

**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:** 11 November 2022

**Filing Party:** Specialist Defence Counsel

**Original Language:** English

**Classification:** Public

**THE SPECIALIST PROSECUTOR**

v.

**PJETËR SHALA**

---

**Defence Submissions on Reparation Proceedings**

---

**Specialist Prosecutor's Office**

Jack Smith

**Specialist Counsel for the Accused:**

Jean-Louis Gilissen

Hédi Aouini

Leto Cariolou

**Counsel for Victims**

Simon Laws

Maria Radziejowska

## I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files the present submissions on the conduct of reparation proceedings as instructed by Trial Panel I (“Panel”) in its Oral Order of 19 October 2022.<sup>1</sup>

## II. PROCEDURAL HISTORY

2. On 18 October 2022, in the course of the Trial Preparation Conference, the Panel informed the Parties and participants that, with regard to the conduct of reparation proceedings, it intends to follow the procedure followed in case KSC-BC-2020-05.<sup>2</sup> Specifically, to conduct reparation proceedings in parallel with the criminal proceedings and, in the event of a conviction, issue a reparation order pursuant to Articles 22(8) and 44(6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”) instead of referring victims to civil litigation in Kosovo. The Panel noted that it would invite the Defence and Victims’ Counsel to submit their position on this matter.<sup>3</sup>
3. On 19 October 2022, the Panel invited the Defence and Victims’ Counsel to file written submissions on the conduct of reparation proceedings. Specifically, the Defence and Victims’ Counsel were instructed to state whether: (i) reparation proceedings should be conducted in parallel with the criminal proceedings; and (ii) whether, in the event of a conviction, the Panel should refer victims to civil litigation in Kosovo, pursuant to Article 22(9) of the KSC Law, and Rule 167 of the Rules of Procedure and Evidence Before the Kosovo Specialist

---

<sup>1</sup> T. 19 October 2022 p. 408, lines 6-19.

<sup>2</sup> T. 18 October 2022 p. 383 *referring to* KSC-BC-2020-05, F00310RED, Public redacted version of Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information, 4 February 2022 (“*Mustafa Decision*”).

<sup>3</sup> T. 18 October 2022 p. 383.

Chambers (“Rules”), or issue a reparation order pursuant to Articles 22(8) and 44(6) of the KSC Law.<sup>4</sup>

4. On 8 November 2022, the Victims’ Counsel filed his submissions requesting that: (i) reparation proceedings be conducted in parallel with the criminal proceedings; (ii) the Panel include findings on the scope and extent of damage, loss, and injury to, or in respect of, victims participating in this case (“VPPs”) in the trial judgment; and (iii) in the event of a conviction, a reparation order be issued by the Panel.<sup>5</sup>

### III. SUBMISSIONS

5. In response to the Panel’s questions, the Defence requests the following:
  - i) any reparation claims be heard after the conclusion of the criminal proceedings; and
  - ii) in the event of a conviction, the Panel hear itself the reparation claims presented by VPPs and issue any appropriate reparation order pursuant to Articles 22(8) and 44(6) of the KSC Law.

#### **A. Reparation Proceedings Should Be Conducted After the Criminal Proceedings**

6. The Defence submits that the reparation proceedings should not be conducted in parallel with the criminal proceedings but after the conclusion of the criminal proceedings.
7. Allowing the reparation proceedings to take place in parallel to the criminal proceedings in this case would obstruct the expeditious resolution of the

---

<sup>4</sup> T. 19 October 2022 p. 408, lines 6-19.

<sup>5</sup> KSC-BC-2020-04, F00340, Victims’ Counsel Submissions on Reparation Proceedings, 8 November 2022, paras. 2-4, 21.

criminal trial, cause procedural delays, and prejudice the fair trial rights of the Accused.<sup>6</sup>

8. Victim Counsel argues that the number of VPPs is low and that the reparation proceedings can be conducted in parallel with the criminal trial in a manner that would not be prejudicial to the rights of the Accused.<sup>7</sup> However, the number of participating victims should be considered in light of the number of witnesses the Prosecution intends to rely on at trial (at present 19 witnesses). In proportion to the number of Prosecution witnesses the number of participating victims is high. The Panel will need to hear evidence regarding the harm suffered by each of them, including expert evidence. Pursuant to Rule 168 of the Rules the Defence may need to make observations on such expert evidence and may request the Panel to appoint additional experts to assist in determining the scope of any damage to, or in respect of, victims and/or suggest options concerning appropriate individual or collective reparations. Receiving such evidence and submissions in the course of the criminal trial will inevitably and substantially prolong the proceedings. All such effort might be rendered pointless in the event of an acquittal. If the Panel wishes to comment generally on the nature of any harm suffered by the victims in its judgment, it can do so on the basis of evidence elicited from the dual status victims. The merits of the reparation claims can be heard after the trial is concluded.
9. The civil claims of the victims will be partially based on facts and evidence falling outside of the scope of the Indictment and the criminal trial. Their assessment would require hearing additional evidence and receiving expert

---

<sup>6</sup> See also OLG Hamburg, Judgment of 29 July 2005 – 1 Ws 92/05, paras. 19-23.

