



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-04**
The Specialist Prosecutor v. Pjetër Shala

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 9 February 2023

Language: English

Classification: **Public**

Decision on reparation proceedings

Acting Specialist Prosecutor

Alex Whiting

Counsel for the Accused

Jean-Louis Gilissen

Victims' Counsel

Simon Laws

TRIAL PANEL I (Panel) hereby renders this decision on reparation proceedings.

I. PROCEDURAL BACKGROUND

1. On 18 October 2022, in the course of the Trial Preparation Conference, the Panel informed the Parties and Victims' Counsel that, with regard to the conduct of reparation proceedings, it intends to follow the procedure followed in case KSC- BC - 2020 -05 (Case 05), namely to conduct reparation proceedings in parallel to 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 (Law).¹

2. On 19 October 2022, the Panel ordered Victims' Counsel and the Defence for Pjetër Shala (Defence and Accused, respectively) to file written submissions by 11 November 2022, if they so wish, on this matter, namely: (i) whether reparation proceedings shall be conducted in parallel to criminal proceedings; and (ii) whether, in case of a conviction, the Panel should refer victims to civil litigation in Kosovo, pursuant to Article 22 (9) of the Law and Rule 167 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules), or issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law.²

3. On 8 November 2022, Victims' Counsel filed submissions (Victims' Counsel Submissions).³

4. On 11 November 2022, the Defence filed submissions (Defence Submissions).⁴

¹ KSC-BC-2020-04, Transcript of Hearing, 18 October 2022, public, p.383, lines 10-23.

² KSC-BC-2020-04, Transcript of Hearing, 19 October 2022, public, p.408, lines 8-18.

³ KSC-BC-2020-04, F00340, Victims' Counsel, *Victims' Counsel Submissions on Reparation Proceedings*, 8 November 2022, public.

⁴ KSC-BC-2020-04, F00347, Defence, *Defence Submissions on Reparation Proceedings*, 11 November 2022, public.

II. SUBMISSIONS

5. Victims' Counsel argues that: (i) considering the low number of victims participating in the proceedings (eight), reparation proceedings in this case can be conducted in parallel with the criminal proceedings in a manner that would not be prejudicial to the fair trial rights of the Accused;⁵ and (ii) considering the expert reports submitted in Case 05, and the related decision by the Panel,⁶ the Panel should not refer victims participating in proceedings (VPPs) to civil litigation in Kosovo.⁷ Victims' Counsel further requests that, independent from any possible Reparation Order, the Trial Panel include in its judgment a decision on the scope and extent of any damage, loss and injury to, or in respect of VPPs, pursuant to Article 22(7) of the Law.⁸

6. The Defence disagrees with Victims' Counsel on point (i) above, and submits that reparation proceedings should be conducted after the conclusion of the criminal proceedings, as conducting reparation proceedings in parallel to criminal proceedings would obstruct the expeditious resolution of the criminal trial, cause procedural delays, and prejudice the fair trial rights of the Accused.⁹ In this regard, the Defence first argues that the Panel will need to hear evidence regarding the harm suffered by each of the VPPs, including expert evidence and receiving such (additional) evidence and submissions in relation to reparations in the course of the criminal trial will "inevitably and substantially prolong the proceedings",¹⁰ and that the Defence would be forced to divert valuable resources to answer civil claims simultaneously with the conduct of the trial.¹¹ The Defence further argues that conducting reparation

⁵ Victims' Counsel Submissions, paras 2, 11-14.

⁶ See KSC-BC-2020-05, F00310/RED, Trial Panel I, *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, public.

⁷ Victims' Counsel Submissions, paras 3, 17-20.

⁸ Victims' Counsel Submissions, paras 4, 15-16.

⁹ Defence Submissions, paras 5(i), 6-15, 18(i).

¹⁰ Defence Submissions, para. 8.

¹¹ Defence Submissions, paras 9, 13.

proceedings following the conclusion of the trial would be in the interests of judicial economy, as in the event of an acquittal, the resources invested in reparation proceedings would be wasted.¹²

7. Secondly, the Defence argues that, in the circumstances of the present case, the main consideration that requires reparation claims to be heard in parallel to criminal proceedings in domestic jurisdictions – namely to facilitate the victim’s access to justice – does not apply.¹³ The Defence submits that victims’ right to justice is already adequately ensured in the present case, as VPPs: (i) are represented by competent counsel who can elicit relevant evidence on any harm suffered; and (ii) should not be referred to civil litigation in Kosovo.¹⁴ The Defence agrees with Victims’ Counsel that, in the event of a conviction, the Panel should hear itself the reparation claim, and if appropriate issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law.¹⁵ The Defences argues in this regard that 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 be 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”.¹⁶

8. Thirdly, the Defence argues that conducting in parallel reparation and criminal proceedings would affect the Accused’s right to remain silent and raises the issue of withholding the identity of VPPs from the Defence.¹⁷

¹² Defence Submissions, paras 13, 14.

