

In: KSC-SC-2024-02
The Prosecutor v. Salih Mustafa

Before: **Supreme Court Panel**
Judge Ekaterina Trendafilova
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Victims' Counsel

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VC Observation on victims' rights and interests

Specialist Prosecutor's Office

Kimberly P. West

Victims' Counsel

Dr Anni Pues

Counsel for Salih Mustafa

Venkateswari Alagenda

I. INTRODUCTION

1. In these proceedings on the protection of legality, Victims' Counsel submits observations on the continued safeguarding of victims' rights and interests. She requests that it is critical to ensure information for victims and provide opportunities to make submissions as far as these concern victims' rights and interests.

II. PROCEDURAL HISTORY

2. On 15 January 2024, the Defence filed an Urgent Motion for an Extension of Time to File a Request for Protection of Legality¹, the Prosecution submitted its response on 17 January 2024.² The same day, the President assigned a Supreme Court Panel.³ In none of these filings was Victims' Counsel included on the cover sheet of the filing or informed about the submission. The Registry submitted information on the approval of Counsel with a filing on 18 January 2024, which was the first occasion at which Victims Counsel was included.

III. SUBMISSIONS

3. Victims' Counsel observes that some key filings omitted to include Victims' Counsel on the cover sheet, which meant that Victims' Counsel had not been notified of the submissions and the Decision to assign a Supreme Court Panel.

¹ KSC-SC-2024-02/F00001 (Defence) Mustafa Urgent Motion for an Extension of Time to File a Request for Protection of Legality, 15 January 2024.

It is important to note that Defence Counsel has since apologised for apologies for inadvertently not stating Victims' Counsel on the cover sheet, a practice that will be rectified going forward.

² KSC-SC-2024-02/F00002 (Prosecution) Prosecution response to 'Mustafa Urgent Motion for an Extension of Time to File a Request for Protection of Legality', 17 January 2024.

³ KSC-SC-2024-02/F00003 (President) Decision Assigning a Supreme Court Panel, 17 January 2024.

4. Victims have the rights to notification, acknowledgement, reparation and protection in proceedings before the KSC.⁴ Non-inclusion in the present proceedings directly affects these rights.

Victims' Rights

5. The right to notification includes "notification", this refers to the victims' personal interest and right to receive information about the proceedings before the KSC, in order to allow them to participate in those proceedings.⁵ Rule 114(3) of the Rules even imposes a duty on Victims' Counsel to keep participating victims informed of relevant developments in the proceedings. If Victims' Counsel is not included in filings in the present proceedings, she cannot comply with her obligation as set out in Rule 114 (3) of the Rules.
6. The right to acknowledgment that the harm they suffered is 'recognised and, to that end, to contribute meaningfully, through the modalities of their participation, to the recognition of such harm and of the responsibility of those at the origin of it.'⁶ It is therefore important that victim participation, with the necessary modifications to adjust to the nature of the proceedings at hand, can continue. As a first step, this requires access to information and, in a second step, the right to make submissions, as long as victims rights' are directly affected.
7. The right to reparations even makes participating victims parties to the proceedings in as far as reparations are concerned and extends the protection of article 6(1) of the ECHR to participating victims.⁷ After the final judgment in this case has been issued, a single judge has now been appointed in separate proceedings in this case regarding the enforcement of the Reparations Order

⁴ Article 22 (3) of the Law; see also KSC-BC-2020-05/F00152, para 9.

⁵ KSC-BC-2020-05/F00152, para 12.

⁶ KSC-BC-2020-05/F00152, para 16.

⁷ KSC-BC-2020-05/F00152, para 12.

in this case.⁸ The direct link between the proceedings before this Supreme Court Panel and the reparations becomes apparent in the Defence request to stay the enforcement of the reparations order because of the proceedings pending here.⁹ The Defence argues that the current proceedings may have an impact on the scope of the awarded reparations. Therefore, fairness commands that the victims in this case are enabled to continue their participation in this case.

8. Lastly, victims' have a direct interest – and right - to protection which includes 'victims' safety, physical and psychological well-being, dignity and privacy'.¹⁰ At this point, it is difficult to determine if and to what extent the current proceedings may impact victim protection. As this may be the case, though, information is critical for Victims' Counsel to flag any issues vital to the protection of victims.

Modalities of victim participation

9. The modalities of victims' participation must be consistent across the different stages of the proceedings. In Victims' Counsel's view, victim participation must extend to proceedings with which an extra-ordinary remedy is sought to ensure the continued protection of the rights set out above.
10. No directly applicable legal provision exists that would set out the frame of victim participation before the Supreme Court for article 48 requests. However, the Appeals Panel found that

there is, in fact, a legal basis for the participation of victims, through Counsel for Victims, in these appellate proceedings. The Panel considers

⁸ KSC-CA-2023-02/R001/F00001 (President) *Decision Assigning a Single Judge* (public), 17 January 2024.

⁹ KSC-CA-2023-02/R001/F00003 (Defence) *Mustafa Request for a Temporary Stay*, 22 January 2024, para 6-8.

¹⁰ KSC-CA-2023-02/F00011(Appeals Panel) *Decision on Modalities of Victim Participation in Appellate Proceedings*, 15 February 2023, para 8.

that regardless of whether Counsel for Victims has filed an appeal under Article 46(9) of the Law, victim participation is permissible as long as it complies with the Law and the Rules, is limited to issues impacting their personal interests and is not prejudicial to or inconsistent with the rights of the Accused.¹¹

11. Victims Counsel recognises the extraordinary nature of the proceedings here. This is also apparent in the Rules of Procedure and Evidence, which are modified to the rules at other stages of the proceedings. However, the Rules directly recognise a role for Victims' Counsel in extraordinary legal remedy proceedings based on article 48 of the Law through the provisions in Rules 187 (3) and 191 (3).
12. While no such role for Victims' Counsel is explicitly mentioned for protection of legality requests, the direct impact of such a decision on victims' rights, specifically regarding their right to reparations, requires victim participation in these proceedings. It is to be recalled that, as far as reparations are concerned, victims enjoy the protection of article 6 (1) of the ECHR as parties. The conviction, which is the potential subject of the request of legal protection, is the legal foundation for the reparations award. Thus, victims must be kept informed and, if and when their rights and interests are directly affected, be able to make submissions. The Supreme Court Panel clarified in the case against Gucati and Haradinaj that '[w]hat matters is that Parties are adequately heard, be it through written or oral submissions'.¹² While this finding referred in the context of that case to the question of an oral hearing, it has importance in the context here because of the hybrid status of victims as participants and, whenever their reparations claims and award are affected, as parties.

¹¹ KSC-CA-2023-02/F00011 *Decision on Modalities of Victim Participation in Appellate Proceedings*, para 6.

¹² KSC-SC-2023-01/F00021 (Supreme Court) Prosecutor v Gucati and Haradinaj, *Decision on Requests for Protection of Legality*, para 24.

13. At the current juncture, Victims' Counsel does not seek to make any submissions on the subject-matter as such, as the arguments so far do not require so for the protection of victims' rights beyond the points made here. However, it is sought to clarify that Victims' Counsel ought to be included in the list of those receiving filings in these proceedings to ensure full notification of relevant developments.

IV. RELIEF REQUESTED

14. Victims Counsel requests that

Victims' Counsel remains informed of the proceedings in this case pending before the Supreme Court Panel.

V. CLASSIFICATION

15. This filing responds to a public filing and is therefore classified as such.

Word count: 1340



Anni Pues
Victims' Counsel

23 January 2024

At The Hague, the Netherlands