



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06/IA023

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 15 September 2022

Original language: English

Classification: Public

Decision on Veseli's Appeal Against "Third Decision on Victims' Participation"

Specialist Prosecutor's Office:

Jack Smith

Counsel for Hashim Thaçi:

Gregory Kehoe

Counsel for Victims:

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Counsel for Kadri Veseli:

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Counsel for Rexhep Selimi:

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Counsel for Jakup Krasniqi:

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 12 July 2022 by Mr Kadri Veseli (“Appeal” and “Veseli” or “Accused” or “Defence”, respectively),² against the “Third Decision on Victims’ Participation” (“Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) and the Victims’ Counsel responded on 25 July 2022 that the Appeal should be rejected (“SPO Response” and “Victims Response”, respectively).⁴ Veseli replied on 1 August 2022.⁵

I. BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against Hashim Thaçi, Veseli, Rexhep Selimi and Jakup Krasniqi.⁶

¹ IA023/F00001, Decision Assigning a Court of Appeals Panel, 30 June 2022.

² IA023/F00002, Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation, 12 July 2022 (“Appeal”).

³ F00817/RED, Public Redacted Version of Third Decision on Victims’ Participation, 25 May 2022 (strictly confidential and *ex parte* version filed on 25 May 2022) (“Impugned Decision”).

⁴ IA023/F00003, Prosecution response to Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation, 25 July 2022 (“SPO Response”); IA023/F00004, Victims’ Counsel Response to Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation, 25 July 2022 (“Victims Response”).

⁵ IA023/F00005, Veseli Defence Consolidated Reply to SPO and Victims’ Counsel Response to Interlocutory Appeal Against Third Decision on Victims’ Participation, 1 August 2022 (“Reply”).

⁶ F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020, confidential redacted version filed on 19 November 2020); F00034/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*); F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020). A corrected confirmed indictment was filed on 3 September 2021. See F00455/RED/A01, Public Redacted Version of ‘Indictment’, KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021). A confirmed amended and operative indictment was filed on 29 April 2022 following the Pre-Trial Judge’s confirmation of amendments to the charges. See F00777/RED, Public Redacted Version of Decision on the Confirmation of Amendments to the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 6 May 2022 (strictly confidential and *ex parte* version filed on 22

2. On 4 January 2021 and 6 July 2021, the Pre-Trial Judge issued two framework decisions establishing the principles governing the admission of victims to participate in the proceedings.⁷
3. On 21 April 2021 and 10 December 2021, the Pre-Trial Judge issued the first and second decisions on victims' participation, admitting 20 victims to participate in the proceedings and rejecting eight applications ("First Decision on Victims' Participation" and "Second Decision on Victims' Participation", respectively).⁸
4. On 18 November 2021, the Victims' Participation Office ("VPO") filed a third report on victims' applications,⁹ to which Veseli responded on 10 December 2021.¹⁰
5. On 25 May 2022, the Pre-Trial Judge issued the Impugned Decision, admitting 12 victims as participants in the proceedings and granting non-disclosure of their identities to the public and the Parties.¹¹

April 2022, confidential redacted version filed on 22 April 2022, confidential lesser redacted version filed on 16 May 2022); F00789/A05, Public Redacted Version of Amended Indictment, 29 April 2022 (strictly confidential and *ex parte* version filed on 29 April 2022, confidential redacted version filed on 29 April 2022) ("Indictment").

⁷ F00159, Framework Decision on Victims' Applications, 4 January 2021 ("First Framework Decision"); F00382, Second Framework Decision on Victims' Applications, 6 July 2021.

⁸ F00257/RED, Public Redacted Version of First Decision on Victims' Participation, 21 April 2021 (confidential version filed on 21 April 2021) ("First Decision on Victims' Participation"), para. 85(a), (f); F00611/RED, Public Redacted Version of Second Decision on Victims' Participation, 10 December 2021 (strictly confidential and *ex parte* version filed on 10 December 2021) ("Second Decision on Victims' Participation"), para. 70(a)-(c).

⁹ F00572, Third Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings, 18 November 2021 (confidential and *ex parte*, reclassified as public on 30 November 2021) ("Third Registry Report"). Annexes 1 to 13 to the Third Registry Report are strictly confidential and *ex parte*.

¹⁰ F00612, Veseli Defence Response to Third Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings (F00572), 10 December 2021 ("Veseli Submissions").

¹¹ Impugned Decision, paras 29-33, 43-46, 50(a), (e).

6. On 1 June 2022, Veseli filed a request for leave to appeal the Impugned Decision.¹²

7. On 10 and 13 June 2022, the SPO and the Victims' Counsel filed their respective responses.¹³ On 20 June 2022, the Veseli Defence filed a consolidated reply.¹⁴

8. On 28 June 2022, the Pre-Trial Judge certified the following two issues for appeal (collectively, "Certified Issues"):¹⁵

- (i) Whether total anonymity of victims participating in the proceedings is a valid protective measure foreseen by Articles 22 and 23 of the Law and Rule 80 of the Rules ("First Issue"); and
- (ii) Whether total anonymity of victims participating in the proceedings violates basic constitutional and international human rights of the Accused as protected by Article [21] of the Law, Article 31 of the Constitution of Kosovo, Article 6 of the European Convention of Human Rights ("ECHR") and Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") ("Second Issue").¹⁶

¹² F00828, Veseli Defence Request for Leave to Appeal Third Decision on Victims' Participation, 1 June 2022 ("Certification Application").

¹³ F00836, Prosecution Response to Veseli Defence request for leave to appeal Decision F00817, 10 June 2022; F00839, Victims' Counsel's Response to Veseli Defence Request for Leave to Appeal Third Decision on Victims' Participation, 13 June 2022.

¹⁴ F00850, Consolidated Veseli Defence Reply to SPO and Victims Counsel Response to Veseli Defence Request for Leave to Appeal Third Decision on Victims Participation, 20 June 2022 ("Veseli Reply to SPO and Victims Responses to Certification Application").

¹⁵ F00856, Decision on Veseli Defence Request for Leave to Appeal the Third Decision on Victims' Participation, 28 June 2022 ("Certification Decision"), paras 26, 35, 50. The Pre-Trial Judge declined to certify the remainder of the issues put forward by Veseli, namely the Third and Fourth Issues. See Certification Decision, paras 42, 49, 50.

