

Case No.: KSC-BC-2020-04
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: Dr Fidelma Donlon

Date: 14 July 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Public Redacted Version of Defence Response to the
Victims' Counsel's Submissions pursuant to the Order of 4 May 2023 setting
further procedural steps for the presentation of evidence by Victims' Counsel
with six confidential annexes**

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I. INTRODUCTION

1. Pursuant to the Trial Panel's instructions,¹ the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files its Response to the "Victims' Counsel's Submissions pursuant to the Order of 4 May 2023 setting further procedural steps for the presentation of evidence by Victims' Counsel".²
2. On 4 May 2023, the Trial Panel ordered Victims' Counsel to "provide specific observations on whether [it] intend[s] to present expert evidence on the physical, mental, and material harm allegedly suffered by the direct victim, for the establishment of the truth or for the purposes of reparations or both".³ Victims' Counsel was further ordered to "provide observations on how [Victims' Counsel] envisage[s] the calculation of the compensation of for the alleged harm suffered to be made in financial terms, if any".⁴ Victims' Counsel was ordered to present such observations by 30 June 2023 and the Defence to submit its observations, including any response to Victims' Counsel's submissions, by 12 July 2023.⁵

II. SUBMISSIONS

3. At the outset, the Defence notes that it is unable to respond effectively to the submissions by Victims' Counsel on appropriate reparations prior to the Panel's definitive ruling on the guilt or innocence of the Accused and the presentation of specific claims concerning reparation by Victims' Counsel. The Defence reserves

¹ T. 4 May 2023 p. 1360, l. 9-11.

² KSC-BC-2020-04, F00558, Victims' Counsel's Submissions pursuant to the Order of 4 May 2023 setting further procedural steps for the presentation of evidence by Victims' Counsel with six confidential annexes, 30 June 2023 (confidential)("Victims' Counsel's Submissions"). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

³ T. 4 May 2023 p. 1357, l. 14-18.

⁴ T. 4 May 2023 p. 1357, l. 25 – p. 1358, l. 2. *See also* p. 1358, l. 11-13.

⁵ T. 4 May 2023 p. 1360, l. 9-11.

its right to challenge any specific claim for pecuniary, non-pecuniary, or other damages that will be presented by Victims' Counsel on behalf of the victims he represents. The Defence will only be in a position to challenge such claims after the conclusion of the trial and the issuing of the judgment on the guilt or innocence of the Accused.

4. In the event of a conviction, the Defence requests that a hearing be held to address the merits of the Victims' Counsel's Submissions.
5. The Defence further notes that the harm allegedly caused to direct and indirect victims cannot be attributed to the Accused. Any reparation order must necessarily include findings on the attribution of liability on the part of the Accused, following the presentation of specific arguments on this matter. The Defence reserves its rights to respond to such submissions.
6. The Victims' Counsel carries the burden of proof to show that the harm attributed to the Accused specifically is directly linked to his actions. Any claim for pecuniary or non-pecuniary damage must be sufficiently specific and be proved to the applicable standard by appropriate and specific evidence.⁶
7. Without prejudice to the above, the Defence submits the following.

Expert Evidence

⁶ See, relevantly, ICC, *Prosecutor v. Kony et al.*, Case No. ICC-02/04-179, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 36, where the Appeals Chamber held that "it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law."

8. As indicated in its Notice filed on 10 July 2023, the Defence does not intend to challenge the expertise of the three proposed expert witnesses but does not accept the content or entire content of their expert reports and wishes to cross-examine the expert witnesses.⁷
9. The Defence notes that Victims' Counsel intends to call only two of the three experts, namely, the two experts who prepared the report of the Institute for Human Rights and Medical Research (iMMO), and not [REDACTED], a proposed expert in the calculation of income loss and material harm suffered by the alleged victims.⁸ The Defence submits that this omission interferes with the Accused's right to confront witnesses against him as guaranteed by Article 6(1) and 6(3)(d) of the European Convention on Human Rights, which includes expert witnesses, and the right of the Accused to challenge the expert witness's findings and conclusions by direct questioning.⁹ This is not mediated by the fact that the same expert witness "provided expert evidence in the *Mustafa* case".¹⁰ Mr Shala was neither a party nor participant in the *Mustafa* case.

Response to Proposals on Modalities for the Assessment of Harm

10. The *Mustafa* Reparation Order¹¹ is inapposite and cannot be treated as precedent save where there are sufficient reasons to follow the approach taken in that case for the purposes of the specific circumstances in this case. The Defence reiterates that the circumstances in the two cases differ to a significant extent. For instance,

⁷ KSC-BC-2020-04, F00578, Defence Notice on Evidence of Victims' Counsel's Expert Witnesses Pursuant to the Trial Panel's Order of 4 May 2023, 10 July 2023 (confidential), para. 3.

⁸ Victims' Counsel's Submissions, para. 2 ("requests the Panel to call two of the three experts to testify"). See also para. 9 and Annex 6 to the Victim's Counsel's Submissions.

⁹ See, for instance, ECtHR, *Danilov v. Russia*, no. 88/05, 1 March 2021, paras. 111, 114, 116.

¹⁰ Victims' Counsel's Submissions, para. 16.

