

**Case No.:** KSC-BC-2020-04

**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

**Date:** 17 October 2022

**Filing Party:** Defence Counsel

**Original Language:** English

**Classification:** Confidential

**THE SPECIALIST PROSECUTOR**

v.

**PJETËR SHALA**

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**Defence Response to**

**Victims' Counsel Submissions on the Need for the Continued Application of the  
Protective Measures Ordered for Victims Participating in the Proceedings**

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**Specialist Prosecutor's Office**  
Jack Smith

**Counsel for the Accused:**  
Jean-Louis Gilissen  
Hédi Aouini  
Leto Cariolou

**Counsel for Victims**  
Simon Laws  
Maria Radziejowska

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files the present submissions in response to the “Victims’ Counsel Submissions on the Need for the Continued Application of the Protective Measures Ordered for Victims Participating in the Proceedings”.<sup>1</sup>
2. The Victims’ Counsel requests the continued application of the protective measures granted by the Pre-Trial Judge with regard to seven victims participating in the present proceedings (“VPPs”).<sup>2</sup> Specifically, the Victims’ Counsel requests continued non-disclosure of the VPPs’ identity to the public, the Accused, and the Defence until further order.<sup>3</sup> The request is based on the VPPs’ “preference” for the protective measures to continue.<sup>4</sup>
3. In his Second and Third Decisions on Victims’ Participation, the Pre-Trial Judge granted the said protective measures on a “provisional basis”, specifically stating that they were appropriate for the purposes of the stage of the proceedings when they were granted and without prejudice to their subsequent variation.<sup>5</sup>
4. The Defence does not object to the continued non-disclosure of the victims’ identity to the public.

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<sup>1</sup> KSC-BC-2020-04, F00294, Victims’ Counsel Submissions on the Need for the Continued Application of the Protective Measures Ordered for Victims Participating in the Proceedings, 5 October 2022 (confidential)(“Submissions”). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated. The Defence notes that the Response is filed as confidential as it refers to confidential filings in this case, pursuant to Rule 82(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”). The Defence does not object to the reclassification of this Response as public.

<sup>2</sup> Submissions, paras. 1, 11.

<sup>3</sup> Submissions, paras. 9-11; F00249, Second Decision on Victims’ Participation, 11 August 2022 (confidential)(“Second Decision”), paras. 35, 36; F00279, Third Decision on Victims’ Participation, 19 September 2022 (confidential)(“Third Decision”), paras. 37, 38.

<sup>4</sup> Submissions, paras. 9, 10.

<sup>5</sup> Second Decision, paras. 32, 35-37 (with respect to Victim 02/04); Third Decision, paras. 35-38 (with respect to Victims 03/04, 04/04, 05/04, 06/04, 07/04, and 08/04).

5. However, the continued non-disclosure of the seven VPPs' identity to the Accused and the Defence is clearly disproportionate, unnecessary and highly prejudicial to the right of the Accused to know with certainty the case against him and prepare his defence.
6. The VPPs' stated "preference" for the continuation of the protected measures in force fails to meet the applicable test.<sup>6</sup> There is no demonstrated "objectively justifiable risk" posed by the disclosure of each of the seven VPP's identity to the Accused and/or the Defence. Nor has it been shown that the requested protective measures are strictly necessary and proportionate in view of the prejudice caused to the Accused. Thus the protective measures currently in force should be varied to ensure timely disclosure of the VPPs' identity to both the Accused and the Defence. Any concern leading the Pre-Trial Judge to grant the said measures provisionally, must give weight to the right of the Accused to know with certainty the case against him and be given an effective opportunity to prepare his defence. This is especially true as the start of the trial is approaching.
7. In addition, the VPPs' position fails to meet the heightened threshold set in Rule 80(4)(e)(i) of the Rules. The latter permits non-disclosure of the identity of a victim to the Parties as a measure of last resort that can only be granted "in

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<sup>6</sup> See Rule 80(4)(d), 80(4)(e)(i) of the Rules. See also, Second Decision, para. 31; Third Decision, para. 26, referring to F00064, Framework Decision on Victims' Applications, 1 September 2021, paras. 51-56. See also F00033, Framework Decision on Disclosure of Evidence and Related Matters, 30 April 2021, para. 78; KSC-BC-2020-05, F00034, Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020, para. 76; KSC-BC-2020-06, F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 85; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008, para. 131 ("extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial."); ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-699, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, para. 24.

exceptional circumstances” and “subject to any necessary safeguards”. There has been no suggestion by either the Victims’ Counsel or the Specialist Prosecutor’s Office that alludes to *any* concern posed by disclosure of the VPPs’ identity to the Defence. In addition, the Pre-Trial Judge has not made the prejudice caused by such an extreme measure mitigated by *any* safeguard. In these circumstances, should the Trial Panel be inclined to grant continuation of the protective measures in force (which, in the view of the Defence, would be unnecessary), the Defence respectfully requests that the identity of the VPPs be disclosed to the Defence. This would mitigate the prejudice to the rights of the Accused and is preferable to the current regime that lacks objective foundation.

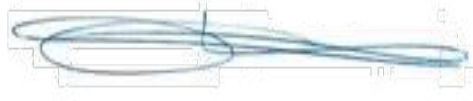
8. Lastly, the Defence notes that maintaining the protective measures in force with regard to the Accused and the Defence is essentially artificial. The Pre-Trial Judge’s Decisions on Victims’ Participation, read in the light of the evidentiary material disclosed by the SPO, make the identity of the VPPs to a large extent evident to both the Accused as well as the Defence.<sup>7</sup> No measure can be deemed proportionate when it fails to serve the purpose for which it is imposed.
9. For all the above reasons, the Defence respectfully requests the Trial Panel to lift the protective measure of non-disclosure to the Accused and the Defence of the identity of the seven VPPs. This would bring the clarity regarding this matter to which the Accused is entitled. To the alternative, the Defence requests variation of the protective measures in force that would permit disclosure of the VPPs’ identity to the Defence.

**Word count: 1026**

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<sup>7</sup> See, for instance, F00123, First Decision on Victims’ Participation, 15 December 2021, paras. 34, 35.

Respectfully submitted,



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**Jean-Louis Gilissen**  
**Specialist Defence Counsel**



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**Hédi Aouini**  
**Defence Co-Counsel**



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**Leto Cariolou**  
**Defence Co-Counsel**

Monday, 17 October 2022  
The Hague, the Netherlands