¹⁶ In the Appeal, Veseli indicates that, in the Certification Application, he erroneously referred to Article 32 instead of Article 21 of the Law in the Second Issue, and that in the Certification Decision, the Pre-Trial Judge did not expressly correct this error but considered the right provision in the reasoning. See Appeal, fn. 3; Certification Application, para. 2; Certification Decision, paras 10(2), 32. The Panel notes that Article 32 of the Law, entitled "Appointment and Functions of the President and Vice-President of the Specialist Chambers", is indeed irrelevant to the Second Issue. In light of what seems

II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.¹⁷

10. The Court of Appeals Panel recalls that, according to Rule 113(6) of the Rules, a Party may, pursuant to Rule 77, seek certification to appeal a decision granting or denying victims the right to participate in the proceedings as well as any request for protective measures, but only on grounds of an error of law.¹⁸

III. DISCUSSION

11. At the outset, the Appeals Panel observes that, although the issues certified on appeal refer to “total anonymity” of Victims Participating in the Proceedings (“VPPs”), the Pre-Trial Judge did not use this terminology at any point in the Impugned Decision.¹⁹ In the view of the Appeals Panel, the Certified Issues concern whether “anonymity” for VPPs is a valid protective measure consistent with the Accused’s right to a fair trial during the pre-trial proceedings. For the purpose of this Decision, the Panel understands anonymity as the non-disclosure of the identity of VPPs vis-à-vis the Parties.²⁰ Therefore, the Panel considers that the Certified Issues do not concern other measures, such as the non-disclosure of the VPPs’ identities on an

to be a clerical error, the Appeals Panel will therefore consider the Second Issue as whether anonymity of victims participating in the proceedings violates the rights of the Accused as protected by Article 21 of the Law. See similarly ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-476, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, para. 46.

¹⁷ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“*Gucati Appeal Decision*”), paras 4-14. See also IA001/F00005, Decision on Kadri Veseli’s Appeal Against Decision on Interim Release, 30 April 2021 (“*Veseli Interim Release Appeal Decision*”), paras 4-7.

¹⁸ See also Rule 113(5) of the Rules; First Framework Decision, para. 54.

¹⁹ *Compare* Certification Decision, para. 10 *with* Impugned Decision, paras 36-46.

²⁰ See similarly 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 (“*STL Decision*”), para. 22.

interim basis pursuant to Rule 105 of the Rules or the non-disclosure of victims' applications to the Parties pursuant to Rule 113(1) of the Rules.

A. WHETHER ANONYMITY OF VICTIMS PARTICIPATING IN THE PROCEEDINGS IS A VALID PROTECTIVE MEASURE (GROUND 1)

1. Submissions of the Parties

12. Veseli submits that the Pre-Trial Judge erred in concluding that "the Rules do provide for anonymity for victims".²¹ Veseli first argues that given that Article 23(1) of the Law states that protective measures for victims will be provided by the Rules, the possibility of anonymity for VPPs cannot be inferred in the absence of a specific provision.²²

13. Second, in Veseli's view, a distinction should be drawn between VPPs and victim applicants.²³ In particular, Veseli argues that the Pre-Trial Judge's reliance on Rule 113(1) and (2) of the Rules to support his finding that "the Rules do provide for anonymity for victims" is irrelevant and erroneous given that it regulates the "non-disclosable nature" of application forms rather than the identity of VPPs.²⁴

14. Third, Veseli submits that the Pre-Trial Judge failed to address his arguments with respect to Rule 80 of the Rules, specifically that: (i) Rule 80(4)(e)(i) is a "secondary measure" which aims to give effect to an existing protective measure, namely interim non-disclosure of the identity of a witness or VPP pursuant to Rule 105 or "total anonymity" of witnesses pursuant to Rule 80(4)(e)(ii);²⁵ and (ii) "total anonymity" is reserved only for witnesses under *inter alia* Rule 80(4)(e)(ii).²⁶ Veseli adds that "full

²¹ Appeal, para. 13, referring to Impugned Decision, para. 36. See also Appeal, paras 15-20.

²² Appeal, para. 14.

²³ Appeal, para. 15.

²⁴ Appeal, para. 15.

²⁵ Appeal, para. 17. See also Appeal, para. 16.

²⁶ Appeal, paras 18-19. See also Appeal, para. 16.

anonymity” is not foreseen by the legal texts of any other domestic or international court or tribunal.²⁷

15. Finally, in case of any ambiguity, Veseli invites the Panel to apply the *in dubio pro reo* principle according to Rule 4(3) of the Rules.²⁸

16. The SPO first responds that the Appeal should be summarily dismissed as untimely because it was filed more than a year after the First Decision on Victims’ Participation which granted VPPs anonymity for the first time in this case and Veseli had two prior opportunities to challenge the legal basis of these protective measures.²⁹

17. The SPO argues that Veseli ignores the plain language, object and purpose of the Law and Rules³⁰ and, similarly, the Victims’ Counsel submits that not only do the Rules provide for the VPPs’ anonymity, but their provisions are supported by the Law and the Criminal Procedure Code of Kosovo (“KCPC”).³¹ In particular, both the SPO and the Victims’ Counsel submit that Article 23(1) of the Law refers specifically to the protective measures set out in Articles 221 to 226 of the KCPC, which include anonymity for an injured party or victim.³²

18. The Victims’ Counsel also submits that the Pre-Trial Judge correctly concluded that Rule 113(1), (2) and (5) of the Rules allows him to grant protective measures to VPPs, including anonymity.³³

²⁷ Appeal, para. 20; Reply, para. 8.

²⁸ Appeal, para. 21.

²⁹ SPO Response, para. 2, referring to First Decision on Victims’ Participation and Second Decision on Victims’ Participation.

³⁰ SPO Response, paras 3-5.

³¹ Victims Response, paras 11-17. See also Victims Response, paras 32-33.

³² SPO Response, para. 4, referring to KCPC, Articles 19(1)(1.7), 220(1)(1.3), 224; Victims Response, paras 11, 13-17, referring to KCPC, Articles 220(1)(1.3), 221(1) and (4), 224(1), 224(5)(5.1) and 224(5)(5.4).

