Panel decisions. The remedy of interlocutory appeals safeguards the fairness and expeditious conduct of the often very complex proceedings at the Pre-Trial and Trial Stage, which by their nature require review of evidence and determination of the factual scope of the Trial Panel Judgment. In contrast, the second instance appellate stage is not a trial *de novo*⁶ and is limited to a review of possible errors made by the Trial Panel in its Judgment. For this reason, proceedings at the second instance appellate stage are limited in scope, and clear deadlines are provided for the different phases of this procedural stage. Therefore, there is no need for interlocutory appeals with the aim of materially advancing proceedings.
10. Rule 173(3) of the Rules does not offer any room for a different understanding either. It clarifies that the ‘rules governing the trial proceedings shall apply *mutatis mutandis* to proceedings before the Court of Appeals Panel’. This is why, for example, modalities of victim participation, as set out in Rule 114 of the Rules, continue to apply with the changes necessary to fit appropriately into the second instance appeals stage. However, this rule does not support an argument that the possibility of an interlocutory appeal could also be applied *mutatis mutandis*, when viewing the rule in the context of the entirety of the Rules. The Defence misapplies rule 173(3) when suggesting that interlocutory appeals form part of trial proceedings. The rules regulating the trial proceedings are provided in chapter 9 of the Rules, whereas rule 77 on interlocutory appeals is part of chapter five. Furthermore, the Supreme Court Panel, which would have to serve as a review body against Appeals Panel Decisions, is only available as a third instance appellate court within narrowly defined parameters. Namely either when an acquittal is overturned into a

⁶ Article 46 (2) of the Law.

conviction or when life-long imprisonment has been imposed.⁷ This limitation clarifies that the Supreme Court Panel will only convene in extraordinary circumstances and is not available as a decision-making body for interlocutory appeals. No such circumstances exist when a Party or Participant merely disagrees with a decision issued by the Appeals Panel as is the case here. Lastly, Rule 186(3) of the Rules confirms that the Rule 186 (3) makes the argument that the Supreme Court has no jurisdiction to hear interlocutory appeals clear: it specifically applies Rules 173 to 185 to proceedings before the Supreme Court and does not apply Rules 169-171 of the Rules. For these reasons, the reliance of the Defence on rule 173(3) is not persuasive.

11. This understanding of the legal framework of the KSC advanced here that not interlocutory appeal is permissible against Appeals Panel decisions is further supported by international case law. The MICT Appeals Chamber reiterated that ‘pre-appeal and interlocutory decisions [are treated] as binding in ongoing proceedings as to all issues decided therein, and that, in the interests of justice, this principle forecloses re-litigation of such issues.’⁸ This finding is reflective of a general practice in international legal procedures to limit the possibility of interlocutory appeals and to exclude it as a remedy against Appeals Decisions.⁹
12. If anything, the current Defence Request might best be understood as a Request for reconsideration pursuant to Rule 79 of the Rules. However, such requests for reconsideration require exceptional circumstances or a clear error

⁷ Article 47 of the Law.

⁸ *The Prosecutor v Ratko Mladic*, Case No MICT-13-56-A, Public Redacted Version of a “Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release” filed on 22 May 2018, p 2. See also *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, para. 127; *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-A, Decision on Naletilic’s Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 20; *The Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 202.

⁹ For an overview over the largely consistent practice see Göran Sluiter et.al., INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (OUP 2013), pp. 939 ff with further references.

of reasoning, neither of which have been demonstrated by the Defence in this case.

13. For these reasons alone, the Defence should be dismissed.

Test for interlocutory appeal not met

14. In order to exhaustively address the Defence Request, the following section offers observations that underline that the Defence Request does not meet the requirements for the sought remedy.
15. The Defence ultimately argues that victim participation within the parameters provided by the Appeal Panel in its Decision of 15 February would significantly affect the fair and expeditious conduct of the proceedings.¹⁰
16. An interlocutory appeal is not an instrument for a general review of decisions but is rather meant to resolve significant issues affecting the fairness of proceedings or the outcome of the trial. The remedy is only available in situations where there is an ‘appealable issue’¹¹ and is not available when a decision is merely misrepresented or misunderstood, nor when it is based on unsubstantiated and hypothetical claims.¹²
17. In its Decision, the Appeals Panel has limited the right of Victims’ Counsel to make submissions throughout the appeals stage, by requiring her to set out explicitly each time how her submissions are related to the victims’ interests.