¹¹ KSC-BC-2020-05, F00517, Corrected version of Public redacted Version of Reparation Order against Salih Mustafa with 4 Annexes strictly confidential and *ex parte*, 6 April 2023 ("*Mustafa* Reparation Order").

unlike the Accused in this case, Mr Mustafa was a commander and was charged with superior criminal responsibility pursuant to Article 16(1)(c) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office. The Prosecution has withdrawn its allegations that the Accused held a commanding role in the context of the KLA presence at the Kukes Metal Factory.¹² Similarly, neither the number of alleged victims nor the financial situation of the accused in the two cases is similar.

11. Victims' Counsel invited the Panel to accept that "certain harms may be presumed, once a victim has demonstrated, on the balance of probabilities, to be a victim of the crimes of which the convicted person was convicted, and that it may rely upon circumstantial evidence when a victim lacks direct proof".¹³ The Defence reiterates that damages must be specifically demonstrated and linked to acts of the Accused. There is no scope for "presumptions" in this respect, apart from evident harm of non-pecuniary nature. Victims' Counsel must demonstrate specifically any claim for pecuniary damage.
12. The Defence requests the Panel to require adherence to the standards set by the Practice Direction on Just Satisfaction Claims and the relevant jurisprudence of the European Court of Human Rights ("ECtHR"), which is referred to and relied upon by Victims' Counsel. As Victims' Counsel concedes, "[i]t is for the applicant to show that pecuniary damage has resulted from the violations alleged", however, "[a] merely tenuous or speculative connection is not enough"; instead, "[a] direct causal link must be established between the damage and the violation found"; and

¹² T. 21 February 2023 pp. 526, l. 19-22, 527, l. 11-14 (Opening Statements).

¹³ Victims' Counsel's Submissions, para. 32, referring to the *Mustafa* Reparation Order, para. 103 and ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-3728, Order for Reparations pursuant to Article 75 of the Statute with one public annex (Annex 1) and one confidential annex *ex parte*, 24 March 2017, paras. 57-61.

“[t]he applicant should submit relevant evidence to prove, as far as possible, not only the existence but also the amount of value of the damage.”¹⁴

13. For the same reason, the Defence objects to the Victims’ Counsel’s proposal that the Panel accepts that any contribution to the harm allegedly suffered would suffice for the purposes of establishing factual causation.¹⁵ It is well-established jurisprudence of the ECtHR that there must be a “clear causal connection” between a violation of the Convention and the damage claimed to establish a right to reparation.¹⁶ Similarly, as a Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia held in relation to establishing a right to reparations: “[t]he injury suffered must result directly from the criminal conduct of the Accused.”¹⁷ Not any contribution would suffice to meet the test of a direct link; any such contribution must be sufficiently substantial.
14. Importantly, in addition, as the Appeals Chamber at the International Criminal Court emphasised, it is crucial to distinguish between “*identifying* the harms to direct and indirect victims caused by the crimes for which the person was

¹⁴ Victims’ Counsel’s Submissions, para. 39, referring to ECtHR, Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 and amended on 9 June 2022, para. 9, which further states “Normally, the Court’s award will reflect the full calculated amount of the damage, unless it finds reasons in equity to award less (see point 4 above). If the actual damage cannot be precisely calculated, or if there are significant discrepancies between the parties’ calculations thereto, the Court will make an as accurate as possible estimate, based on the facts at its disposal.”

¹⁵ Victims’ Counsel’s Submissions, para.29.

¹⁶ ECtHR, *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV; *Andreou v. Turkey*, no. 45653/99, 27 October 2009, para. 73; *Kallweit v. Germany*, no. 17792/07, 13 January 2011, para. 87; *Jendrowiak v. Germany*, no. 30060/04, 14 April 2011, para. 61.

¹⁷ ECCC, *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCCC/TC, Judgment, 26 July 2010, para. 642.

convicted” and “*assessing the extent* of that harm for purposes of determining the nature and/or size of reparation awards”.¹⁸

15. The Defence further agrees with Victims’ Counsel that similar ECtHR awards may serve as a reference point in the process of assessing adequate compensation for crimes charged. However, the awards relied upon by Victims’ Counsel by the ECtHR need to concern evidently comparable situations to the ones that are at issue in the present case.¹⁹

III. CLASSIFICATION

16. Pursuant to Rules 82(3) and 82(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, the Response is filed as confidential as it relates to a confidential filing and contains confidential information. The Defence will file a public redacted version of the Response in due course.

IV. RELIEF REQUESTED

17. The Defence respectfully requests that the Panel give due consideration to the above considerations when determining the appropriate reparation modalities and reiterates its request to provide complete submissions and observations after the conclusion of the trial and the issuance of a judgment on the guilt or innocence of the Accused.

¹⁸ ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-3129, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, para. 181.

¹⁹ Victims’ Counsel’s Submissions, paras. 42-48. Judgements at the ECtHR concerning the failure of the state authorities to effectively investigate a death (*see, for instance, Yukymovych v. Ukraine*, no. 11464/12, 17 December 2020) or death and medical negligence (*see, for instance, Prizreni v. Albania*, no. 29309/16, 11 June 2019) or ill-treatment (*see, for instance, Ochigava v. Georgia*, no. 14142/15, 16 February 2023) are neither of a “similar or comparable nature/ gravity” nor do they “originate from comparable economic circumstances” as Victims’ Counsel argues at paragraph 42 of the Victims’ Counsel’s Submissions).

Word count: 1983

Respectfully submitted,



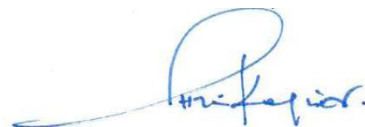
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Friday, 14 July 2023

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