³³ Victims Response, paras 18-19.

19. With regard to the language of Rule 80 of the Rules, the SPO submits that Rule 80(4)(e)(i) undoubtedly allows victim anonymity,³⁴ and that Rule 80(4)(e)(ii) cannot be read as limiting anonymity to witnesses.³⁵ The Victims' Counsel argues that Rule 80(4)(e)(i) is perfectly clear in that it permits non-disclosure of material or information that may reveal the identity of a VPP, which is in fact the measure granted by the Pre-Trial Judge.³⁶ The Victims' Counsel further challenges Veseli's argument that Rule 80(4)(e)(i) is a "secondary measure", submitting that Rule 80(4) lists examples of protective measures for witnesses *and* victims, while Rule 105 concerns disclosure.³⁷ The Victims' Counsel also suggests that the reference to "total anonymity" of a witness in Rule 80(4)(e)(ii) may be linked to the questioning of anonymous witnesses under Rule 147, which would explain why "total anonymity" of VPPs specifically is not included.³⁸ The SPO and the Victims' Counsel add that Rule 80 of the Rules and Article 23(1) of the Law are non-exhaustive and encompass any necessary protective measures which are "appropriate in the specific circumstances" to protect the VPPs.³⁹

20. Furthermore, the SPO and the Victims' Counsel argue that, contrary to Veseli's assertion, anonymity for VPPs is foreseen by other domestic and international courts or tribunals, such as in Kosovo, the International Criminal Court ("ICC") and the Extraordinary Chambers in the Courts of Cambodia ("ECCC").⁴⁰

³⁴ SPO Response, paras 5, 10.

³⁵ SPO Response, para. 5.

³⁶ Victims Response, paras 22-23.

³⁷ Victims Response, paras 24-26.

³⁸ Victims Response, para. 29. See also Victims Response, paras 27-28.

³⁹ SPO Response, para. 5; Victims Response, para. 20, referring, respectively, to Rule 80(1), (4) and (5) of the Rules. See also SPO Response, para. 6.

⁴⁰ Victims Response, para. 17; SPO Response, paras 9-11, referring to ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-140, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013 ("*Ngudjolo* Appeal Decision"), paras 14, 17; ECCC, Internal Rules (Rev. 9), 16 January 2015, Rules 23*bis*, 29(4)(c), (6). See also Victims Response, paras 39-41.

21. Finally, in response to Veseli's argument on the application of Rule 4(3) of the Rules, the Victims' Counsel submits that Veseli failed to refer to the first paragraph of Rule 4 which provides that the Rules shall be interpreted in a manner consonant with the framework set out in Article 3 of the Law and, where appropriate, the KCPC.⁴¹

22. In reply, Veseli submits that the SPO's argument on the timeliness of the Appeal is unsubstantiated, and that each ruling constitutes an independent decision subject to appeal.⁴²

23. Veseli also replies that, contrary to the SPO and the Victims' Counsel's assertions, Article 224 of the KCPC does not foresee anonymity for victims or injured parties, but only for individuals who will testify during trial, namely "regular" witnesses.⁴³ Furthermore, Veseli argues that had the Specialist Chamber of the Constitutional Court ("SCCC") considered that the Rules, namely Rule 80(4)(e), intended to extend the exceptional measure of anonymity to VPPs, it would have stated so.⁴⁴

2. Assessment of the Court of Appeals Panel

24. At the outset, with respect to the timeliness of the Appeal, the Appeals Panel sees some merit in the SPO's argument that Veseli should have raised the issue of the

⁴¹ Victims Response, paras 30-32.

⁴² Reply, para. 2. Veseli also submits that the SPO's arguments should be summarily dismissed given that they are raised for the first time on appeal.

⁴³ Reply, paras 4, 8. Veseli emphasises that the conditions for an order for anonymity, as set out under Article 224(5) of the KSCP are "cumulative"; in particular, the judge must find that "the testimony of the injured party, cooperative witness or witness is relevant to a material issue in the case so as to make it unfair to compel the prosecution to proceed without it". See Reply, para. 5. See also IA023/F00005/A01, Annex 1 to Veseli Defence Consolidated Reply to SPO and Victims' Counsel Response to Interlocutory Appeal Against Third Decision on Victims' Participation, 1 August 2022; IA023/F00005/A02, Annex 2 to Veseli Defence Consolidated Reply to SPO and Victims' Counsel Response to Interlocutory Appeal Against Third Decision on Victims' Participation, 1 August 2022, p. 563.

⁴⁴ Reply, para. 6, referring to KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment"), paras 132-139.

legal basis of victim anonymity earlier and did not provide any reason for not having done so. However, the Panel observes that the Pre-Trial Judge addressed Veseli's arguments on victim anonymity without considering them to be untimely in both the Impugned Decision and the Certified Decision.⁴⁵ In this context, and considering that the First Issue arises from the Impugned Decision,⁴⁶ the Panel will assess the merits of the first ground of appeal.

25. The Panel first observes that in the Impugned Decision, the Pre-Trial Judge concluded that "the Rules do provide for anonymity for victims" on the basis that: (i) Rule 113(1) and (2) of the Rules provides that the victim application forms and the identity of the applicants shall not be disclosed to the Parties; and (ii) Rule 113(5) envisages that the Pre-Trial Judge may grant protective measures to admitted victims under Rule 80, which "contains the full arsenal of protective measures", including not disclosing the victims' identities to the Parties.⁴⁷

26. The Panel recalls that Article 23(1) of the Law states that the Rules "shall provide for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy"⁴⁸ and that "[s]uch protective measures shall include the protection of identity."

⁴⁵ Veseli Submissions, paras 2, 4-12; Impugned Decision, paras 35-36; Certification Decision, paras 23-26. In the Certification Decision, the Pre-Trial Judge considered that "an immediate resolution by the Court of Appeals Panel of the First Issue may materially advance the proceedings as the question whether non-disclosure of victims' identities is rooted in the Law and the Rules may benefit from an authoritative determination by the Court of Appeals Panel at the earliest opportunity".

⁴⁶ See Certification Decision, para. 23. Contra SPO Response, para. 2.

⁴⁷ Impugned Decision, para. 36.

