

1 Thursday, 6 April 2023

2 [Reparation Order]

3 [Open session]

4 [The accused entered court]

5 --- Upon commencing at 12.00 p.m.

6 PRESIDING JUDGE VELDT-FOGLIA: Good afternoon and welcome.

7 Mr. Court Officer, could you please call the case.

8 THE COURT OFFICER: Good afternoon, Your Honours. This is file
9 number KSC-BC-2020-05, The Specialist Prosecutor versus
10 Salih Mustafa.

11 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Mr. Court Officer.

12 First of all, I will call the appearances.

13 Please, Victims' Counsel, you have the floor.

14 MS. PUES: Good morning, Your Honours. Good morning, everybody.

15 The participating victims are today represented by my co-counsel
16 Brechtje Vossenbergh and by myself, Anni Pues, as counsel.

17 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

18 Defence Counsel, you have the floor.

19 MR. VON BONE: Good morning, Your Honour. Defence is
20 represented by myself, Julius von Bone, counsel. And Mr. Mustafa is
21 joining us within the courtroom. Other members are joining via legal
22 Transcend.

23 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

24 The Specialist Prosecutor's Office, you have the floor.

25 MS. D'ASCOLI: Thank you, Your Honours. And good afternoon,

1 Your Honours, and everyone in and around the courtroom.

2 The Specialist Prosecutor's Office today is represented by
3 Mr. Alex Whiting, Acting Specialist Prosecutor; Julie Mann, case
4 manager; and myself, Silvia D'Ascoli, Prosecutor. Thank you.

5 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

6 Now I turn to the Registry. You have the floor.

7 MR. ROCHE: Good afternoon, Your Honours. I'm Ralph Roche, head
8 of Judicial Services Division at the Registry. Thank you.

9 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

10 Trial Panel I will deliver today the Reparation Order in the
11 case of The Specialist Prosecutor versus Salih Mustafa. This
12 Reparation Order is pronounced in public and in the presence of
13 Mr. Mustafa. While I will read a summary of the key findings by the
14 Panel, this summary is not a part of the Reparation Order, which is
15 the only authoritative account of the Panel's rulings and findings,
16 and a non-authoritative summary will be on the web site of the Kosovo
17 Specialist Chambers.

18 At the outset, I wish to emphasise that today's hearing marks
19 another milestone for the Kosovo Specialist Chambers as the first
20 Reparation Order of this Tribunal is issued. Reparations are an
21 integral part of the proceedings before the KSC. They are essential
22 for the delivery of justice to victims of serious violations of human
23 rights and international humanitarian law.

24 This Reparation Order arises from the conviction of
25 Mr. Salih Mustafa on 16 December 2022. I recall in this regard that

1 Mr. Mustafa was found guilty by this Panel of three counts of war
2 crime, namely, arbitrary detention, torture, and murder, which he
3 committed directly and as part of a joint criminal enterprise between
4 approximately 1 April 1999 and around the end of April 1999, in a
5 compound in Zllash in Kosovo. Mr. Mustafa was sentenced to 26 years
6 of imprisonment, with credit for the time served at the KSC detention
7 facilities since 24 September 2020.

8 I recall that the victims participating in the proceedings
9 benefitted from protective measures; namely, that their names and any
10 identifying information be withheld from the public. Accordingly, in
11 the course of this hearing, when referring to the victims, I will use
12 their assigned victim code. The Panel has also carefully reviewed
13 what further information to disclose in public by balancing the need
14 to protect victims with the principle of publicity of the
15 proceedings.

16 I will now begin with the summary of the Reparation Order.

17 I will give a short overview of the proceedings.

18 On 4 February 2022, Trial Panel I ruled that, in case of a
19 conviction, it will not refer victims to civil litigation in Kosovo
20 courts but will issue a Reparation Order. The proceedings concerning
21 reparations were, as a result, conducted in parallel with the trial.

22 On 30 June, Victims' Counsel submitted a request for reparations
23 on behalf of the eight victims admitted to participate in the trial
24 proceedings.

