

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

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

Date: 27 October 2022

Language: English

Classification: Confidential

Victims' Counsel Response to Defence Filing F00316

Specialist Prosecutor
Jack Smith

Counsel for Pjetër Shala
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

I. INTRODUCTION

1. Pursuant to Article 22(6) and Article 40(6)(a)¹ of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), and the oral order issued by Trial Panel I,² Victims' Counsel submits this response³ to *Defence Response to Victims' Counsel Submissions on the Need for the Continued Application of the Protective Measures Ordered for Victims Participating in the Proceedings*.⁴
2. Victims' Counsel does not object to the disclosure of the identity of the dual status witnesses-victims to the Defence, but strongly objects to the disclosure of the identity of the remaining victims participating in the proceedings ("VPPs").

II. CLASSIFICATION OF FILING

3. Pursuant to Rule 82(4) of the Rules, this filing is classified as confidential as it responds to a previous filing that is confidential.

III. PROCEDURAL HISTORY

4. On 11 August 2022, the Pre-Trial Judge issued the Second Decision on Victims' Participation and admitted one applicant to participate in the proceedings as a VPP.⁵

¹ See Article 39(13) of the Law.

² *The Specialist Prosecutor v. Pjetër Shala*, KSC-BC-2020-04, Transcript of 19 October 2022 (confidential draft), T.405:2-17.

³ See paragraph 9 below.

⁴ KSC-BC-2020-04/F00316, Defence Response to Victims' Counsel Submissions on the Need for the Continued Application of the Protective Measures Ordered for Victims Participating in the Proceedings, 17 October 2022 ("Defence Request").

⁵ KSC-BC-2020-04/F00249/RED, Public Redacted Version of Second Decision on Victims' Participation, 11 August 2022 ("Second Decision"), para. 43(b).

5. On 19 September 2022, the Pre-Trial Judge issued the Third Decision on Victims' Participation and admitted six applicants to participate in the proceedings as VPPs.⁶
6. With regard to these seven applicants admitted to participate in the proceedings as VPPs, the Pre-Trial Judge ordered Victims' Counsel to "provide submissions as to the need for the continued application of the protective measures ordered pursuant to Rule 80(4)(d) and (e)(i) of the Rules by no later than Friday, 7 October 2022".⁷
7. On 5 October 2022, Victims' Counsel responded to the Pre-Trial Judge's order requesting the continued application of the protective measures ordered by the Pre-Trial Judge.⁸
8. On 17 October 2022, the *Defence Response to Victims' Counsel Submissions on the Need for the Continued Application of the Protective Measures Ordered for Victims Participating in the Proceedings* was filed.⁹
9. On 19 October 2022, Trial Panel I issued an oral order and considered the Defence filing of 17 October 2022 as a request, not a response to Victims' Counsel filing of 5 October 2022, and invited Victims' Counsel to respond to the Defence Request.¹⁰

⁶ KSC-BC-2020-04/F00279/RED, Public Redacted Version of Third Decision on Victims' Participation, 19 September 2022 ("Third Decision"), para. 43(a).

⁷ Second Decision, paras 37 and 43(g); Third Decision, paras 38 and 43(e).

⁸ 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 ("Victims' Counsel Submissions on Protective Measures").

⁹ *Supra*, footnote 1.

¹⁰ KSC-BC-2020-04, Transcript of 19 October 2022 (confidential draft), T.405:2-17.

IV. SUBMISSIONS

A. Preliminary observations on the number of VPPs in this case

10. Before setting out the reasons for the positions taken by Victims' Counsel in response to the Defence, and by way of clarification, Victims' Counsel would like to point out that although the Defence Request relates to seven¹¹, there are in fact eight VPPs in this case.¹²
11. In Victims' Counsel Submissions on Protective Measures, the position of only seven VPPs was addressed because the protective measures for V01/04 were already in place.
12. For the purposes of this response, it is assumed that the Defence Request applies to all eight VPPs, although only seven are mentioned: there seems to be no logical reason to exclude V01/04 from the proposed disclosure. Victims' Counsel is content for disclosure to be made in this case in relation to V01/04 as well.

B. The dual status witnesses-victims

13. Victims' Counsel agrees that disclosure of the identity of the dual status witnesses-victims is appropriate.
14. In reaching this decision, Victims' Counsel has considered four factors in particular as weighing in favour of disclosure.
15. First, Victims' Counsel acknowledges that the greater the extent and the significance of VPPs' participation, the more likely it is that anonymous participation of such VPPs could be prejudicial to the fair trial rights of the Accused.
16. The degree of participation is a key determinant in the extent of the protective measures afforded to VPPs. This approach has been adopted by the chambers of

¹¹ Defence Request, para. 9.