¹³ Defence Submissions, para. 10.

¹⁴ Defence Submissions, para. 10.

¹⁵ Defence Submissions, paras 5(ii), 10, 16-17, 18(ii); Victims’ Counsel Submissions, paras 3, 17-20, 21(b).

¹⁶ Defence Submissions, para. 16.

¹⁷ Defense Submissions, para. 12.

9. Finally, the Defence argues that conducting reparation proceedings after criminal proceedings would be consistent with the practice of most international criminal jurisdictions.¹⁸

III. APPLICABLE LAW

10. The Panel notes Articles 22(3), (8) and (9), and 44(6) of the Law, and Rule 167 of the Rules.

IV. DISCUSSION

11. At the outset, the Panel notes that, with regard to trial proceedings before the Kosovo Specialist Chambers (SC), the Panel will make – as also done in Case 05 - a distinction between criminal proceedings *stricto sensu* concerning the determination of the charges presented against the Accused, and reparation proceedings leading eventually to the issuance of a Reparation Order, as provided for in Articles 22(8) and 44(6) of the Law.¹⁹

A. THE TIMING OF REPARATION PROCEEDINGS UNDER THE SC LEGAL FRAMEWORK

12. With regard to the first question - whether reparation proceedings should be conducted in parallel with the criminal proceedings - the Panel recalls its interpretation of the relevant legal framework at the SC in the context of Case 05.²⁰

¹⁸ Defence Submissions, para. 15.

¹⁹ KSC-BC-2020-05, F00124, Trial Panel I, *Decision on the appointment of expert(s)*, 20 May 2021, para. 9.

²⁰ See KSC-BC-2020-05, F00124, Trial Panel I, *Decision on the appointment of expert(s)*, 20 May 2021, paras 10- 15; KSC-BC-2020-05, F00310/RED, Trial Panel I, *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, public, paras 26-31.

13. The Panel is sensitive to the Defence's submissions that conducting reparation proceedings in parallel to criminal proceedings should not cause undue delay or otherwise interfere with the fair trial rights of the Accused.²¹ However, as correctly pointed out by Victims' Counsel, there are currently a total of eight VPPs in this case, seven of whom are indirect victims.²² Evidence in relation to the type and extent of the harm suffered by victims will be elicited from the dual status victims-witnesses in the course of trial.²³ In light of the fact that there is only one direct victim, the Panel considers that any (additional) expert evidence on the assessment of the harm suffered would be rather limited. In addition, expert evidence may assist the considerations of the Panel and Parties in relation to the guilt or innocence of the Accused, or the gravity of the alleged crimes. Moreover, the SC legal framework provides the Panel with the necessary procedural tools to ensure the fairness and expeditiousness of the proceedings, including the possibility to hold a status conference to discuss and organise the presentation of evidence pertaining to reparations, if the need arises.²⁴ Finally, the Panel underlines that the conduct of reparation proceedings in parallel to criminal proceedings in Case 05 - where the number of victims and witnesses presented by the Specialist Prosecutor's Office was similar - did not cause undue delay. In light of the above, the Panel is not persuaded by the Defence's argument that conducting such proceedings concurrently will cause considerable procedural delays.²⁵

²¹ Defence Submissions, paras 8, 13-15.

²² KSC-BC-2020-04, F00123, Pre-Trial Judge, *First Decision on Victims' Participation*, 15 December 2021, confidential (a public redacted version was filed on the same day, F00123/RED); F00249, Pre-Trial Judge, *Second Decision on Victims' Participation*, 11 August 2022, confidential (a public redacted version was issued on the same day, F00249/RED); F00279, Pre-Trial Judge, *Third Decision on Victims' Participation*, 19 September 2022, confidential (a public redacted version was issued on the same day, F00279/RED).

²³ Victims' Counsel Submissions, para. 13; Defence Submissions, para. 10.

²⁴ See, similarly, KSC-BC-2020-05, F00152, Trial Panel I, *Decision on victims' procedural rights during trial*, 12 July 2021, public, para. 33.

²⁵ Defence Submissions, paras 8-9.

14. As regards the Defence's submission that valuable resources would be wasted in case of an acquittal, the Panel finds that the time and resources invested in hearing evidence in relation to reparations in the course of the trial would not be wasted even in the event of an acquittal, since as per the wording of Article 22(7) of the Law, the Trial Panel may in its judgment, either upon request or on its own motion in exceptional circumstances, include a decision on the scope and extent of any damage, loss and injury to, or in respect of, Victims. Moreover, the Panel also takes into consideration that in case of a conviction, a considerable amount of time and resources would be necessary to hold subsequent reparation proceedings.