25 For a complete overview of the applicable law and the

1 principles, I refer to the public version of the Reparation Order.
2 For the purposes of the summary, I would like to highlight the
3 following.

4 The Panel emphasises that the objective of reparations at the
5 Kosovo Specialist Chambers is not solely to punish the convicted
6 person, as foreseen in Article 44(6) of the Law, but also to
7 acknowledge and to repair, to the extent possible, the harm caused to
8 the victims.

9 Accordingly, victims should receive reasonable, appropriate and
10 prompt reparations.

11 Moving to the principles applicable to the liability of a
12 convicted person for reparations. The Panel determined that the
13 Reparation Order cannot go beyond crimes of which the convicted
14 persons was held liable, and it must be issued in all circumstances
15 against the convicted person. The responsibility of other persons,
16 organisations or state responsibility is irrelevant to determine the
17 convicted person's liability for reparations. And likewise, the
18 convicted person's indigence is irrelevant to this determination.

19 Let me address now briefly the Panel's approach concerning the
20 assessment of the evidence presented by the victims for the purposes
21 of reparation.

22 First and foremost, the Panel relied on the factual and legal
23 findings made in the Trial Judgment which led to the conviction and
24 sentencing of Salih Mustafa. The Panel also considered, *inter alia*,
25 the Victims' Counsel's reparations request, the impact statement, the

1 imMO expert report and the Lerz report.

2 Finally, the Panel noted that the Defence maintained throughout
3 the proceedings the same position; namely, that due to the denial by
4 Salih Mustafa of any responsibility for crimes charged, no
5 reparations to victims ought to be made by him. Accordingly, the
6 Defence did not make any substantive submissions in the context of
7 the reparation proceedings in this case.

8 Before moving to the Reparation Order against Mr. Mustafa, let
9 me summarise the Panel's findings in relation to the scope and the
10 extent of the harm suffered by the participating victims in this
11 case, in accordance with Article 22(7) of the Law.

12 I will start with the Victims' Counsel submissions.

13 She submitted a request for reparations on behalf of eight
14 participating victims. Victims' Counsel claimed that Victim 08,
15 Victim 09, and Victim 10 - Direct Victims I will call them - all
16 suffered physical, mental and material harm as a result of the war
17 crimes of arbitrary detention and torture committed by Salih Mustafa
18 against them.

19 She further contended that Victim 05, Victim 06, Victim 11,
20 Victim 12 and Victim 13 - I will call them the Indirect Victims - all
21 suffered long-lasting mental harm as a result of the war crimes of
22 arbitrary arrest, torture, and murder committed by Mr. Mustafa
23 against their family member with whom they had a close relationship.

24 I will now turn to the Panel's findings in this respect. I will
25 do that for each victim. I will begin with the Direct Victims.

1 At the outset, the Panel relied on the findings made in the
2 Trial Judgment, establishing that Victim 08, Victim 09, and Victim 10
3 were arbitrarily detained and tortured at the Zllash detention
4 compound by Mr. Mustafa and his BIA subordinates and suffered
5 physical, mental harm as a result.

6 As to the physical harm suffered by Victim 09, the Panel
7 considered that this victim was mistreated almost daily through his
8 time in detention. He was held in inhumane and degrading conditions.
9 As a result, he sustained multiple injuries, and to this day, he
10 suffers physically.

11 As to mental harm, the Panel considered that while detained in
12 Zllash, Victim 09 could hear his co-detainees being mistreated and
13 saw the injuries inflicted on them when they were brought back to the
14 barn, bruised, bloodied or unconscious. He lived in constant fear
15 that he could be next to be mistreated and this caused immense
16 psychological strain. Victim 09 has furthermore symptoms of
17 post-traumatic stress disorder.

18 In addition, as part of mental harm, the Panel observed that, in
19 the aftermath of the crimes, Victim 09 was not able to discuss his
20 time in detention with any other victim as they refused to do so out
21 of what he believes is fear. He also felt unable to tell a doctor
22 the true causes of his injuries.

