

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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**Veseli Defence Response to Third Registry Report to the Pre-Trial Judge
on Victims' Applications for Participation in the Proceedings (F00572)**

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I. INTRODUCTION

1. Pursuant to Rules 76 and 80 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Kadri Veseli (“Defence”) hereby responds to the Third Registry Report to the Pre-Trial Judge on Victims’ Applications for Participation in the Proceedings.¹
2. The Defence strongly opposes the Registry’s proposal to grant full anonymity to all applicants.² Such proposal is i) not supported by the Rules or the Law; ii) constitutes a flagrant violation of fundamental constitutional and international human rights of the Accused; and iii) is inconsistent with Article 22(9) of the Law by barring the possibility of referral to civil litigation in other Kosovo courts.³ In any event, the Defence submits that the specific circumstances of each applicant do not amount to “exceptional circumstances” for the purposes of Rule 80(4)(e).
3. In deciding on a similar request, Judge Daniel Fransen has held that “*it is not conceivable to convict a person for a crime committed against a [victim] who is involved in the trial proceedings and yet, by remaining anonymous, does not allow the accused a full defence.*”⁴ This holding was unanimously confirmed by five judges of the STL Appeals Chamber.⁵ The Defence fully agrees. The rights of Mr Veseli must prevail.

¹ F00572, Third Registry Report to the Pre-Trial Judge on Victims’ Applications for Participation in the Proceedings with strictly confidential and *ex parte* Annexes 1-13, 18 November 2021 (reclassified as “Public” on 30 November 2021) (“Third Registry Report”).

² Third Registry Report, para. 54(iv) and 54(v).

³ Article 22(9) of the Law: “Where appropriate, the Specialist Chambers may refer the Victims to civil litigation in the other courts of Kosovo”.

⁴ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PTJ, [Decision on the Legal Representative of Victims' First, Second, and Third Motions for Protective Measures for Victims Participating in the Proceedings](#), 19 December 2012, para. 23.

⁵ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, para. 38.

II. SUBMISSIONS

A. Total Anonymity of Victims is not Foreseen in the Rules or the Law

4. The Registry relies on Rule 80(4)(e) of the Rules which provides for the possibility that Panel may order, inter alia:

in exceptional circumstances, and subject to any necessary safeguards:

- (i) non-disclosure to the Parties of any material or information that may lead to the disclosure of the identity of a witness or victim participating in the proceedings; or
- (ii) total anonymity of a **witness** (emphasis added).

5. The Defence submits that the Registry erred in law by considering that victims may be granted total anonymity. It is plain that Rule 80(4)(e) prescribes that only witnesses may be granted total anonymity.

6. While the Pre-Trial Judge has previously held that total anonymity of victims may be granted on the basis of Rule 80(4)(e)(i),⁶ it is respectfully submitted that such interpretation is not supported by the plain meaning of Rule 80(4)(e)(i). In addition, if accepted, such interpretation would render Rule 80(4)(e)(ii) meaningless.

7. First, Rule 80(4)(e)(i) is specifically concerned with the process of “disclosure” of any “material or information” which, if disclosed, may lead to the identification of a witness or victim participating in the proceedings. While the ultimate purpose of the provision seeks to protect the identity of the witness or victim participating in the proceedings, it nevertheless concerns the “withholding” of certain material or information which is normally subject to disclosure, and not, as in the case of Rule 80(4)(e)(ii), the identity of the witness, *stricto sensu*.

⁶ F00257/RED, [Public Redacted Version of the First Decision on Victims' Participation](#), 21 April 2021, para. 68; 85(g): “orders that the protective measure of anonymity under Rule 80(4)(e)(i)”.

8. It follows that Rule 80(4)(e)(i) does not authorise a Panel to order the “anonymity” of a victim participating in the proceedings, but instead, the “withholding” of evidence, *i.e.* any material (such as statement or exhibit) which is normally subject to disclosure. Considering that total anonymity is reserved to witnesses only, it further follows that any measure in respect of victims participating in the proceedings pursuant to Rule 80(4)(e)(i) must be ordered on an interim basis, until the identity of the victim is disclosed (for instance, 30 days before the start of trial).
9. Moreover, Rule 80(4)(e)(i) and Rule 80(4)(d) request is not open to the Registry pursuant to Rule 113(2) of the Rules. This is because, while the Victims’ Participation Office may suggest protective measures under Rule 80 “as applicable”, any request to withhold information may be submitted by the SPO only, in accordance with Rule 108.⁷

⁷ Rule 108 (Other Information Not Subject to Disclosure):

(1) Where information in the custody, control or actual knowledge of the **Specialist Prosecutor** is subject to disclosure under Rule 102 or Rule 103, but such disclosure may:

(a) prejudice ongoing or future investigations;

(b) cause grave risk to the security of a witness, **victim participating in the proceedings** or members of his or her family; or

(c) be contrary for any other reason to the public interest or the rights of third parties;

the Specialist Prosecutor may apply confidentially and ex parte to the Panel to withhold the information in whole or in part.

(2) When making such an application the **Specialist Prosecutor** shall include the information in question, the reasons for non-disclosure, the proposed redactions, if any, and a statement relating to the proposed counterbalancing measures [...]

(3) The Panel shall consider whether the information in question is subject to disclosure pursuant to the Rules. Where the Panel concludes that this is the case, it shall consider the **Specialist Prosecutor’s application** and reasons for non-disclosure together with the proposed counterbalancing measures.