¹⁰ Article 45 (2) of the Law.

¹¹ KSC-BC-2020-06/F00172 (public), Pre-Trial Judge *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, para 10.

¹² KSC-BC-2020-06/IA024, Decision on Defence Appeals against “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”, 27 December 2022, para 84; see also KSC-BC-2020-06/F00172 (public), Pre-Trial Judge *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, in which the Pre-Trial Judge specified that “An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns”, para 11.

The Panel retains control over the scope of victim participation, as the failure to 'satisfy the Panel of this relationship may [...] lead to the summary dismissal of the submissions.'¹³ Although the Defence acknowledges this limitation, it misrepresents the clear language of the Decision on this point when it purports that the Appeal Panel is permitting Victims' Counsel to make submissions on 'any point of law or fact, and to file responses and replies, as the case may be, to any submissions'.¹⁴ Precisely because Victims' Counsel's submissions must always be linked to victims' interests, active victim participation through submissions is not unrestricted at all. The in-built limitation set out above ensures the Appeals Panel's control and ability to continuously safeguard the fair trial rights of the accused.¹⁵

18. Furthermore, the Defence asserts that the expeditiousness of the proceedings would 'be significantly affected as each time the victims' counsel will make submissions, replies, oral or written, each of these submissions will have to be put at this test. This will cause significantly delay.'¹⁶ These are unfounded concerns. Victims' Counsel will always be required to clearly spell out which rights and personal interests of the participating victims are at issue, whereupon the Appeals Panel is enabled to assess that link. Also, the limited procedural phases during the appeals proceedings, as set out in article 46 of the Law, do inherently limit the occasions for all parties and participants to make submissions. The Defence has not substantiated its claim that the assessment of victims' interests would lead to such delays that this would significantly affect the fairness of proceedings for the accused. The Defence does not list a single example of undue delays as a result of victim participation during the Trial Phase. Victims' Counsel asserts that the

¹³ [KSC-CA-2023-02-F00011](#), Appeals Panel Decision, para 15.

¹⁴ [KSC-CA-2023-02/F00013](#), Defence Request, para 15.

¹⁵ [KSC-CA-2023-02-F00011](#), Appeals Panel Decision, par. 6, 10.

¹⁶ [KSC-CA-2023-02/F00013](#), Defence Request, para 18.

proceedings before the Trial Panel have demonstrated that in practice so far, victim participation before the KSC has been both balanced and fair. The claims are hypothetical in nature and cannot justify an interlocutory appeal.

19. Victim participation *per se* is not contrary to the fairness and expeditiousness of proceedings. As recognised in the Appeals Decision, the practice of international and hybrid courts and tribunals evidences this.¹⁷ At the International Criminal Court, where victim participation is explicitly limited through the fair trial rights of the accused¹⁸, victim participation in appeal proceedings is a regular feature.¹⁹ Similarly, and although slightly narrower in its framework, victim participation during appeals proceedings has been authorised by the Special Tribunal for the Lebanon.²⁰ Both Appeals Chambers provided modalities equivalent in scope to those provided for in the Decision of this Panel.
20. Additionally, the Defence submission fails to acknowledge the fact that the drafters of the Law specifically provided for victim participation in the proceedings before the KSC, allowing victims to seek to realise their right to reparations within the proceedings before the KSC.²¹
21. On the contrary to breaching the accused's fair trial rights, exclusion of participating victims during the appellate stage would breach the need for fairness towards victims. Victims as claimants of reparations are entitled to fairness of the proceedings within the scope of article 6(1) of the ECHR. The European Court of Human Rights (ECtHR) has clarified that victims as participants in criminal law proceedings fall within the scope of protection of

¹⁷ [KSC-CA-2023-02-F00011](#), Appeals Panel Decision para 6.

¹⁸ Article 68(3) of the Rome Statute.

¹⁹ *The Prosecutor v Dominic Ongwen* Decision on the modalities of victim participation, Appeals Chamber, ICC-02/04-01/15 A, 11 June 2021, para 4.