23 The Panel found that this was the consequence of a social stigma
24 which originated in Zllash when Mr. Mustafa, as part of a joint
25 criminal enterprise, with other BIA members, labelled detainees at

1 the Zllash compound as collaborators and traitors, including
2 Victim 09, setting him apart from his community. In doing so,
3 Mr. Mustafa contributed to Victim 09's sense of isolation and social
4 stigma. In turn, Victim 09 was not afforded the opportunity to
5 process his trauma.

6 The Panel also found that as part of material harm, Victim 09
7 incurred a loss of earnings and a damage to his life plan to the
8 extent that he was deprived of the opportunity to pursue an average
9 career path.

10 Consequently, the Panel found that Victim 09 experienced
11 physical and mental harm with long-term consequences as well as
12 material harm as a result of the war crimes of arbitrary detention
13 and torture of which Mr. Mustafa was convicted.

14 I now move to Victim 08.

15 As to the physical harm, the mistreatment inflicted upon Victim
16 08 left him in pain and bruised. As to mental harm, Victim 08
17 witnessed the brutal mistreatment inflicted on his co-detainees and
18 has carried his fear to this day. Victim 08 displays symptoms of
19 post-traumatic stress disorder. He has experienced disruption in his
20 personal relationships and family. He also suffered a damage to his
21 life plan, as part of the mental harm. In addition by labelling
22 Victim 08 as a collaborator, Mr. Mustafa, as part of a joint criminal
23 enterprise with other BIA members, set him apart from his community.
24 And in doing so, he contributed to Victim 08's feelings of fear to
25 speak out about what happened to him in Zllash or seek accountability

1 for these events. Victim 08 was also never afforded the space to
2 process the trauma ensuing from his time in Zllash.

3 In terms of material harm, the intense mental trauma experienced
4 by Victim 08 affected his ability to develop his career. Thus, the
5 Panel finds Victim 08 has incurred a loss of income as well as damage
6 to his life plan.

7 Consequently, the Panel found that Victim 08 experienced
8 physical harm with no long-lasting consequences, mental harm with
9 long-term consequences, and material harm, as a result of the war
10 crimes of arbitrary detention and torture of which Mr. Mustafa was
11 convicted.

12 I will now turn to Victim 10.

13 As to the physical harm, Victim 10 was mistreated almost on a
14 daily basis and was held in degrading and inhumane conditions. As a
15 result, he sustained multiple injuries from which he has not
16 recovered.

17 As to the mental harm, Victim 10 was terrified by the sounds of
18 others screaming and being beaten and due to the constant fear that
19 he could be next to be mistreated. Victim 10 continues to suffer to
20 this day.

21 The Panel also considered as part of mental harm that by
22 branding Victim 10 as a collaborator during his detention in Zllash,
23 Mr. Mustafa, as part of a joint criminal enterprise with other BIA
24 members, set Victim 10 apart from his community. And in doing so,
25 Mr. Mustafa contributed to Victim 10's inability to openly seek help

1 to heal his trauma ensuing from his time being detained in Zllash.

2 Concerning material harm, the Panel considered that as a result
3 of the torture suffered in Zllash, Victim 10 incurred a loss of
4 income and damage to his life plan.

5 Consequently, the Panel found that Victim 10 experienced
6 physical and mental harm with long-term consequences, and material
7 harm, as a result of the war crimes of arbitrary detention and
8 torture of which Mr. Mustafa was convicted.

9 I will now summarise the scope and harm suffered by the Indirect
10 Victims.

11 To begin with, the Panel relied on the findings made in the
12 Trial Judgment concerning the arbitrary detention, torture and murder
13 of a detainee at the Zllash detention compound, of which Mr. Mustafa
14 was convicted. This detainee will be referred to as "the murder
15 victim."

16 The Panel observed that the murder victim's arbitrary arrest,
17 detention and subsequent murder, as well as the circumstances
18 surrounding it, had a devastating impact on the Indirect Victims.
19 They experienced sorrow, distress and horror. Moreover, they have
20 not been able to grieve the loss of their relative. This has
21 hampered their ability to move forward with their lives.

22 The Panel further considered that the pain and suffering
23 experienced by the family members of the murder victim also had an
24 impact on this family's next generation.