⁴⁸ See also Article 39(11) of the Law which provides that "[t]he Pre-Trial Judge may, where necessary, provide for the protection and privacy of victims and witnesses"; Article 40(2) of the Law which provides that "[t]he Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"; Article 40(6)(f) of the Law which provides that "[p]rior to a trial or during the course of a trial, the Trial Panel may, as necessary: [...] f. provide for the protection of the accused, witnesses and victims."

27. Turning to the Rules, the Panel observes that Rule 113(1) and (2) regulates the non-disclosable nature of application forms for VPPs, including the identity of the applicants.⁴⁹ However, Rule 113(2) of the Rules provides that the VPO shall also file “a request for protective measures under Rule 80” where applicable, and Rule 113(5) states that the competent panel shall render a reasoned decision on such request for protective measures under Rule 80. As correctly noted by the Pre-Trial Judge, Rule 113(2) and (5) of the Rules refers to Rule 80 in its entirety, and gives him the power to order, among “the full arsenal of protective measures”, the non-disclosure to the Parties of the victims’ identities under Rule 80(4)(e)(i).⁵⁰

28. The Panel does not find convincing Veseli’s unsupported argument that Rule 80(4)(e)(i) of the Rules⁵¹ is a secondary measure which gives effect to an existing protective measure, or that the fact that Rule 80(4)(e)(ii) provides for “total anonymity of a witness” excludes the possibility to grant anonymity to VPPs.⁵² The Panel finds that the Pre-Trial Judge did not err by failing to engage further with these arguments.

29. In fact, Rule 80(4)(e)(i) of the Rules clearly provides for the possibility to withhold the identity of the VPPs from the Parties, as well as any material revealing their identity. The Panel considers that this encompasses anonymity vis-à-vis the Parties. Further, Rule 80(5) of the Rules provides that the measures under Rule 80(4)

⁴⁹ Rule 113(1) of the Rules provides that “[a]pplication forms shall not be disclosed to the Parties” (emphasis added). Rule 113(2) of the Rules provides that “the Victims’ Participation Office shall submit to the Parties a confidential report thereon, without providing any identifying information of the applicants” (emphasis added).

⁵⁰ Impugned Decision, para. 36.

⁵¹ Rule 80(4)(e)(i) of the Rules provides that “[a] Panel may hold an *in camera* hearing to determine whether to order, *inter alia*: [...] (e) 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 [...]”.

⁵² Appeal, paras 17-19.

are non-exhaustive and encompass any “*other* measures [the Panel may find] appropriate in the specific circumstances”.⁵³

30. Therefore, and contrary to Veseli’s assertion, the Panel considers that the relevant Rules are not ambiguous within the meaning of Rule 4(3) of the Rules such that its interpretation would require the application of the most favourable interpretation to the Accused.⁵⁴

31. With respect to Veseli’s argument that anonymity for VPPs is not foreseen by the legal texts of any other domestic or international court or tribunal, the Panel observes that Article 224 of the KCPC, to which Article 23(1) of the Law specifically refers, provides that a competent judge may order anonymity for an injured party (also called a “victim”⁵⁵) from the defendant and the Defence counsel under certain conditions and following a specific procedure. Observing that injured parties are “party to the proceedings” under Kosovo law,⁵⁶ the Panel notes that the KCPC thus envisages the possibility for anonymity of victims whose participating rights are broader than those of VPPs before the Specialist Chambers. In light of the KCPC provisions, the Specialist Chambers’ legal framework and the ICC practice discussed below,⁵⁷ the Panel dismisses Veseli’s above mentioned argument.

32. In conclusion, the Panel finds that the Pre-Trial Judge did not err in concluding that the Rules provide for anonymity for victims and that anonymity of victims participating in the proceedings before the Specialist Chambers is a valid protective

⁵³ Emphasis added. Rule 80(5) of the Rules provides that “[a] Panel may order any combination of the above measures, or other measures appropriate in the specific circumstances, to protect the witness or victim participating in the proceedings.”

⁵⁴ See Rule 4(1) of the Rules. *Contra* Appeal, para. 21.

⁵⁵ Article 19(7) of the KCPC defines an injured party or victim as “a person whose personal or property rights are violated or endangered by a criminal offence.”

⁵⁶ See KCPC, Articles 9(3), 19(1.15).

⁵⁷ See below, paras 46-47, 49.

measure pursuant to Articles 22 and 23 of the Law and Rules 80 and 113 of the Rules. Veseli's first ground of appeal is dismissed.

B. WHETHER ANONYMITY OF VICTIMS PARTICIPATING IN THE PROCEEDINGS VIOLATES BASIC CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS OF THE ACCUSED (GROUND 2)

1. Submissions of the Parties

33. Veseli submits that anonymity of VPPs is inherently prejudicial to the accused.⁵⁸ First, he argues that the Pre-Trial Judge erred in "referring selectively" to the jurisprudence of the ICC which is the only court that allows (subject to significant safeguards) anonymity of VPPs,⁵⁹ while ignoring a decision by the Appeals Chamber of the Special Tribunal for Lebanon ("STL").⁶⁰ According to Veseli, the STL Decision is a "persuasive authority" to interpret international human rights standards and delineates an approach which offers greater protection to the Accused.⁶¹

34. Second, Veseli submits that the Pre-Trial Judge misrepresented the Defence's concern, which is not that victims' participation would go *beyond* the charges confirmed in the Indictment,⁶² but that (i) the Accused should have the right to mount a defence against "separate and additional" accusations alleging that VPPs have personally suffered harm that is a direct result of a crime in the Indictment, and (ii) such right would be infringed if the VPPs were allowed to remain anonymous.⁶³

⁵⁸ Appeal, paras 23, 30-33.

⁵⁹ Appeal, para. 23, referring to Impugned Decision, fns. 57, 59-60. See also Reply, para. 9

⁶⁰ Appeal, para. 23, referring to Impugned Decision, fn. 50 and STL Decision, paras 27, 39. See also Reply, paras 8-9.

⁶¹ Appeal, paras 23, 32. See also Reply, paras 8-9.

⁶² Appeal, para. 24, referring to Impugned Decision, para. 37.

⁶³ Appeal, paras 24-25, referring to STL Decision, para. 28. See also Reply, para. 11.