¹² See KSC-BC-2020-04/F00123/RED, Pre-Trial Judge, First Decision on Victims' Participation, 15 December 2021 (admitting one VPP – V01/04); Second Decision (admitting one VPP – V02/04); Third Decision (admitting six VPPs – V03/04, V04/04, V05/04, V06/04, V07/04 and V08/04).

the International Criminal Court (“ICC”)¹³ and was recently followed by the Appeals Panel of the Kosovo Specialist Chambers in the context of pre-trial proceedings in the *Thaçi et al.* case¹⁴.

17. Victims’ Counsel does not suggest that a similar regime should not apply in this case.
18. Second, from a purely pragmatic perspective, in the context of this case, it will be impossible to adequately discharge the role of Victims’ Counsel without revealing the identities of the dual status witnesses-victims. The facts in this case are within a relatively narrow compass. The dual status witnesses-victims are prominent within it. Victims’ Counsel will, of necessity, have to refer to them (albeit by pseudonym) in his opening statement and in the course of the trial. It will rapidly become obvious to the Defence which of the witnesses must also be victims. It is plainly preferable to avoid unnecessary and ineffective obfuscation by simply making their identities known.
19. Third, there is some force in the Defence submission that the identity of the dual status witnesses-victims is already largely apparent, and that maintaining the protective measures is therefore artificial.¹⁵
20. Finally, none of the dual status witnesses-victims have been granted anonymity vis-à-vis the Defence in their capacity as witnesses.
21. Having made that concession, Victims’ Counsel is also mindful of the position of the remaining VPPs who are not also witnesses (and in respect of whom it is submitted below that no disclosure should be made). As is apparent from the

¹³ ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Corrigendum to Directions for the conduct of the proceedings and testimony in accordance with Rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, para. 22; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 92.; ICC, *Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, ICC- 01/05-01/08-2027, 21 December 2011, para. 19.

¹⁴ SC-BC-2020-06/IA023/F00006/COR, Decision on Veseli’s Appeal Against “Third Decision on Victims’ Participation”, 15 September 2022 (“KSC Appeals Panel Decision”), paras 47-51.

¹⁵ Defence Request, para. 8.

Third Decision on Victims' Participation, seven of the eight VPPs are family members¹⁶. It follows that the identification of the remaining VPPs will be facilitated by the disclosure of the identities of their dual status family members.

22. Victims' Counsel proposes that, in order to provide them with the maximum protection for the longest period compatible with the rights of the Defence, the order for disclosure of the identities of the dual status victims should take effect 30 days before trial.
23. In light of Rule 81(5) of the Rules, Victims' Counsel notes that all the dual status VPPs have been informed of the fact that their participation as victims may have to be disclosed, and all have given their consent to that course.
24. Victims' Counsel notes that Rule 81(5), first sentence, envisages only the involvement of the Witness Protection and Support Office ("WPSO") in obtaining a consent to vary protective measures from the protected person.
25. Rule 81(5) appears to have been drafted only with witnesses in mind, and not victims, who have access to their own advice through Victims' Counsel. It is respectfully submitted that the VPPs do not need the involvement of two separate entities on this straightforward topic.
26. Victims' Counsel submits that this duplication is not necessary and that this provision, specifically in relation to VPPs, should be read in the context of Rule 114(1),(2) and (4), as well as Article 22(5) of the Law and the role that these provisions give to Victims' Counsel. Therefore, the Panel can proceed, should it choose to do so, in reliance on the submission of Victims' Counsel under Rule 114(1), (2) and (4) and Article 22(5) of the Law and not require the duplicative assistance of WPSO.

¹⁶ Third Decision, para. 25.

C. The VPPs who are not dual status witnesses-victims

27. Having conceded the position so far as the dual status witnesses-victims are concerned, Victims' Counsel stresses his opposition to the request for disclosure of the identities of the remaining – single status – VPPs.
28. The Defence mount two arguments in favour of the disclosure of the identity of the VPPs:
 - (i) that there is an inadequate legal basis for the protective measures¹⁷, and
 - (ii) that the anonymity of the VPPs is disproportionate, unnecessary and highly prejudicial to the Defence.¹⁸
29. Victims' Counsel submits that there is a clear legal basis to grant the protective measures to single status VPPs in the form of anonymity, which is proportionate, necessary and in no way prejudicial to the Defence.

i. There is a clear legal basis for the protective measures

30. It is submitted by the Defence that: "The request is based on the VPPs' "preference" for the protective measures to continue."¹⁹
31. With respect, this is not the basis for the request. Rather, the request is predicated upon the Pre-Trial Judge's finding that:

In assessing the existence of an objectively justifiable risk and the necessity of the protective measures for the Applicants, the Pre-Trial Judge takes into account the following factors: (i) the Applicants allege that they suffer from mental trauma as a result of the mistreatment the Applicants' immediate family member allegedly suffered; (ii) the Applicants have expressed concerns about revealing their identities to the public and/or the Accused; and (iii) Victim 02/04 benefits from protective measures that would otherwise be impaired if the identities of his family members would be shared with the Parties at this stage. In addition, the Pre-Trial Judge pays regard to: (i) the general climate of witness and victim intimidation prevailing in Kosovo, particularly in criminal proceedings against former members of the Kosovo Liberation Army; and (ii) there is a risk that the Accused will obstruct the progress of SC proceedings and/or commit further crimes in view of inter alia his continued readiness to resort to violence. Moreover, the Pre-Trial Judge is also mindful that adequate protective measures for a victim are often the legal means by which their

¹⁷ Defence Request, paras 5-7.

¹⁸ Defence Request, para. 5.

¹⁹ Defence Request, para. 6.

participation in the proceedings can be secured and such measures are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and privacy in accordance with Rule 80 of the Rules. For these reasons, the Pre-Trial Judge considers that disclosure to the public, the Accused and the Defence of any material or information leading to the identification of the Applicants poses an objectively justifiable risk to them. Accordingly, the Pre-Trial Judge finds that anonymity under Rule 80(4)(e)(i) of the Rules is the most appropriate and necessary measure at this stage of the proceedings.²⁰

32. The Pre-Trial Judge directed Victims' Counsel to consult with the VPPs with regard to the need for protective measures, and the result was duly reported by Victims' Counsel. The VPPs preference was to adopt the Pre-Trial Judge's analysis of the need for protective measures, but that is obviously not the same as their preference being the basis for the decision. The basis for the decision is fully set out in the Decision itself, as cited at paragraph 31 above.

ii. The anonymity of the VPPs who do not hold dual status is proportionate, necessary and in no way prejudicial to the Defence.

33. The Request fails to establish any prejudice to the Defence from the continued anonymity of VPPs who are not witnesses.
34. The Defence submits that:
- 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.²¹
35. The Defence fails to identify or elaborate on the prejudice that is said to be caused by anonymous non-witness VPPs or how their participation might alter in any way the case against the Accused or impact upon his "effective opportunity" to prepare his defence.
36. The reality is that the participation of a VPP who is not also a witness can have no impact at all on the case against the Accused. The case against him is shaped

²⁰ KSC-BC-2020-04 F00279/RED, Third Decision on Victims' Participation, 19 September 2022, para. 35.

²¹ Defence Request, para. 6.

by the prosecution's evidence and not by VPPs who are not testifying. Their impact on the case against the Accused is no different to that of the other detainees at the Kukes Metal Factory who have chosen not to participate as VPPs or witnesses.

37. Further, the Defence fail to engage with the reasoning of the KSC Appeals Panel in their Decision on Veseli's Appeal Against "Third Decision on Victims' Participation", in which they observed that:

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 Chambers and considers that there might be reasons in exceptional circumstances, notably in light of the vulnerable position of victims, to justify anonymity.²²

38. Finally, Victims' Counsel notes that anonymity of a VPP throughout the proceedings is the default position at the ICC (whose scheme of victim participation closely resembles that provided for in the Law and the Rules of the KSC):

Before the ICC, most victims remain anonymous throughout the proceedings, meaning that their identity is not known to the parties (or at least to the Defence). While some victims will have their anonymity lifted for various reasons, the default assumption is anonymity, and for this reason, ICC chambers commonly adopt redactions as an appropriate protective measure at the initial application stage.²³

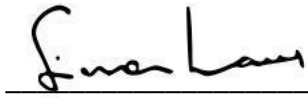
V. RELIEF SOUGHT

39. Victims' Counsel respectfully invites the Panel to:
- a. order the disclosure to the Defence of the witness pseudonyms of the dual status witnesses-victims 30 days before trial; and
 - b. reject the Defence Request with regard to VPPs who are not witnesses.

²² KSC Appeals Panel Decision, para. 51.

²³ Fardel M. and Olarra N.V. (2017), 'The Application Process: Procedures and Players', in Tibori-Szabo, K. & Hirst, M. (Eds.) *Victim Participation in International Justice, Practitioner's Guide* (T.M.C. Asser Press), pp 39-40.

Word count: 2506



Simon Laws KC
Counsel for Victims
27 October 2022
The Hague, the Netherlands



Maria Radziejowska
Co-Counsel for Victims
27 October 2022
The Hague, the Netherlands