25 Consequently, the Panel found that the Indirect Victims

1 experienced mental harm as a result of the war crimes of arbitrary
2 detention, torture and murder, of which Mr. Mustafa was convicted
3 with regard to the murder victim.

4 This concludes the Panel's findings as to the scope and extent
5 of harm suffered by the victims and brings me to the Reparation Order
6 against Mr. Mustafa.

7 This order is made directly against Mr. Mustafa. The
8 beneficiaries of reparations are the three Direct Victims and the
9 five Indirect Victims as mentioned before.

10 Concerning the type and modalities of reparations, the Panel has
11 determined as follows.

12 In its determination, the Panel noted that the conviction and
13 sentencing in the Trial Judgment constituted already a form of remedy
14 in the form of an acknowledgment for the victims. It also gave the
15 opportunity to the victims to demand and receive justice for crimes
16 against them or a family member committed more than two decades ago.
17 Lastly, it contributed to the right for the victims, their families
18 and their communities to have access to the truth.

19 For reasons set out in the Reparation Order, the
20 Panel determined that compensation for each of the victims on an
21 individual basis constituted the most appropriate type and modality
22 of reparation in this case.

23 Even though, as expressed by Victims' Counsel, no money will
24 bring back the lost family member or can ever repair years of
25 depression, of a life deprived of opportunities to work as before and

1 live a life which allows joys and happiness, compensation will
2 provide some measures of financial relief to the victims.

3 I will now address the scope of Mr. Mustafa's liability for
4 reparations. I will start with Victims' Counsel requests.

5 Victims' Counsel requested with respect to Victim 08, at a
6 minimum €30.000 for material, physical and mental harm.

7 In respect of Victim 09, she requested, at a minimum, €80.000
8 for material, physical and mental harm.

9 In respect of Victim 10, she requested, at a minimum, €60.000
10 for material, physical and mental harm.

11 And lastly, she requested €10.000 for Victim 05, Victim 06 and
12 Victim 12; 5.000 for Victim 11; and 2.000 for Victim 13, as a
13 compensation for mental harm.

14 I will now move to the Panel's determination of the scope of
15 Mr. Mustafa's liability for reparations.

16 Mr. Mustafa is liable to repair the harm caused to all Direct
17 and Indirect Victims of the crimes of which he was convicted. This
18 is regardless of the different modes of liabilities relied on in the
19 conviction and regardless of whether others may have also contributed
20 to the harm.

21 Second, the Panel ought to set out an amount for each type of
22 harm and also the overall amount of Mr. Mustafa's financial liability
23 that it considers reasonable, in accordance Article 22(3) of the Law.

24 Moreover, in setting the amount of Mr. Mustafa's financial
25 liability, the Panel considered the scope and extent of the harm

1 suffered by the victims and the Victims' Counsel reparation request.

2 It also took into consideration relevant Kosovo legislation.
3 This legislation regulates the rights and benefits to which different
4 categories of persons affected by the armed conflict in Kosovo
5 between 1998 and 1999 are entitled. These include, veterans and
6 civilians who were harmed during the armed conflict; those who
7 participated in the war efforts; and family members of deceased or
8 missing Kosovo Liberation Army members and civilians. The Panel
9 decided to consider it as a reference point in order to set a
10 reparation award that it deemed reasonable in the context of Kosovo.

11 It further considered the Lerz report. The Panel noted that
12 said report provided rough estimations of the economic loss incurred
13 by the Direct Victims.

14 In the same vein, the Panel considered that these amounts were
15 not disproportionate when compared with the benefits available under
16 Kosovo legislation as indicated before.

17 As for the Indirect Victims, the Panel considered that the sums
18 requested by the Victims' Counsel to repair the harm suffered by
19 those victims were in line with the ones pertaining to the Direct
20 Victims, although they reflect a different type of mental harm.

21 Consequently, the Panel found that the sums requested by
22 Victims' Counsel reflected the scope and extent of the harm suffered
23 by victims and were reasonable, as foreseen in Article 22(3) of the
24 Law.