²⁰ *The Prosecutor v Salim Jamil Ayyash et al* Decision on the admissibility of the LRV Appeal against sentence and modalities of victim participation, STL-11-01/A-1/AC, 24 February 2021, paras 52-70.

²¹ Article 22 of the Law.

article 6 (1) of the ECHR if the outcome of the proceedings in question must be decisive for obtaining redress.²² The ECtHR also emphasises the importance of the right of victims to know the truth about the circumstances surrounding events involving grave human rights violations which imply the right to an effective judicial investigation and a possible right to compensation.²³ If victims in this case were not afforded to make representations on issues affecting their interests, this would amount to a breach of fair trial rights for the participating victims rather than the accused.

22. The Defence disregards the fact that the trial format that applies before the KSC is not strictly adversarial. For example, the Panel is enabled to admit evidence beyond the case presented by the SPO, based on submissions made by Victims' Counsel.²⁴ The SPO has the right to respond to appeals submissions filed by the Defence. Barring Victims' Counsel from participation in issues that are directly linked to victims' rights and personal interests would leave a gap in the procedural framework. This would run counter to the process before the KSC as envisaged by the drafters and indeed breach the participating victims' constitutionally guaranteed rights.
23. Indeed, article 31 (1) of the Constitution of the Republic of Kosovo provides that '[e]veryone shall be guaranteed equal protection of rights in the

²² *Arnoldi v. Italy*, case no 35637/04, 7 December 2017, paras 25-40; *Perez v. France* [GC], case no 47287/99, paras 62-66 and 74-75; *Krumpel and Krumpelová v. Slovakia*, case no 56195/00, 5 July 2005, paras 45-49; *Javor and Javorová v. Slovakia*, case no 42360/10, 15 September 2015, paras 46-66.

²³ *Alexandrescu and Others v. Romania*, case nos. 56842/08 et.al, 24 November 2015, para 22.

²⁴ See in particular Rule 132 RPE, which provides that: "After hearing the Parties and, where 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 determination of the truth." See also Rule 149(2) and (3) RPE, which stipulate that Parties and Victims' Counsel may challenge expert reports, but if no submissions are made in that respect the Trial Panel may call the reports by those experts into evidence without calling the experts to testify. The Trial Panel did this with regard to the (unchallenged) medical expert reports generated by Victims' Counsel, for the purpose of its deliberations on the guilt or innocence of Salih Mustafa. See for this, [KSC-2020-05/F00430RED](#) (public), TP *Public redacted version of Decision under Rules 132 and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers on evidence called by the Panel* of 3 June 2022, para. 9.

proceedings before courts'. This protection is further specified in paragraph two which stipulates that '[e]veryone is entitled to a fair and impartial public hearing as to the determination of one's rights [...] by an independent and impartial tribunal established by law.' These provisions support the claim that an exclusion of victims from participation at the appellate stage would breach their rights to a fair trial.

24. The Defence request for certification of leave to appeal the Appeals Panel's Decision of 15 February 2023 is therefore wholly unfounded.

Observations on Defence compliance with KSC Practice Directions

25. Finally, Victims' Counsel observes the Defence's failure to comply with the KSC Practice Directions on Files in Filings in its Request, when omitting Victims' Counsel from the title page despite the Appeals Panel's Decision of 15 February 2023., which sets out that 'Counsel for Victims shall also continue to be notified of all disclosed and/or distributed items in the case file, including all public, confidential and strictly confidential filings [...].'²⁵
26. Article 29(2)(j) of the Practice Direction on Files and Filings requires all written submissions to name on their title page all participants to which the filing should be distributed. The failure of the Defence to include Victims' Counsel on the title page therefore places an undue reliance on CMU staff to include Victims' Counsel in those submissions in the absence of instruction from the Defence.

²⁵ [KSC-CA-2023-02-F00011](#), Appeals Panel Decision, para 11.

IV. RELIEF REQUESTED

27. Victims Counsel requests that:

- a. The Appeals Panel dismisses the Request;
- b. The Appeals Panel reminds the Defence of compliance with the legal framework and specifically the Practice Directions on Files and Filings to ensure the orderly conduct of proceedings.

Word count: 2976



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3 March 2023

At The Hague, the Netherlands