15. In light of the above, the Panel is not persuaded by the Defence's argument that conducting such proceedings concurrently will cause considerable procedural delays or that conducting reparation proceedings after the conclusion of the trial would necessarily better uphold the principle of judicial economy.²⁶ Furthermore, while being cognizant of the Accused's right to be tried within a reasonable time, the Panel recalls that victims also have a right to *prompt* reparations for the harm suffered,²⁷ in case of a conviction. It is the Panel's duty to ensure an adequate balance between the rights of the Accused and the rights of VPPs.

16. As regards the Defence's argument that the Accused's right to remain silent would be compromised when he is called upon to respond to possible civil claims,²⁸ the Panel considers that the Defence fails to substantiate how such a right would be affected by responding to expert evidence, if they wish to do so, on the extent of the harm suffered by victims, the causal link between that harm and the crimes allegedly committed and the modalities of reparations. The Defence also

²⁶ Defence Submissions, paras 8-9, 14.

²⁷ UN General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), U.N. Doc. A/RES/60/147, 16 December 2005, para. 11(e).

²⁸ Defence Submissions, para. 12.

fails to explain the relevance of, or to put in context, its reference to domestic proceedings in Germany in this regard.²⁹ The Panel therefore dismisses this argument by the Defence.

17. As regards the Defence's claim that the Accused has the right to know the identity of claimants of reparation to properly respond to such claims, the Panel first notes that, consistent with Article 23 of the Law and Rule 80 of the Rules, the non-disclosure of the identity of certain VPPs to the Defence is first and foremost a protective measure. The interest protected is the safety, security and well-being of victims, in light of specific risk factors identified per each individual VPP. As such, withholding the identity of VPPs from the Defence does not preclude the Defence from responding to claims regarding the harm suffered by victims in relation to crimes charged in the Confirmed Indictment.³⁰ Furthermore, the Defence fails to explain how the question of withholding VPP's identity from the Defence goes *specifically* to the issue of the concurrent or subsequent conduct of reparation proceedings. The Panel notes in this regard that other international criminal jurisdictions have withheld the identity of participating victims, even when reparation proceedings have been conducted after the end of criminal proceedings.³¹ In light of the above considerations, the Panel is not persuaded by the Defence's argument.

18. Finally, as regards the Defence's argument that other international criminal jurisdictions have an established practice of conducting criminal and reparation

²⁹ Defence Submissions, para. 12, with accompanying footnote 11.

³⁰ KSC-BC-2020-04, F00107/A01/RED, Pre-Trial Judge, [ANNEX 1 to Submission of public redacted version of corrected Indictment](#), 16 November 2021, public.

³¹ See, for example, ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129 03-03-2015 1/97 NM A A2 A3, Appeals Chamber, [Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012](#), 3 March 2015, public, with Annex A (amended order for reparations) and public Annexes 1 – 2, paras 163-168; ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-259-Red2, Appeals Chamber, [Public redacted Judgment on the appeal of the victims against the "Reparations Order"](#), 8 March 2018, public, paras 88-95.

proceedings separately,³² the Panel first notes that such practice is not uniform,³³ and secondly, that with regard to proceedings before the International Criminal Court (ICC) specifically, such an approach is justified by the distinct procedural legal framework in place, which is not identical to the one governing proceedings before the SC. In this regard, the Panel notes that while Article 22 of the Law mirrors to a certain extent Article 75 of the ICC Statute, there is no equivalent either in the Law or in the Rules, to Article 76(3) of the ICC Statute which provides for additional hearings, after conviction and sentencing, for representations under Article 75 of the ICC Statute to be heard. This leads the Panel to conclude that, unlike the ICC, reparation proceedings before the SC should be conducted in parallel to criminal proceedings, in accordance with the SC legal framework.

19. In light of the above considerations, the Panel finds that there is no reason to depart from the procedure established in Case 05 and that consequently, reparation proceedings shall be conducted concurrently with criminal proceedings in the present case.

B. REFERRING VICTIMS TO CIVIL LITIGATION IN KOSOVO

20. The Defence and Victims' Counsel agree that, considering the difficulties around civil proceedings in Kosovo at the moment, the Panel should hear any reparation claims itself instead of referring victims to civil litigation in Kosovo.³⁴

21. At the outset, the Panel notes that Article 22(9) of the Law does not establish criteria to decide in which circumstances it would be appropriate to refer victims

³² Defence Submissions, para. 15.