25 Taking all the aforementioned considerations into account,

1 bearing in mind the scope and extent of the harm suffered by the
2 Direct and Indirect Victims, resolving uncertainties in favour of the
3 convicted person, the Panel sets the total reparation award for which
4 Mr. Mustafa is liable at €207.000.

5 Accordingly, Mr. Mustafa is ordered to pay as compensation for
6 the harm inflicted:

7 €30.000 to Victim 08;

8 €80.000 to Victim 09;

9 €60.000 to Victim 10;

10 €10.000 to Victim 05, Victim 06 and Victim 12;

11 €5.000 to Victim 11; and

12 €2.000 to Victim 13.

13 This concludes the Panel's determination of the financial
14 liability of Mr. Mustafa for reparations.

15 The last part of the Reparation Order concerns its
16 implementation and execution.

17 The Panel noted that its jurisdiction in this case will cease
18 with the issuance of this Reparation Order. As a result, the Panel
19 invited the President of the Kosovo Specialist Chambers to assign a
20 judicial authority that will be in charge of monitoring and
21 overseeing the implementation and execution of this Reparation Order.

22 As to the execution of this Reparation Order, the Panel recalled
23 that the responsibility to pay the compensation awarded by this Panel
24 to the victims lies exclusively with Mr. Mustafa.

25 The Panel noted, however, that at the time of issuance of the

1 Reparation Order, Mr. Mustafa does not have the means to fully comply
2 with said order. The Panel found Mr. Mustafa, therefore, partially
3 indigent for the purposes of reparations. Nevertheless, the Panel
4 decided to issue as an annex to the present Reparation Order a
5 decision ordering the production of records and documents concerning
6 Mr. Mustafa in order to see if his existing assets could be used to
7 execute, albeit partially, this Reparation Order. In any event, the
8 fact that Mr. Mustafa is partially indigent does not absolve him from
9 his obligations towards the victims, and he remains liable for the
10 full compensation award.

11 Given the status of Mr. Mustafa's financial situation, the Panel
12 emphasised that other actors ought to step in to execute the
13 Reparation Order. And the Panel observed that the first such actors
14 may be Kosovo.

15 In its submissions, the Ministry of Justice of Kosovo informed
16 the Panel last year that victims of crimes under the jurisdiction of
17 the KSC may be awarded compensation or restitution from the Victim
18 Compensation Programme which was established pursuant to the Law on
19 Crime Victim Compensation. This compensation programme may be
20 triggered when it has been established that the convicted person is
21 unable to pay the award in whole or in part. Although this law was
22 recently abrogated and replaced by a new law, the submissions of the
23 Ministry of Justice remained relevant in the context of this new law.

24 And in order to preserve the anonymity of the victims
25 participating in the procedures before the KSC and to ensure their

1 protection, the Panel decided that the Registrar, in coordination
2 with Victims' Counsel, are best suited to seek compensation from the
3 Crime Victim Compensation Programme on behalf of the victims.

4 The Panel observed, nevertheless, that other means of execution
5 need to be envisaged to fully execute the Reparation Order, taking
6 into consideration the maximum sums which can be awarded by the Crime
7 Victim Compensation Programme.

8 I will now turn to other means of execution; namely, the
9 establishment of a new reparation mechanism in Kosovo.

10 The Panel took notice of the fact that Kosovo took no proactive
11 steps to specifically prepare for the need to ensure reparations for
12 victims of crimes under the jurisdiction of the Kosovo Specialist
13 Chambers. The Panel also noted that Kosovo foresaw the need to
14 financially support the defence of suspects and accused before the
15 KSC.

16 It also observed that legislation in Kosovo which addresses harm
17 and injuries suffered in the context of the war in Kosovo in
18 1998-1999 refers exclusively to the victims of the enemy forces and
19 not to all victims during the war in Kosovo. In the view of the
20 Panel, these laws created a discrimination between the victims of
21 this war.

22 The Panel observed that it has no power to order Kosovo to pay
23 the compensation awarded to the victims.

24 It found, however, important to remind Kosovo of its obligations
25 pertaining to the victims' rights to an effective remedy as enshrined

1 in Article 54 of the Constitution and under international treaties.
2 This right comprises a duty to ensure that such a remedy is
3 enforceable.