35. Third, Veseli argues that, instead of focusing on formal distinctions between witnesses and VPPs,⁶⁴ the Pre-Trial Judge should have explained how the right to an adversarial trial is compatible with, for example, barring the Defence from challenging the “status” of VPPs, investigating false declarations⁶⁵ or raising other challenges.⁶⁶ In Veseli’s view, the Pre-Trial Judge’s consideration that the Parties may not challenge the credibility of individual applicants is irrelevant since Rule 113(3) of the Rules only concerns the admission of victims in the proceedings, not their participation.⁶⁷ In addition, Veseli argues that, contrary to the Pre-Trial Judge’s finding, Rule 114(5) of the Rules specifically foresees that VPPs may be bound to disclose exculpatory information.⁶⁸

36. Fourth, Veseli submits that while the Pre-Trial Judge correctly held that a balance must be struck between, on one hand, the interests of the Defence and, on the other hand, those of the VPPs and the expeditiousness of the proceedings,⁶⁹ the victims’ participation is conditional on respecting the fair trial rights of the accused which would be infringed by anonymity of victims.⁷⁰ In Veseli’s view, contrary to the ICC approach, the Pre-Trial Judge erred in not distinguishing between so-called “passive” or “silent” and “active” VPPs, by implicitly holding that no prejudice is caused even if anonymous VPPs assume an active role in the proceedings.⁷¹ Veseli further submits that even “silent” anonymous VPPs are potentially prejudicial to the Accused.⁷²

⁶⁴ Appeal, para. 26, referring to Impugned Decision, para. 38.

⁶⁵ Appeal, para. 26.

⁶⁶ Appeal, para. 28, giving the example of identifying challenges “with respect to witnesses who are in some capacity connected to the VPPs”.

⁶⁷ Appeal, para. 27, referring to Impugned Decision, para. 38.

⁶⁸ Appeal, para. 28, referring to Impugned Decision, para. 38.

⁶⁹ Appeal, para. 29, referring to Impugned Decision, para. 39.

⁷⁰ Appeal, para. 29, referring to Article 22(6) of the Law and STL Decision, para. 38.

⁷¹ Appeal, para. 30. See also Appeal, para. 31; Reply, para. 10.

⁷² Appeal, para. 31, referring to STL Decision, para. 26.

37. The SPO and the Victims' Counsel respond that the Pre-Trial Judge was correct to disregard the STL Decision, on which Veseli largely based his second ground of appeal, and to refer to the more relevant ICC jurisprudence, considering that: (i) the STL Decision was reached in the context of a different legal framework,⁷³ and preceded the ICC Appeals Chamber's decision which reaffirmed that victim anonymity is permissible;⁷⁴ (ii) the STL Decision omits relevant human rights standards and ECtHR jurisprudence concerning the testimony of anonymous witnesses;⁷⁵ and (iii) the Rules, adopted after the ICC and the STL decisions were issued, presumably took this jurisprudence into account.⁷⁶

38. The SPO and the Victims' Counsel also respond that the Appeal misrepresents and ignores relevant parts of the Impugned Decision, notably the fact that the Pre-Trial Judge, when ordering protective measures, considered the modalities and degrees of victim participation and the impact that it may have on their anonymity.⁷⁷

39. The SPO and the Victims' Counsel argue that Veseli's arguments are "speculative" and "premature" as they are based on potential developments in the proceedings and further, that the Pre-Trial Judge specifically indicated that such measures are "without prejudice to any future ruling by the relevant Trial Panel and

⁷³ SPO Response, paras 10-11, referring to STL Decision, paras 24, 28 and Rule 80(4)(e)(i) of the Rules; Victims Response, paras 36-38, comparing Rule 80(4)(e)(i) of the Rules with STL Rules of Procedure and Evidence, Rule 93 (as amended on 20 February 2013). See also Victims Response, para. 46, wherein the Victims' Counsel describes the STL Decision as an "outlier".

⁷⁴ SPO Response, para. 10, referring to *Ngudjolo* Appeal Decision, paras 14, 17; Victims Response, paras 37, 39-41. The Victims' Counsel specifically argues that the STL Decision is partly based on the absence of a conclusive decision, at the time, by the ICC Appeals Chamber on the issue of anonymity of VPPs, and that the ICC Appeals Chamber subsequently noted but disregarded the STL Decision, which then became the "default position for participating victims" before the ICC. See Victims Response, paras 39-41, referring to several decisions by the ICC chambers and to Reyes, Y.A., "The Protection of Victims Participating in International Criminal Justice", in Tibori-Szabó, K. and Hirst, M. (Eds.), *Victim Participation in International Justice - Practitioner's Guide*, T.M.C Asser Press, July 2017, p. 188.

⁷⁵ Victims Response, paras 42-45. See also Victims Response, para. 70.

⁷⁶ SPO Response, para. 10.

⁷⁷ SPO Response, paras 2, 7; Victims Response, paras 47-49, referring to Appeal, para. 30; Impugned Decision, para. 40; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008 ("*Lubanga* Decision dated 18 January 2008"), para. 130.

without prejudice to any additional measures stemming from the victims' potential dual status".⁷⁸ In the Victims' Counsel's view, the Pre-Trial Judge did not purport to make an order that applies "throughout the proceedings".⁷⁹ Submitting that, at this stage, the participation of the VPPs is not of a degree that could impact the rights of the Defence, the Victims' Counsel accepts that if the VPPs choose to take a more active role in the proceedings, the issue of their anonymity would be reviewed on a fact-specific basis.⁸⁰ As for the SPO, it submits that the fairness of victim anonymity depends on the modality of victim participation at a given stage of the proceedings,⁸¹ but that, in any event, even when a victim actively participates in proceedings, for example, as a witness, anonymity is not inherently unfair.⁸² In this context, the SPO recalls that the SCCC, referring to ECtHR jurisprudence, found that the language of Rule 80(4)(e)(i)(ii) of the Rules complies with Chapter II of the Constitution.⁸³

40. The Victims' Counsel further submits that anonymity of VPPs has no bearing on the right of the Accused to mount a defence, considering that, contrary to Veseli's assertion and the STL Decision, the fact that the VPPs allege to have suffered harm as a result of the alleged crimes does not contribute to the prosecution's task of proving the Accused's guilt, and the VPPs' participation does not equal an "accusation".⁸⁴

41. With regard to Veseli's argument regarding the right to challenge the "status" of VPPs, the Victims' Counsel responds that the Specialist Chambers' legal framework "offers sufficient safeguards" for the competent panel to ensure that VPPs are not false or based on fabricated documents.⁸⁵ The Victims' Counsel further submits that

⁷⁸ SPO Response, paras 2, 7, referring *inter alia* to Impugned Decision, paras 40, 45; Victims Response, paras 50-52, 59, referring to Impugned Decision, para. 40.