<sup>7</sup> KSC-BC-2020-04, F00340, Victims' Counsel Submissions on Reparation Proceedings, 8 November 2022, para. 2.

opinions on the physical, mental, and material harm claimed to be suffered.<sup>8</sup> In addition, evidence will need to be presented on possible loss of earnings and any financial impact that demonstrated harm may have caused for the direct victim. Evidence will also need to be presented on loss of income, property, and educational opportunity for the indirect victims.<sup>9</sup> Evidently, evidence will need to be presented on the link between any demonstrated harm and any claim for reparations. Awards to victims of torture and their families are not merely symbolic: they require a large number of complex civil law issues to be assessed.

10. The main consideration that requires simple reparation claims to be heard in parallel to criminal proceedings in domestic jurisdictions, namely to facilitate the victims' access to justice does not apply in the present context. In the present proceedings the VPPs are represented by competent counsel who can elicit evidence on any harm suffered generally from the dual status victims and represent them in subsequent reparation proceedings, presenting the merits of each of their claims in appropriate detail.<sup>10</sup> As argued below, the Defence agrees with Victims' Counsel that, in the event of a conviction, the VPPs should not be referred to civil litigation in Kosovo. The victims' right to justice is therefore adequately ensured in the present context and does not require conducting the reparation proceedings in parallel to the criminal trial.

---

<sup>8</sup> LG München I, Judgment of 22 August 2018 – 5 KLS 401 Js 160054/14, para. 14; KSC-BC-2020-04, F00340, Victims' Counsel Submissions on Reparation Proceedings, 8 November 2022, para. 14. KSC-BC-2020-04, F00249, Second Decision on Victims' Participation, 11 August 2022 (confidential), para. 27; KSC-BC-2020-04, F00279, Third Decision on Victims' Participation, 19 September 2022 (confidential), para. 30.

<sup>9</sup> KSC-BC-2020-04, F00249, Second Decision on Victims' Participation, 11 August 2022 (confidential), para. 27; KSC-BC-2020-04, F00279, Third Decision on Victims' Participation, 19 September 2022 (confidential), para. 30.

<sup>10</sup> KSC-BC-2020-04, F00340, Victims' Counsel Submissions on Reparation Proceedings, 8 November 2022, para. 13.

11. Article 22(6) of the KSC Law provides that “[t]he Specialist Chambers may permit representations by Victims’ Counsel on behalf of Victims [...] when the Victims’ personal interests are impacted and only when it is not prejudicial to or inconsistent with the rights of the accused.”
12. The Accused’s right to remain silent will be adversely affected when he is called upon to respond to the civil claims.<sup>11</sup> The Accused may elect to exercise his right to remain silent for the purpose of the criminal proceedings but may wish to respond differently to any reparation claims. In addition, should the Panel be inclined to maintain the anonymity status of victims participating in these proceedings the right of the Accused to respond to claims for reparation will be unacceptably undermined. The Accused has the right to know the identity of claimants of reparation to properly respond to such claims.<sup>12</sup>
13. The impact of parallel proceedings on the rights of the defence will be significant and unnecessary as the rights of victims can be sufficiently protected by hearing their claims after the criminal proceedings are concluded. The presentation and assessment of additional evidence, including expert evidence, on a large number of complex civil law matters in parallel proceedings would require additional court days and cause considerable procedural delays. It would increase the complexity of the case and require the application of different evidentiary burdens and procedures. It would add on the heavy workload of the Defence team forcing it to divert valuable resources to answer civil claims simultaneously with the conduct of the trial. Thus, the conduct of parallel proceedings will disproportionately interfere with the Accused’s right to a fair and expeditious trial.<sup>13</sup> To date, the Accused has been detained on

---

<sup>11</sup> See, for instance, LG München I, Judgment of 22 August 2018 – 5 KLs 401 Js 160054/14, paras. 12, 42.

<sup>12</sup> See, for instance, *ABC v Google* [2019] EWHC 3020 (QB), 14 November 2018, para. 43.

<sup>13</sup> See also LG München I, Judgment of 22 August 2018 – 5 KLs 401 Js 160054/14, paras. 11, 12, 42.

remand for 20 months,<sup>14</sup> and the date for the start of the trial is still to be determined. Prolonging the already protracted proceedings in these circumstances is unnecessary (given that, in the event of a conviction, reparation claims can be heard after the trial) and cannot be justified.

