

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: 31 October 2022

Filing Party: Defence Counsel

Original Language: English

Classification: Confidential

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Reply to Prosecution and Victims' Counsel Submissions on Continued Non-Disclosure of VPPs' identity to the Accused and the Defence

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. Pursuant to the Trial Panel's order issued on 19 October 2022,¹ the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) files the present Reply to the "Prosecution Reply to filing F00316" and the "Victims' Counsel Response to Defence Filing F00316".²
2. At the outset the Defence notes that, in his submissions dated 5 October 2022, Victims' Counsel requested the continued application of protective measures concerning seven of the victims participating in the present proceedings ("VPPs").³
3. In response, the Defence opposed the above request in so far as it related to the non-disclosure of the seven VPPs' identity to the Accused and the Defence and requested the disclosure of the identity of these VPPs to the Accused and the Defence.⁴
4. On 19 October 2022, Trial Panel I instructed the Specialist Prosecutor's Office and Victims' Counsel to respond to the Defence request for disclosure of the identity of the VPPs to the Accused and the Defence.⁵ This was done respectively in the "Prosecution Reply to filing F00316" and the "Victims' Counsel Response to Defence Filing F00316".⁶

¹ T. 19 October 2022 p. 405, lines 2-17.

² KSC-BC-2020-04, F00321, Prosecution Reply to filing F00316, 24 October 2022 (confidential)("SPO Response"); KSC-BC-2020-04, F00328, Victims' Counsel Response to Defence Filing F00316, 27 October 2022 (confidential)("Victims' Counsel Response").

³ 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, paras. 1, 8-10. *See also* Victims Counsel Response, para. 11. The Defence notes that the continuation of protective measures concerning the first victim was ordered by the Pre-Trial Judge on 4 March 2022. *See* T. 4 March 2022 p. 192, lines 1-7.

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 (confidential), paras. 5-9.

⁵ T. 19 October 2022 p. 405, lines 2-17.

⁶ SPO Response; Victims' Counsel Response.

5. The Defence notes the position taken by the SPO and Victims' Counsel, namely that they do not object to the disclosure to the Accused and the Defence of the identities of all dual status witnesses-victims.⁷
6. However, the Defence also notes that both the SPO as well as Victims' Counsel fail to substantiate the need to delay such disclosure until 30 days before the start of trial.⁸ For all purposes, given that most VPPs are family members their identity is already apparent in general and no valid reason has been provided to justify such delayed disclosure. The Defence also reiterates that the burden to justify delayed disclosure rests with the participant that has applied for the continuation of the protective measure in question.
7. In light of the above, the identities of all dual status witnesses-victims must be disclosed to the Accused and the Defence with immediate effect. There is no justification for ordering the continuation of largely ineffective protective measures and full disclosure to the Defence and the Accused will allow the Defence to prepare its case with certainty without exposing the dual-status VPPs to any objective and realistic risk.
8. As to the victims who do not hold dual status, the Victims' Counsel has not substantiated "reasons in exceptional circumstances, notably in light of the vulnerable position of victims, to justify anonymity."⁹ The Victims' Counsel relies on the preliminary findings by the Pre-Trial Judge to justify his request for continuation of non-disclosure. However, none of these findings justify continued non-disclosure particularly at the present stage of the proceedings. Specifically, none of these considerations show "reasons in exceptional

⁷ SPO Response, paras. 3, 4; Victims' Counsel Response, para. 39(b).

⁸ Victims' Counsel Response, para. 22.

⁹ Victims' Counsel Response, para. 37 referring to KSC-BC-2020-06, IA023, F00006, Decision on Veseli's Appeal Against "Third Decision on Victims' Participation", 15 September 2022, para. 51.

circumstances” that require the continued application of the prejudicial measure of non-disclosure. With respect, the submission that the victims have suffered mental trauma as a result of the ill-treatment allegedly suffered by their family member cannot be considered exceptional in cases involving war crimes. All direct and indirect victims of war crimes have suffered serious mental trauma.