⁷⁹ Victims Response, paras 58-59, referring to Appeal, para. 25.

⁸⁰ Victims Response, paras 50-52, 57.

⁸¹ SPO Response, para. 8.

⁸² SPO Response, paras 8, 11.

⁸³ SPO Response, para. 8, referring to Constitutional Court Judgment, paras 132-139.

⁸⁴ Victims Response, paras 53-56. See also SPO Response, fn. 24.

⁸⁵ Victims Response, para. 61.

requiring disclosure of the VPPs' identities to meet a "hypothetical risk" is not "proportionate or warranted".⁸⁶

42. Finally, the Victims' Counsel argues that the anonymity of VPPs does not impact the Defence's ability to raise other challenges at the relevant point in the proceedings.⁸⁷ In particular, should the Victims' Counsel request to present evidence pursuant to Rule 114(5) of the Rules, the Defence would have "ample opportunity" to request the disclosure of identifying information and/or relevant material.⁸⁸

43. Veseli replies that the ICC is an "outlier" for allowing VPPs' anonymity in the absence of an express legal provision or substantiated reasons.⁸⁹ Further, in his view, the Specialist Chambers Plenary, by omitting VPPs' anonymity from Rule 80(4)(e)(ii) of the Rules, appears to have taken into account the STL approach.⁹⁰

44. Veseli also replies that the attempts by the SPO and the Victims' Counsel to extend to anonymous *victims* provisions which allow anonymous *witnesses* and to equate VPPs with dual status witnesses, overlook that, while a VPP voluntarily decides to participate in the proceedings, a witness is obligated to testify if called upon.⁹¹ In his view, the VPPs' interests thus "cannot outweigh basic fair trial rights of the accused".⁹² Furthermore, Veseli argues that the Victims' Counsel fails to distinguish between interim measures, designed to automatically expire at a certain point, and those which are designed to apply throughout the proceedings.⁹³

⁸⁶ Victims Response, para. 63. See also Victims Response, paras 62, 64.

⁸⁷ Victims Response, paras 65-67. See also Victims Response, para. 68.

⁸⁸ Victims Response, para. 66.

⁸⁹ Reply, para. 9. See above, fn. 73.

⁹⁰ Reply, para. 9. See above, fn. 74.

⁹¹ Reply, para. 7.

⁹² Reply, para. 7.

⁹³ Reply, para. 11, referring to repeated "unsuccessful arguments", for example, in Veseli Reply to SPO and Victims Responses to Certification Application, paras 3-4.

2. Assessment of the Court of Appeals Panel

45. The Appeals Panel recalls that victims are permitted to make representations via Victims' Counsel during the pre-trial and trial proceedings, "when the Victims' personal interests are impacted and only when it is not prejudicial to or inconsistent with the rights of the accused."⁹⁴ Article 21(2) of the Law provides that "[i]n the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 23 of this Law and any measures ordered by the Specialist Chambers for the protection of victims and witnesses."⁹⁵ Thus, as correctly noted by the Pre-Trial Judge, and acknowledged by the Defence, the competent panel must strike a balance between, on the one hand, the rights and interests of the Defence and, on the other hand, the safety, physical and psychological well-being, dignity and privacy of victims, the expeditiousness of the proceedings and the need to ensure the victims' meaningful participation.⁹⁶

46. First, with respect to Veseli's argument that the Pre-Trial Judge erred in disregarding the STL Decision and in relying instead on the jurisprudence of the ICC, the Panel agrees with the Pre-Trial Judge that the Specialist Chambers are guided, first and foremost, by the legal instruments of this court, which expressly foresee anonymity for victims,⁹⁷ and are not bound to follow judicial precedents from other jurisdictions.⁹⁸ However, the Specialist Chambers may be guided in their

⁹⁴ Article 22(6) of the Law. See also Rule 114(4) of the Rules.

⁹⁵ The right of the Accused to a fair trial is also protected by Article 31 of the Constitution of Kosovo, Article 6 of the ECHR and Article 14 of the ICCPR.

⁹⁶ Impugned Decision, para. 39; ICC, *Prosecutor v. Said*, ICC-01/14-01/21-171, Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation", 14 September 2021, paras 3, 67; *Ngudjolo* Appeal Decision, para. 16; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3045-Red2, Decision on 32 applications to participate in the proceedings, 27 August 2013 ("*Lubanga* Decision dated 27 August 2013"), paras 20-23. See also Appeal, para. 29.

⁹⁷ See above, paras 25-32. See Impugned Decision, fn. 50.

⁹⁸ *Veseli* Interim Release Appeal Decision, para. 51; IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("*Veseli* Appeal Decision on Jurisdiction Challenges"), paras 28, 44. See Impugned Decision, para. 50.

interpretation of the legal framework by jurisprudence from other courts and tribunals, such as the ICC and the STL.⁹⁹ While the ICC and STL decisions relied upon by the Pre-Trial Judge and the Parties were reached in the context of different legal frameworks which, unlike at the Specialist Chambers, do not expressly provide for victim anonymity, the Panel considers that these decisions are relevant to answer the question of whether the anonymity of victims is prejudicial to the Accused in the current stage of the proceedings.

47. The Panel is of the view that the anonymity of victims is not necessarily prejudicial to the accused in all contexts, in particular when the degree of participation is limited as in the present stage of the proceedings before the Pre-Trial Judge. The Panel considers that the prejudice to the accused and therefore the need to disclose a victim's identity is contingent upon their modalities of participation in the proceedings, under Article 22 of the Law and Rule 114 of the Rules, which depends on the stage of the proceedings.¹⁰⁰ The Panel observes that the VPPs have limited participatory rights at the pre-trial stage,¹⁰¹ and that in ordering protective measures for these victims, the Pre-Trial Judge emphasised that the protective measures ordered at this stage of the proceedings, including anonymity, are “without prejudice to any future ruling by the relevant Trial Panel and without prejudice to any additional measures stemming from the victims’ potential dual status”, underlining the

⁹⁹ Appeal Decision on Jurisdiction Challenges, paras 54, 136, 169; *Gucati* Appeal Decision, paras 9-14.