(4) The Panel may order that appropriate counterbalancing measures be taken. If, in the opinion of the Panel, no measures would ensure the Accused’s right to a fair trial, the Specialist Prosecutor shall be given the option of either disclosing the information, or amending or withdrawing the charges to which the information relates.

(5) The Specialist Prosecutor may apply to the President to appoint an amicus curiae to assist and advise the Panel on counterbalancing measures.

(6) Paragraphs (1) to (5) shall apply mutatis mutandis to the Defence.

10. Second, if it is accepted that anonymity for victims participating in the proceedings (as well as witnesses) may be ordered on the basis of Rule 80(4)(e)(i), then Rule 80(4)(e)(ii) would be rendered meaningless and superfluous. This would run against the principle that every provision is to be given effect.
11. In conclusion, Rule 80(4)(e)(i) may not be relied upon for the purpose of ordering anonymity because i) it relates to a different subject-matter, namely the disclosure of evidence; and ii) may only be relied upon by the SPO or the Defence.
12. The same rationale is submitted with regard to the request that Rule 80(4)(d) be relied upon as a basis for ordering anonymity towards the Accused.⁸

B. Total Anonymity Violates Basic Constitutional and International Human Rights

13. The Defence endorses and incorporates herewith the arguments put forward by Judge Fransen⁹ and the STL Appeals Chamber¹⁰ to the extent that such arguments relate to fundamental rights applicable to Mr Veseli as protected by the Constitution, the Law and international human rights law. More specifically:
14. First, during trial the very existence of each VPP might be construed as constituting a specific accusation, separate and additional to those made by the Prosecution. An accused is generally entitled to mount a defence against such accusations. If victims are not required to disclose their identity at all, this

⁸ *Contra*, Third Registry Report, para. 54(iv).

⁹ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PTJ, [Decision on the Legal Representative of Victims' First, Second, and Third Motions for Protective Measures for Victims Participating in the Proceedings](#), 19 December 2012, paras 22-27.

¹⁰ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, paras 25-31; 37-38.

would amount to an anonymous accusation against the accused, in breach of fair trial rights.¹¹

15. Second, without knowledge of the identities of victims participating in the proceedings, the Defence would not be in a position to effectively challenge the status of individual victims before a final judgment identifies them as such.¹² Moreover, the Defence would be barred from investigating and uncovering any instance of false declaration or fabricated identity.¹³
16. Third, total anonymity would seriously hamper the ability of the Defence to request disclosure of potential exculpatory information from the victims participating in the proceedings.¹⁴ Moreover, this could potentially prevent the Defence from raising other challenges in respect to witnesses who may be connected to the victims participating in the proceedings.
17. Finally, totally anonymity of victims would be inherently prejudicial to Mr Veseli, regardless of the degree of participation of the victims during trial.

¹¹ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, para. 28.

¹² Rule 113(9). See STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, para. 29. Note that Rule 113(9) of the Rules is taken verbatim from Rule 86 (G) of the STL Rules of Procedure and Evidence.

¹³ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, para. 29 (Referring to an instance in the Lubanga case wherein the Trial Chamber considered the real possibility that certain victims had fabricated their status as victims – ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 484, 502).

¹⁴ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, [Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures](#), 10 April 2013, para. 30.

C. Total Anonymity Eliminates the Possibility of Civil Proceedings Before Other Kosovo Courts

18. Article 22(9) of the Law provides that “[w]here appropriate, the Specialist Chambers may refer the Victims to civil litigation in the other courts of Kosovo.”

19. If total anonymity is granted, it would render Article 22(9) of the Law meaningless given that it would be materially impossible for a Trial Chamber to refer any victim admitted in the proceedings to civil litigation in other Kosovo Courts. This is because the Kosovo Law No. 03/L-006 on Contested Procedure (Code of Civil Procedure) does not foresee the possibility of anonymous plaintiffs.¹⁵

D. *In the alternative, the Specific Facts of Each Potential Victim Does not Constitute “Exceptional Circumstances”*

20. In order to justify the proposed request for anonymity towards the Accused and the Defence, the Registry relied on the following factors applicable to all of the applicants: (i) continued suffering from ongoing trauma; (ii) fears or concerns for their safety or that of their family members, should their identities become known; and (iii) some of them continue to live in Kosovo or have links with Kosovo.¹⁶

21. Even in the event that anonymity for victims is allowed by the Rules and the Law – which is contested – none of the stated factors comes even close to justifying the granting of such extreme measures of last resort. Specifically, no concrete and unique risk specific to each potential victim has been indicated. Moreover, the Defence notes that the Pre-Trial Judge has in the past granted

¹⁵ See, for example, the concerns of the Victims’ Counsel in the Mustafa case, KSC-BC-2020-05/F0013, [Victims’ Counsel Submission on the Decision on the appointment of expert\(s\)](#), 14 June 2021, paras 27-30.

¹⁶ Third Registry Request, para. 53.

less stringent protective measures in respect to witnesses who, according to the information disclosed to the Defence, were in a more vulnerable and potentially riskier situation than the applicant victims in the Registry Report.¹⁷

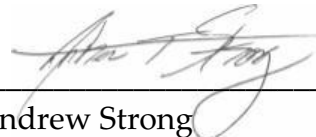
III. CONCLUSION

22. Accordingly, the Defence respectfully requests the Pre-Trial Judge to reject the proposal by the Registry in paragraph 54 (iv) and (v) of the Third Registry Report and rescind all previous protective measures granting anonymity on the basis of Rule 80(4)(e)(i) of the Rules.

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¹⁷ See F00190/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, 5 February 2021.