

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

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**Victims' Counsel's Submissions on the Draft Order on the Conduct of
Proceedings**

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I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), Rule 114(4)(a) and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), and the Trial Panel's order,¹ Victims' Counsel provides his submissions on the Draft Order on the Conduct of Proceedings ("Draft Order").²

II. SUBMISSIONS

2. Victims' Counsel wishes to make observations in relation to paragraphs 34-35 of the Draft Order:

"34. Questioning of witnesses by Victims' Counsel shall be limited in principle to: (i) the harm or injury done to victims and circumstances in which this occurred; (ii) the consequences of those acts, on the victim, close relatives or the community to which he or she belongs; and (iii) the appropriate relief to remedy the harm done to the victim.

35. Where Victims' Counsel wishes to ask questions on any other issue, he shall seek leave from the Trial Panel together with: (i) a brief indication of the issue; (ii) a justification for the request; and (iii) an estimate of the time necessary for the additional questioning."

3. Victims' Counsel recognises that his primary responsibility is to elicit evidence relevant to the determination of harm suffered by victims.³ However, he welcomes the Panel's acknowledgement that legitimate questions may arise on behalf of the victims that go beyond harm.
4. Victims have a personal interest in the determination of the truth, including the role and responsibility of the Accused. The following guidance issued by the

¹ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F01178, Order for Submissions on the Draft Order on the Conduct of Proceedings, 22 December 2022, para. 4; KSC-BC-2020-06, Transcript of 16 December 2022, T.1772:9-25 – T.1773:1-3.

² KSC-BC-2020-06/F01178, Order for Submissions on the Draft Order on the Conduct of Proceedings, 22 December 2022, Annex 1.

³ *Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00152, Decision on victims' procedural rights during trial, 12 July 2021, para. 40.

Trial Panel in *The Prosecutor v. Salih Mustafa* should, in the submission of Victims' Counsel, be adopted in this case:

"16. With regard to "acknowledgement", in the view of the Panel it must be understood, in the context of criminal proceedings before the KSC concerning the determination of the charges in the Confirmed Indictment against the Accused, as the victims' personal interest and right to have the harm they allegedly suffered recognised and, to that end, to contribute meaningfully, through the modalities of their participation, to the recognition of such harm and of the responsibility of those at the origin of it.

17. This interpretation is in line with – firstly – the findings of the Specialist Chamber of the Constitutional Court that victims have a fundamental right "to independent and effective investigation under the procedural heads of Articles 25 and 27 of the Constitution and Articles 2 and 3 of the Convention" and – secondly – the finding of the Grand Chamber of the European Court of Human Rights, in its judgment in the *El-Masri* case. The Grand Chamber underlined the importance of the right to truth not only for the victim and his family but also for other victims in similar cases and the general public who had the right to know what happened. It concluded that the applicant was deprived "of being informed of what had happened, including getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal" and that therefore, there had been a violation of the procedural head of Article 3 of the ECHR. The Panel is of the view that acknowledgment of serious breaches of human rights and international humanitarian law is a form of remedy that is as important, or even more important than, the right to compensation.

18. The aforementioned interpretation is also in line with the Rules. In this regard, Victims' Counsel, unlike the Parties, does not have an independent right to submit evidence but, in accordance with Rule 114(5) of the Rules, may only request the Panel to order the submission of relevant evidence or call witnesses to testify. The exercise of the Panels' power to order the submission of evidence, in accordance with Rule 132 of the Rules, is in turn contingent on the Panel finding it "necessary for the determination of the truth". Therefore, the Rules also necessarily make the victims' right to participate in the proceedings and to present evidence contingent on the establishment of the truth with regard to what allegedly happened to them and the responsibility of those involved therein. That being said, the Panel will apply Rules 114(5) and 132 of the Rules in order to ensure that victims can meaningfully exercise such a right during trial proceedings.

19. In the view of the Panel, such a conclusion on the victims' rights in criminal proceedings before the KSC does not in any way affect the fact that it remains entirely incumbent on the SPO to prove to the requisite standard the different elements of the crimes contained in the Confirmed Indictment and the criminal responsibility of the Accused."⁴

5. The finding that the VPPs have a legitimate interest in the truth is, it is submitted, very hard to fault. Many of the victims participating in these proceedings are still

⁴ *Ibid.*, paras 16-19.

awaiting an accurate account of the suffering that they endured *and the role of those responsible for their ordeal.*

6. It follows that in the course of these proceedings questions may arise on their behalf that do not relate to harm, but to the *truth* of what happened. That may make it necessary for Victims' Counsel to ask questions which have the potential to bear on the issue of guilt but which do not duplicate or interfere with the responsibilities of the SPO or the Defence. That may be the case where there is information available to Victims' Counsel which is not known to the SPO, or in situations in which the approach of the SPO and Victims' Counsel are not entirely aligned, or for some other reason.
7. Finally, Victims' Counsel acknowledges the instruction to seek leave before asking any question that goes beyond harm.

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