14. Respect for victims' rights can be adequately ensured by holding any reparation proceedings following the conclusion of the criminal trial. There is a measure that is less restrictive of the rights of the Accused that is viable, would ensure sufficient respect for the rights of victims, and would serve the interests of judicial economy (no resources would be wasted in the event of an acquittal while in the event of a conviction the Panel could receive focused submissions that address directly the actual harm suffered as proved in the context of the trial and not in the abstract). In these circumstances, the interference with the rights of the Accused as a result of hearing reparation claims in the context of the criminal trial cannot be justified.<sup>15</sup>
15. In addition, the procedure proposed by the Defence is consistent with the practice of most international criminal jurisdictions. Both the ICTY and ICTR recognized the importance of the right of victims to compensation but found that amending their respective Statutes so that trial chambers have the power to order compensation to victims of crimes committed by convicted persons would be inappropriate, as it would increase the length and complexity of trials and prejudice the rights of the accused.<sup>16</sup> Victims could rely on judgments by

---

<sup>14</sup> KSC-BC-2020-04, F00019, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel with strictly confidential and *ex parte* Annexes 1-2, 15 April 2021 (confidential), para. 2.

<sup>16</sup> ICTY, SC Doc. S/2000/1063, Annex: Letter dated 12 October 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General, 3 November 2000, paras. 46, 47: the President of the ICTY concluded that victims have a right to compensation but "believe that the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal." ICTR, SC Doc. S/2000/1198, Annex: Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the

these tribunals and seek compensation in subsequent proceedings before a national court or other competent body.<sup>17</sup> The same procedure is followed at the International Residual Mechanism for Criminal Tribunals.<sup>18</sup> Similarly, at the ICC there is a strict separation between criminal and reparation proceedings, with the latter conducted only at the end of a trial in the event of a conviction.<sup>19</sup>

## **B. Any Reparation Claims Should Be Presented and Determined by the KSC Trial Panel**

16. The Defence submits that, in the event of a conviction, the Panel should hear the reparation claims itself and, if appropriate, issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the KSC Law. The KSC should be the forum to decide on reparations claims in the event of a conviction given that it will be in the best position to assess the nature of any harm suffered by each of the participating victims and in light of the likely length of domestic civil proceedings and uncertainty regarding the legal aid funds in Kosovo.<sup>20</sup>

---

Secretary-General, 15 December 2000, para. 4: the President of the ICTR found that the aim of these tribunals is to minimize the length of detention by shortening trials, in order to guarantee the fundamental right of the accused to an expeditious trial, and stated that implementing a new system and expanding the ICTR's mandate with compensation claims would "not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal."

<sup>17</sup> Rules of Procedure and Evidence of the ICTY (as amended on 8 July 2015), 11 February 1994, Rule 106; Rules of Procedure and Evidence of the ICTR (as amended on 13 May 2015), 29 June 1995, Rule 106. *See also* Statute of the Special Tribunal for Lebanon, 30 May 2007, Article 25; (as amended on 31 May 2012), 16 January 2002, Rule 105.

<sup>18</sup> Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals (as amended on 4 December 2020), 8 June 2012, Rule 130.

<sup>19</sup> Rome Statute of the ICC (as amended 16 January 2002), 17 July 1998, Article 75(2) and 75(4); Rules of Procedure and Evidence of the ICC, 3-10 September 2022, Rules 98, 143. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3728-tENG, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, 8 March 2021.

<sup>20</sup> *Mustafa* Decision, paras. 35-38.




17. Given the uncertainties, difficulties, and length of civil proceedings in Kosovo, the financial situation of the Accused who is indigent,<sup>21</sup> and the availability and feasibility of a Victim Compensation Fund to cover the payment of a Reparation Order issued by the Panel in the event of a conviction,<sup>22</sup> the Defence requests that the Panel hear any reparation claims itself instead of referring victims to civil litigation in Kosovo.

#### IV. RELIEF REQUESTED

18. In light of the above, the Defence respectfully requests:
- i) any reparation claims be heard after the conclusion of the criminal proceedings; and
  - ii) in the event of a conviction, the Panel hear the reparation claims presented by the victims participating in these proceedings and issue a reparation order pursuant to Articles 22(8) and 44(6) of the KSC Law.

**Word count: 2483**

Respectfully submitted,



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

---

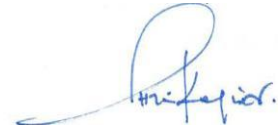
<sup>21</sup> KSC-BC-2020-04, F00039, Motion for Provisional Release, 27 May 2021 (confidential), para. 24; KSC-BC-2020-04, F00044, Reply to Prosecution's Response to Motion for Provisional Release, 14 June 2021 (confidential), para. 11.

<sup>22</sup> KSC-BC-2020-05, F00407, Response to your document KSC-BC-2020-05, 12 May 2022, pp. 1, 2.



---

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



---

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

Friday, 11 November 2022  
The Hague, the Netherlands