9. The victims’ concerns about disclosure of their identity to the public can continue to be fully respected. The Defence does not object to continuation of non-disclosure to the public.¹⁰
10. The protective measures in force concerning Victim 2/04 will most likely be lifted in light of the position of the SPO and Victims’ Counsel as to dual-status victims. In any event, the identity of the remaining VPPs is to a large extent already apparent.
11. The *general* climate of witness and victim intimidation prevailing in Kosovo does not show any specific risk posed by the disclosure of the victims’ identity to the Accused and the Defence. As to the generalized and unspecified concerns about disclosure of their identity to the Accused, these cannot be considered sufficient to justify continuation of non-disclosure. The perceived risk that the Accused will obstruct the progress of SC proceedings and/or commit further crimes would be a reason not to disclose the identity of dual status victims.¹¹ Indeed Victims Counsel suggests that the “participation of a VPP who is not also a witness can have no impact at all on the case against the Accused.”¹² Yet no objection is being made as to the dual-status victims and while that

¹⁰ See also 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 (confidential), para. 4.

¹¹ As stated above, no such objection is made.

¹² Victims’ Counsel Response, para. 36.

understandably stems out of concern about the fairness of the proceedings it is also a fact that this is also because there are no serious concerns about disclosing the identity of such dual-status victims to the Accused. Inevitably, in light of the more limited impact of other victims to the case against the Accused, any perceived risk of obstructing the proceedings or interfering with victims must also be considered reduced.

12. Lastly, no reason has been put forward purporting to justify continued non-disclosure of the identity of victims to the Defence.
13. As to the submission made by Victims' Counsel that the anonymity of victims does not prejudice the Accused, the Defence notes that the Accused has the right to know the case against him. This requires actual knowledge as opposed to guess work that allows certainty in preparing his response to the charges. Any limitation of this right needs to be strictly necessary and proportionate. No valid reason has been put forward that justifies such continued limitation. In the absence of justification, this is not a matter of discretion; the Accused has the right to know the identity of the victims participating in these proceedings. In addition, no specific submissions as to the prejudice caused by continued anonymity can be made at present given that the nature and extent of Victims' Counsel participation in these proceedings is not yet known. The need for full disclosure of the VPPs identity will inevitably vary depending on the Trial Panel's decision on the scope and modalities of VPPs' participation in these proceedings and the corresponding right of the Accused to respond.
14. Any "default" position as to the VPPs participation at the ICC does not justify continued anonymity in the present circumstances.¹³ In fact, anonymity of VPPs cannot be considered the norm in international criminal jurisdictions. In

¹³ Victims' Counsel Response, para. 38.

the Practitioners' Guide on Victim Participation in International Criminal Justice it is stated that "while anonymity is accepted at the ICC, the STL Appeals Chamber has rejected it and the ECCC never contemplated it as a protective measure". It is also noted that "the legal concept of anonymity has only been accepted at the ICC, while victims wishing to participate in proceedings before ECCC and the STL will have to disclose their identity to all parties in the proceedings."¹⁴

15. In the case of *Ayyash et al.* at the Special Tribunal for Lebanon, the Appeals Chamber found that, while they have considered the jurisprudence of the ICC, they "do not find it persuasive as in [their] view it does not take fully into account the potential of prejudice arising to the accused if the identity of the participating victims were to be withheld from them."¹⁵ The Appeals Chamber further found that "totally anonymous participation by victims is inherently prejudicial to the accused, regardless of how active or passive their desired method of participation and even for victims who do not seek to give or tender evidence."¹⁶
16. Contrary to the Victims' Counsel submission that "the Request fails to establish any prejudice to the Defence from the continued anonymity of VPPs who are not witnesses",¹⁷ the Defence reiterates that the relevant burden must be discharged by the Party or participant seeking the protective measures in question.

¹⁴ Kinga Tibori-Szabó and Megan Hirst, *Victim Participation in International Criminal Justice, Practitioners' Guide*, pp. 6, 468, 469. See also, pp. 189, 190, 201, 305, 310, 313.

¹⁵ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 26.

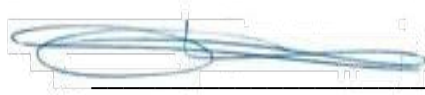
¹⁶ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 27.

¹⁷ Victims' Counsel Response, para. 33.

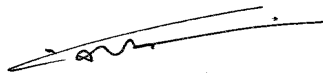
17. Lastly, the Defence notes the Victims' Counsel readiness to accept disclosure to be made in relation to V01/04.¹⁸
18. In light of the above, the Defence invites the Trial Panel to order the disclosure of the identity of *all* VPPs to the Accused and the Defence.

Word count: 1628

Respectfully submitted,



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Monday, 31 October 2022
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¹⁸ Victims' Counsel Response, para. 33.