

In: KSC-BC-2020-04
The Prosecutor v. Pjetër Shala

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

Date: 10 October 2022

Language: English

Classification: Public

Victims' Counsel Submissions for Trial Preparation Conference

Specialist Prosecutor
Jack Smith

Counsel for Pjetër Shala
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

I. INTRODUCTION

1. Pursuant to the Trial Panel's order of 30 September 2022,¹ the Victims' Counsel files these submission for the trial preparation conference.

II. CLASSIFICATION OF FILING

2. This filing is classified as public as it responds to a previous filing that is public, and does not refer to any confidential information and only refers to and cites public redacted versions of confidential filings.

III. PROCEDURAL HISTORY

3. On 15 December 2021, 11 August 2022 and 19 September 2022, the Pre-Trial Judge issued three decisions admitting a total of eight applicants as victims participating in the proceedings ("VPPs").²
4. On 21 September 2022, the Pre-Trial Judge transmitted the case file to Trial Panel I.³
5. On 30 September 2022, Trial Panel I decided to convene a trial preparation conference on 18, 19 and 20 October 2022, and 21 October 2022 as a reserve day,⁴ and ordered, *inter alia*, Victims' Counsel to file written submissions for the trial preparation conference.⁵

¹ KSC, *The Prosecutor v. Pjetër Shala*, KSC-BC-2020-04/F00289, Decision setting the dates for trial preparation conferences and requesting submissions with one strictly confidential and *ex parte* annex, 30 September 2022 ("the Decision"), paras 11 and 13(c).

² KSC-BC-2020-04/F00123/RED, Pre-Trial Judge, First Decision on Victims' Participation, 15 December 2021; F00249/RED, Second Decision on Victims' Participation, 11 August 2022; F00279/RED, Third Decision on Victims' Participation, 19 September 2022 (together "the three Decisions on Victims' Participation").

³ KSC-BC-2020-04/F00284, Pre-Trial Judge, Decision Transmitting the Case File to Trial Panel I, 21 September 2022.

⁴ The Decision, para. 13(a).

⁵ KSC-BC-2020-04/F00289, Decision setting the dates for trial preparation conferences and requesting submissions with one strictly confidential and *ex parte* annex, 30 September 2022, para. 13(c).

IV. SUBMISSIONS

6. Victims' Counsel responds to the various issues raised by the Trial Panel, using the same lettering and numbering as in the Decision.

A. INVESTIGATIONS AND DISCLOSURE OF EVIDENCE

Submissions by the Parties on the adoption of a framework governing the handling of confidential information during investigations and contacts with witnesses, taking into account the framework adopted in Case KSC-BC-2020-06.

7. Although not specifically invited to make submissions on this topic, Victims' Counsel wishes to record his full support for the framework and notes that he has argued extensively in favour of its adoption in Case KSC-BC-2020-06 in so far as it relates to dual status witnesses⁶.

B. CRIME SITE VISIT

Submissions by the Parties and Victims' Counsel on the necessity of a crime site visit for the proper administration of justice, as envisaged by Rule 74 of the Rules, and the timing of any such visit;

8. Site visits have been deemed beneficial by the judges of the International Criminal Court ("ICC"), the International Criminal Tribunal for the former Yugoslavia ("ICTY") or the International Criminal Tribunal for Rwanda ("ICTR") as being of material assistance in gaining a better understanding of the context

⁶ KSC-BC-2020-06/F00690, Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 14 February 2022; KSC-BC-2020-06, Transcript of 22 February 2022; KSC-BC-2020-06/IA024-F00008 Victims' Counsel Response to Defence Appeals against the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant".

of the events and in evaluation of the evidence before them.⁷ The ICTR Trial Chamber in the *Rwamakuba* case noted that “[w]hile photographs, sketches and maps have been tendered as exhibits regarding these locations, the Chamber is of the view that, in the particular circumstances of this case a firsthand knowledge of the area will be in the interests of justice.”⁸

9. Victims’ Counsel has canvassed the views of the VPP who was held at the Kukes Metal Factory on the topic of whether the judges should visit the crime site. This VPP’s view is that a visit by the judges will equip them to understand the layout and the nature of the Metal Factory in a way that photographs alone cannot achieve. While expressing that he would be pleased to see the judges do so, he did sound a note of caution as to the possible security issues that such a visit might entail.
10. Victims’ Counsel submits that a site visit would facilitate the Trial Panel’s comprehensive understanding of the site and the facts of the case, but also the perspective of the victims who were detained and tortured at the Kukes Metal Factory. However, Victims’ Counsel acknowledges that this benefit must be weighed against security and cost considerations.

⁷ ICC, *The Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 108; ICC, *The Prosecutor v. Dominic Ongwen*, ICC-01/06-01/15-1020, Decision on Judicial Site Visit to the Republic of Uganda, 13 October 2017, para. 1; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Site Visit, 28 January 2011, para. 11; ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Site Visit, 4 June 2013, para. 6 (footnote omitted); For example: ICTR, *Prosecutor v. Bagilishema*, ICTR-95-IA-T, Judgement, 7 June 2001, para. 10; *Prosecutor v. Ntawukulilyayo*, ICTR-05-82, Scheduling order for site visit to Rwanda and Hearing of closing arguments, 9 March 2010, para. 3.