¹⁰⁰ *Ngudjolo* Appeal Decision, para. 17. See also ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-471, Decision on Disclosure of Victims’ Identities, 17 June 2016 (“*Ongwen* Decision dated 17 June 2016”), paras 13-14; *Lubanga* Decision dated 27 August 2013, para. 23; *Lubanga* Decision dated 18 January 2008, para. 131.

¹⁰¹ See Impugned Decision, para. 49, referring to First Decision on Victims’ Participation, paras 82-84, 85(d). The Pre-Trial Judge authorised Victims’ Counsel to *inter alia* (i) have access to all public and confidential filings, transcripts and evidentiary material of the case file and to keep the VPPs informed of relevant developments without revealing non-public information; (ii) be present at all pre-trial hearings, excluding any *ex parte* hearings; and (iii) make oral and written submissions whenever the personal interests of the VPPs are affected.

differences between VPPs and dual status witnesses.¹⁰² The Panel finds no error in the Pre-Trial Judge's assessment, namely that he was unpersuaded by the Defence's argument that "regardless of the degree of participation, the anonymity of victims is inherently prejudicial to the Accused" and thus automatically incompatible with the right to a fair trial.¹⁰³

48. The Panel observes that the victims' role in the proceedings at the Specialist Chambers is significantly more limited as compared to the parties.¹⁰⁴ The victims' participation is provided through Victims' Counsel¹⁰⁵ and subject to the authorisation of and the modalities decided by the competent panel.¹⁰⁶ Furthermore, in comparison to the procedure applicable to witnesses,¹⁰⁷ Rule 113 of the Rules provides that the Parties may only make submissions on legal grounds regarding the admissibility of victim applications,¹⁰⁸ but may not challenge the credibility or the admissibility of

¹⁰² Impugned Decision, para. 40. Therefore, contrary to Veseli's assertion, the Pre-Trial Judge, while not referring to the specific terms of "passive" and "active" VPPs, did consider the degree of participation of VPPs. See also Impugned Decision, paras 38, 39.

¹⁰³ Impugned Decision, para. 39. Contra Appeal, paras 23, 25, 31, 33; Reply, para. 10.

¹⁰⁴ Article 22(3) of the Law provides that "a Victim's personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation." See similarly *Ongwen* Decision dated 17 June 2016, para. 11. See also Impugned Decision, para. 38.

¹⁰⁵ See Article 22(5)-(6) of the Law; Rule 114 of the Rules. In particular, Rule 114(1) of the Rules provides that "[v]ictims participating in the proceedings shall exercise their rights through an assigned Victims' Counsel during all stages of the proceedings pursuant to Articles 22(6) and 46(9) of the Law." The Law and the Rules make a clear distinction between the Victims' Counsel and the VPPs themselves; for instance, the VPPs generally do not have access to confidential material. See Rule 114(3) of the Rules. See also First Decision on Victims' Participation, para. 81.

¹⁰⁶ See Article 22(6) of the Law. Rule 114(2) of the Rules provides that "Victims' Counsel shall have the right to make opening and closing statements, and may be present at pre-trial and trial proceedings *if deemed necessary by the Panel*" (emphasis added). Rule 114(4) of the Rules provides that [w]henver the personal interests of victims participating in the proceedings are affected, and unless otherwise provided in the Rules, Victims' Counsel may, *under the control of the Panel*: (a) make oral and written submissions; and (b) ask questions of witnesses" (emphasis added) and that "the Panel shall issue specific guidelines regulating the participation of victims in the proceedings". See also First Decision on Victims' Participation, paras 82-84, 85(d); Second Decision on Victims' Participation, para. 60; Impugned Decision, para. 49.

¹⁰⁷ See e.g. Rules 135, 139(4), 143(2)-(3), referring to the credibility of witnesses and the reliability of their testimony.

¹⁰⁸ Rule 113(1)-(3) of the Rules. The Panel notes that the Parties do not have access to application forms.

individual applicants.¹⁰⁹ As underlined by the Victims' Counsel, the responsibility for ensuring that only *true* victims participate in the proceedings lies with the competent panel, which shall assess the admissibility of victims' applications on a *prima facie* basis.¹¹⁰ Contrary to Veseli's assertion, the Panel considers that this provides sufficient safeguards at this stage of the proceedings as the competent panel knows the victims' identities and is well placed to assess the impact of any prejudice should it arise and to take any necessary measures.¹¹¹

49. The Panel turns next to Veseli's argument that allowing the VPPs to remain anonymous "would amount to an anonymous accusation against the accused".¹¹² Recalling the fundamental and constitutional right of an accused in a criminal trial to have an effective opportunity to challenge the evidence against him,¹¹³ the Panel observes that not only the STL Appeals Chamber but also the ICC chambers have expressed concerns that the participation of anonymous victims could lead to anonymous accusations.¹¹⁴ While the Panel agrees with the Pre-Trial Judge that victim participation in the present case is limited to victims of crimes alleged in the Indictment,¹¹⁵ it also stresses that the participation of anonymous victims may, in certain circumstances, infringe the accused's right to a fair trial. Should a VPP be called

¹⁰⁹ Impugned Decision, para. 38. See also IA005/F00008, Decision on Appeal Against "First Decision on Victims' Participation", 16 July 2021 ("First Appeal Decision on Victims Participation"), para. 35.

¹¹⁰ Victims Response, para. 61. See Rule 113(4) of the Rules; First Decision on Victims' Participation, paras 42-43; First Framework Decision, para. 29 and jurisprudence cited therein.

¹¹¹ See similarly *Lubanga* Decision dated 18 January 2008, para. 131. See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-807-Corr, *Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, para. 65.

¹¹² See Appeal, para. 25.

¹¹³ Constitutional Court Judgment, para. 134.