³³ The legal framework of either International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) indeed does not provide for any procedural avenue in relation to reparations, in contrast with the explicit wording in both the Law and the Rules of the SC. At the Extraordinary Chambers in the Courts of Cambodia (ECCC), criminal and reparation proceedings have been conducted in parallel.

³⁴ Defence Submissions, paras 16-17; Victims' Counsel Submissions, paras 17-20.

to civil litigation to the other courts of Kosovo or, alternatively, pursuant to Article 22(8) of the Law, “[i]n the event that a Trial Panel or Court of Appeals Panel of the Specialist Chambers adjudges an accused guilty of a crime”, to “make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims, collectively or individually”. The Panel is of the view that it would not be appropriate to refer victims to civil litigation in other courts in Kosovo if the victims would not have an effective remedy with regard to their compensation claims.

22. The Panel recalls that according to the expert reports submitted on this matter in Case 05, the national courts in Kosovo do not offer a realistic avenue for the victims of the alleged crimes to claim reparations and, if reparations would be granted by judgments issued by national courts in Kosovo, to have such judgments enforced.³⁵ One of the issues identified in the expert reports was that the current legal framework in Kosovo does not provide for anonymous civil claims and/or the possibility of protective measures in civil cases more generally.³⁶ The Panel recalls that this information is in stark contrast to the possibilities available and measures implemented before the SC.³⁷ The Panel considers that, although not expressly mentioned in Article 22(3) of the Law, the protection of the safety, physical and psychological well-being, dignity and privacy of victims provided for in Article 23 of the Law must be understood as an essential part of

³⁵ See KSC-BC-2020-05, F00310, Trial Panel I, *Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information*, 4 February 2022, confidential, paras 35 and following; KSC-BC-2020-05, F00287/A02, Registrar, *Annex 2 to Transmission of the Expert Reports, Public Redacted Version of the Report submitted by REDACTED*, 17 December 2021, public (First Expert Report); F00287/A04, Registrar, *Annex 4 to Transmission of the Expert Reports, Public Redacted Version of the Report submitted by REDACTED*, 17 December 2021, public (Second Expert Report); F00287/A06, Registrar, *Annex 6 to Transmission of the Expert Reports, Public Redacted Version of the Report submitted by REDACTED*, 17 December 2021, public (Third Expert Report).

³⁶ See First Report, pp. 21-24; Second Report, paras 39-40, 42-43; Third Report, pp. 13, 21, 25, 29, 47-48.

³⁷ KSC-BC-2020-05, F00310, Trial Panel I, *Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information*, 4 February 2022, confidential, para. 38.

the victims' personal interests and rights,³⁸ and that consequently, the Panel must ensure the protection of victims as provided for in Article 23 of the Law throughout the entirety of the judicial process, including the reparation proceedings, irrespective of the forum in which such reparation proceedings are conducted. For these reasons, the ability to protect victims' identities, and consequently their and their families' safety and physical and psychological well-being, constitutes a key consideration for the Panel's assessment as to whether victims should be referred to civil litigation in Kosovo courts in case of a conviction. The Panel has no information at present to suggest that there has been a change in circumstances regarding this issue since the expert reports were produced. The Panel therefore does not consider it necessary to solicit further expert reports on this matter and instead finds that referring victims to Kosovo courts continues to bear the risk of infringing upon the measures taken by the SC to protect those victims in the present judicial proceedings, as it would not allow for adequate protection of their identities.

23. In light of the foregoing, the Panel is of the view that it would not be appropriate to refer victims to civil litigation in Kosovo courts pursuant to Article 22(9) of the Law and Rule 167 of the Rules. Rather, in case of a conviction, the Panel will issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law.

24. The Panel informs the Defence, the SPO and Victims' Counsel that further decisions in relation to reparation proceedings will be issued in due course.

³⁸ KSC-BC-2020-05, F00152, Trial Panel I, *Decision on victims' procedural rights during trial*, 12 July 2021, public, para. 11.

V. DISPOSITION

25. For the above-mentioned reasons, the Panel hereby decides that:

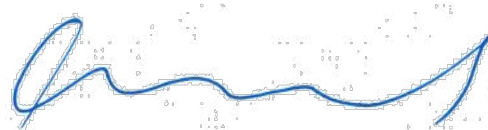
- (a) reparation proceedings and criminal proceedings will be conducted concurrently in the present case;
- (b) in case of a conviction, it will not refer victims to civil litigation in Kosovo courts pursuant to Article 22(9) of the Law and Rule 167 of the Rules, but issue a Reparation Order pursuant to Articles 22(8) and 44(6) of the Law.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 9 February 2023

At The Hague, the Netherlands.