⁸ ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Defence motion for a view *locus in quo*, 16 December 2005, para. 8.

C. CONDUCT OF PROCEEDINGS

1. *Commencement of Trial and Opening Statements*

a. *Submissions by the Parties and Victims' Counsel as to a tentative date for the commencement of the trial;*

11. The VPPs would favour the trial starting as soon as the readiness of the parties allows.
12. Victims' Counsel will be ready to start the trial whenever it is scheduled.

d. *Whether Victims' Counsel intends to make an opening statement pursuant to Rule 126(3) of the Rules and, if so: (i) how much time will he require; and (ii) will visual aids or other tools be used;*

13. Victims' Counsel confirms that he will make an opening statement pursuant to Rule 126(3). This will take not more than two hours. Visual aids will be used.

2. *Familiarisation of Witnesses Prior to Testimony*

The Panel intends to issue directions on witness familiarisation prior to testimony in due course. The Parties, Victims' Counsel and the Registry / WPSO may make submissions on this matter, if they so wish, taking into account the Panel's previous practice.

14. Victims' Counsel has no objection to the *Decision on witness familiarisation*⁹ from Case KSC-BC-2020-05 being adopted in this case.

⁹ *The Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00150, Decision on witness familiarisation, 9 July 2021.

3. *Dual Status Witnesses-Victims*

Whether the SPO and Victims' Counsel have exchanged information in order to identify which participating victims are also SPO witnesses and vice versa and, if not, whether they plan to do so or otherwise have objections to any such communication or disclosure of information, including to WPSO.

15. Victims' Counsel believes that the SPO are aware of which witnesses have dual status in this case but has no objection to providing a written list in order that the matter is clear.
16. Victims' Counsel has no objection to the disclosure of this information to WPSO.

4. *Presentation of (Witness) Evidence by the Parties and Participants*

- a. *Whether, at this stage and subject to Rule 114(5) of the Rules, Victims' Counsel can already indicate whether he intends to submit evidence, call (expert) witnesses and/or participating victims to testify, or request that victims be permitted to present their views and concerns where their personal interests are affected; and, if so, what is the requested time for the direct examination of said witnesses/victims or for the presentation of their views and concerns. The Panel also invites Victims' Counsel to consider relying on Rules 153 and 154 should he intend to call witnesses. This is without prejudice to any further changes to be communicated sufficiently in advance of the end of the SPO case;*

17. As will become clear, in this case the Trial Panel will have a very good sense of the harm inflicted on the VPPs by the close of the prosecution case.
18. As a result it is likely that the relevant material that remains to be adduced after the close of the prosecution case will be modest in scope.

19. It is anticipated that expert evidence from a clinical psychologist specialising in trauma will be called in relation to one of the VPPs.
20. It may be the case that Victims' Counsel would additionally seek to adduce views and concerns from one or more VPP.
21. It is difficult to give a reliable estimate of the time that will be needed at this stage for the presentation of this material, but it is not likely to be more than two days.

5. *Order of Appearance and Issues Related to the Questioning of Witnesses*

- a. *Whether, at this stage, and subject to Rule 114(5) of the Rules, Victims' Counsel can already indicate the order in which he intends to call (expert) witnesses, and/or participating victims to testify or to present their views and concerns, if any, and the modalities of testimony / presentation of views and concerns (live or video-link). This is without prejudice to any further changes to be communicated sufficiently in advance of the end of the SPO case;*

22. In terms of the modalities of presentation of evidence and views and concerns, should any be ordered by the Panel, Victims' Counsel envisages that the expert witness would testify in the court room. If VPPs are called to present their views and concerns it is highly likely that there would be a request for them to do so by video-link following the expert evidence.

6. *Non-Oral Evidence*

- a. *Whether Victims' Counsel intends to object to the admissibility of non-oral evidence under Rules 102 or 104 of the Rules and, if so, what is the nature of the objections;*

23. Victims' Counsel has no objections to any of the non-oral evidence as things stand.

d. Submissions by the Parties and Victims' Counsel, taking into account the Panel's previous practice, as to whether the admissibility of non-oral evidence should be decided at the time of its submission at trial or whether it can be deferred to the judgment, after giving the Parties and Victims' Counsel an opportunity to make submissions, if they wish to do so, on the admissibility of any such items.

24. Victims' Counsel has no opposition to the adoption of the *Decision on the submission and the admissibility of evidence*¹⁰ from Case KSC-BC-2020-05.

D. OTHER MATTERS

Further Trial Preparation with WPSO and SPO

25. If the discussions envisaged by paragraph 10 of the Decision will involve arrangements for dual status witnesses, then Victims' Counsel would ask the Trial Panel to consider whether it is appropriate for him to be invited to that part of the discussion.

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¹⁰ *The Prosecutor v. Mustafa*, KSC-BC-2020-05/F00169, Decision on the submission and the admissibility of evidence, 25 August 2021.