¹¹⁴ STL Decision, para. 28 ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-474, PTC I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 ("*Katanga and Ngudjolo* Decision Dated 13 May 2008"), paras 180-181, citing ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-462-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006 ("*Lubanga* Decision Dated 22 September 2006"), p. 7; ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09-136, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 October 2009, para. 22. See also *Ngudjolo* Appeal Decision, paras 17-19.

¹¹⁵ Impugned Decision, para. 37. See also First Appeal Decision on Victims Participation, paras 16-18.

to appear as a witness, for example, the protective measures in place for the VPP might need to be reassessed, as the Pre-Trial Judge correctly noted.¹¹⁶ Moreover, the Panel observes that there are other ways for a VPP to participate in proceedings under the legal framework which may also impact the Accused's right to a fair trial.¹¹⁷

50. Nevertheless, and while Rule 81 foresees that a Party shall make an application to the competent panel to vary the protective measures, the Panel recalls that the Pre-Trial Judge and the Trial Panel shall ensure that a trial is fair and expeditious, and may, where necessary and even *proprio motu*, issue any order to protect the accused, witnesses and victims.¹¹⁸ In particular, when deciding on future modalities of victims' participation during trial or during the reparation phase, the competent panel shall consider the protective measures already ordered, and may decide, in light of the precise circumstances and the potential prejudice to the Parties, to vary them.¹¹⁹ In this context, the Panel agrees with the Pre-Trial Judge's findings in the First Decision on Victims' Participation that protective measures at this stage have minimal effect on the ability of the Defence to prepare in relation to future testimonies,¹²⁰ and considers that the Defence will have ample opportunity to raise at the relevant time any

¹¹⁶ See *Ngudjolo* Appeal Decision, para. 17; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1117, Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses, 22 December 2017, paras 10-18; *Ongwen* Decision dated 17 June 2016, paras 13-14; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, paras 92-93. The Panel recalls that even if a VPP was to be called as witness, the continuation of anonymity might not be considered incompatible with the Accused's rights. See Constitutional Court Judgment, para. 136. See also Impugned Decision, paras 40, 45.

¹¹⁷ This includes asking questions to witnesses called by the parties, submitting evidence and calling witnesses to testify, or making submissions on facts related to the Prosecution's case against the Accused. See Article 22(6) of the Law; Rule 114(4)-(5) of the Rules. See also *Ngudjolo* Appeal Decision, para. 19; *Ongwen* Decision dated 17 June 2016, para. 14; *Lubanga* Decision Dated 22 September 2006, p. 7; *Katanga and Ngudjolo* Decision Dated 13 May 2008, paras 181-182; STL Decision, para. 27.

¹¹⁸ Articles 39(11) and (13), 40(2), (6)(a) and (f) of the Law. See also Rule 116(4)(b) of the Rules.

¹¹⁹ The Panel notes that the Victims' Counsel indicated that if the VPPs choose to take a more active role, "the issue of their anonymity will be reviewed". See Victims Response, paras 51, 55-57, 66.

¹²⁰ First Decision on Victims' Participation, paras 69, 80.

challenge it finds pertinent.¹²¹ The Panel finds it therefore premature and unnecessary to address at this stage of the proceedings any prejudice that might arise at trial or at the reparation phase as a result of the participation of anonymous VPPs.¹²²

51. While the Panel recognises that the participation of anonymous victims may, in certain circumstances, infringe the accused's right to a fair trial, the Panel recalls that anonymity for VPPs is expressly foreseen by the legal framework of the Specialist Chambers¹²³ and considers that there might be reasons in exceptional circumstances,¹²⁴ notably in light of the vulnerable position of victims, to justify anonymity.¹²⁵ The Panel therefore considers that the Pre-Trial Judge's approach in the Impugned Decision ordering the protective measure of anonymity considering specific factors, including the modality of victim participation at the pre-trial proceedings, was not unfair and did not violate fair trial guarantees under Article 21 of the Law, Article 31 of the Constitution of Kosovo, Article 6 of the ECHR and Article 14 of the ICCPR.¹²⁶ In this context, the Panel also recalls that the SCCC, despite focusing more on the anonymity of witnesses rather than VPPs, found that the language of Rule 80(4)(e)(i) and (ii) of the Rules complies with Chapter II of the Constitution of Kosovo, and that the non-disclosure of a witness' identity, or the granting of anonymity, is not incompatible

¹²¹ For example, with respect to the disclosure of exculpatory information by VPPs or reparations. See Appeal, paras 6, 28.

¹²² Contra Appeal, para. 25, wherein Veseli argues that "[i]f the VPPs were allowed to remain anonymous *throughout the proceedings*, this would amount to an anonymous accusation against the accused, in clear breach of fair trial rights" (emphasis added). See also Reply, para. 11. The Panel notes that the Victims' Counsel indicated that if the VPPs choose to take a more active role, "the issue of their anonymity will be reviewed". See Victims Response, paras 51, 55-57, 66.

¹²³ See above, para. 32.

¹²⁴ Rule 80(4)(e)(i) of the Rules.

¹²⁵ See Impugned Decision, paras 43-44; Second Decision on Victims' Participation, paras 51-52; First Decision on Victims' Participation, para. 68.

¹²⁶ The Panel agrees with the Victims' Counsel that Veseli does not provide any analysis about how anonymity of VPPs may infringe these provisions nor provide any supporting authorities. See Victims Response, para. 42.

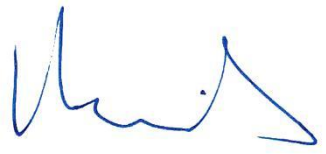
with the Constitution of Kosovo, in particular with the right to a fair trial as guaranteed under its Article 31(4).¹²⁷

52. In light of all of the above, the Panel finds that anonymity of VPPs, at this stage of the proceedings, does not violate basic constitutional and international human rights of the Accused. As such, Veseli's second ground of appeal is dismissed.

IV. DISPOSITION

53. For these reasons, the Court of Appeals Panel:

DENIES the Appeal.



**Judge Michèle Picard,
Presiding Judge**

Dated this Thursday, 15 September 2022

At The Hague, the Netherlands

¹²⁷ Constitutional Court Judgment, paras 132-140. Rule 80(4)(e) of the Rules was originally numbered as Rule 77(4)(e).