4 Accordingly, it urged Kosovo to enact the necessary laws and to
5 establish a reparation mechanism for the purposes of fully
6 compensating victims of crimes under the jurisdiction of the Kosovo
7 Specialist Chambers. In the view of the Panel, this would ensure,
8 within the legal system of Kosovo, equal treatment between the
9 victims and the suspects or accused before the KSC.

10 The Panel also underlined that, when establishing such a
11 reparation mechanism, consideration should be given to fund it
12 through the budget of Kosovo inasmuch as the defence of suspects and
13 accused before the KSC is also financed through said budget. In the
14 view of the Panel, this equal use of the budget of Kosovo would
15 promote the mandate of the KSC, pursuant to Article 1(2) of the Law,
16 as upheld by Kosovo and Member States of the European Union, together
17 with other contributing countries, when establishing the KSC and
18 financially supporting its work.

19 Having said that, the Panel stressed that if victims of crimes
20 under the jurisdiction of the KSC cannot enforce their right to
21 reparations, this right would become meaningless.

22 The Panel therefore also recommended the establishment of a
23 trust fund for victims of crimes under the jurisdiction of the KSC,
24 at the initiative of the KSC, in case Kosovo fails to uphold its
25 obligations towards victims in a reasonable time through the

1 establishment of a reparation mechanism. It should be financially
2 supported, above all, by Kosovo, as well as other states and donors
3 wishing to support victims.

4 Accordingly, for the reasons summarised above, the Panel hereby:

5 Issues a Reparation Order against Mr. Mustafa;

6 Finds that Victim 08, Victim 09, Victim 10, Victim 05, 06, 12,
7 11, and 13 have shown to the standard of proof of balance of
8 probabilities that they are victims of the crimes of which
9 Mr. Mustafa was convicted;

10 Decides to award reparations to the aforementioned Direct and
11 Direct Victims;

12 Awards individual reparations, in the form of compensation;

13 Sets the reparation award for which Mr. Mustafa is liable at
14 €207.000;

15 Orders Mr. Mustafa to pay, as compensation for the harm
16 inflicted:

17 €30.000 to Victim 08;

18 €80.000 to Victim 09;

19 €60.000 to Victim 10;

20 €10.000 to Victims 05, 06 and 12;

21 €5.000 to Victim 11; and

22 €2.000 to Victim 13;

23 And this should be done within a time-limit to be determined by
24 the judicial authority in charge of monitoring and overseeing the
25 implementation and execution of this Reparation Order.

1 The Panel declares Mr. Mustafa partially indigent for the
2 purposes of enforcement of this Reparation Order;

3 Issues the "Decision ordering the production of records and
4 documents for the purposes of the enforcement of a Reparation Order"
5 and related orders, annexed to this Reparation Order;

6 Orders the Registrar to take the necessary steps to implement
7 this Reparation Order;

8 Invites the President of the Kosovo Specialist Chambers to
9 designate a judicial authority which will be in charge of monitoring
10 and overseeing the implementation and execution of this
11 Reparation Order;

12 Invites Kosovo to establish a new reparation mechanism for
13 victims of crimes under the jurisdiction of the KSC.

14 The Panel orders the Registrar to transmit the present
15 Reparation Order, in its public redacted form, to the Government of
16 Kosovo; and

17 Recommends the establishment of the trust fund, at the
18 initiative of the KSC, for the benefit of the victims of crimes under
19 the jurisdiction of the KSC in case Kosovo fails to uphold its
20 obligations towards victims in a reasonable time through the
21 establishment of a reparation mechanism.

22 And this concludes the summary of the Reparation Order.

23 The Registry shall now serve the judgment in electronic form,
24 and Mr. Mustafa will be served with a certified copy in the detention
25 facilities in its English form. The Albanian version will be served

1 on Mr. Mustafa as soon as it is ready.

2 And this concludes the first instance proceedings in this case.

3 The Court stands adjourned.

4 --- Whereupon the hearing adjourned at 12.32 p.m.

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