

In: KSC-BC-2020-06
The Specialist 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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Public Redacted Version of Victims' Counsel's response to "Thaçi Defence Notice of Objection to Victims' Counsel Cross-examination of W03780 and W04741"

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I. INTRODUCTION

1. Pursuant to Article 22(3) and (6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), and Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel responds to the Thaçi Defence Notice of Objection to Victims' Counsel Cross-examination of W03780 and W04741 (sic).¹
2. Objection is taken by the Thaçi Defence to the proposed questioning of two witnesses by Victims' Counsel. It is argued that the proposed questioning "(i) is not sufficiently justified, and (ii) would be prejudicial to the Defence's preparation for its cross-examination."² Neither of these objections is made out: the questioning is appropriate, justified and will not adversely affect the preparations of the Defence.

II. CLASSIFICATION

3. This submission is classified as confidential pursuant to Rule 82(1) and (4).

III. PROCEDURAL HISTORY

4. On 10 October 2023, Victims' Counsel submitted his seventh notification of his wish to cross-examine witnesses,³ as instructed by the Trial Panel in the Order on the Conduct of Proceedings.⁴
5. Between 18-19 October 2023, an *inter partes* email exchange between the Thaçi Defence and Victims' Counsel took place. The Thaçi Defence wanted to know the identity of the VPP in respect of whom Victims' Counsel wished to cross-

¹ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F01879, Thaçi Defence Notice of Objection to Victims' Counsel Cross-examination of W03780 and W04741 (sic), 23 October 2023 ("Notice of Objection"). Note that the Thaçi Defence inadvertently refers to "W04741" rather than W04147: for ease of reference the correct pseudonym is used in this response.

² *Ibid.*, para. 2.

³ KSC-BC-2020-06/F01845, Victims' Counsel's Seventh Notification of Wish to Cross-Examine Witnesses, 10 October 2023 ("Seventh Notification").

⁴ KSC-BC-2020-06/F01226/A01, Annex 1 to the Order on the Conduct of Proceedings, 25 January 2023, para. 35.

examine W04147.⁵ Victims' Counsel answered by indicating that this VPP's identity had already been disclosed and provided the relevant reference to the transcript.⁶ Both sides set out their position as to the issue of the disclosure of VPPs identities and associated matters.⁷

6. On 23 October 2023, the Thaçi Defence submitted its Notice of Objection.

IV. SUBMISSIONS

7. The Thaçi Defence Notice of Objection claims that:

- a. Based on the information that Victims' Counsel has provided, it is not possible to assess the relevance of his intended cross-examination of W03780 and W04147 to the interests of VPPs, and, therefore, he should not be granted leave to cross-examine these witnesses; and
- b. Victims' Counsel is obliged to disclose to the Defence the identities of those victims or VPPs he intends to cross-examine witnesses about in order for the Defence to have sufficient time to prepare for their cross-examination of the witnesses concerned.

8. These propositions are not founded in the Kosovo Specialist Chamber's legal framework and practice, and the Defence has failed to substantiate their arguments by reference to other jurisprudence or relevant practice. They are intended to have a chilling effect on the exercise of victims' rights which are, by contrast, founded in the legal framework and practice of the KSC and established human rights standards.⁸ If accepted, the Thaçi Defence objections would diminish the meaningful participation of VPPs in these proceedings.

⁵ Email from the Thaçi Defence to Victims' Counsel Team received on 18 October 2023, at 09:13 a.m.

⁶ Email from Victims' Counsel Team to the Thaçi Defence, sent on 18 October 2023, at 12:58.

⁷ Email from Victims' Counsel Team to the Thaçi Defence, sent on 18 October 2023, at 12:58; Email from the Thaçi Defence to Victims' Counsel Team, received on 18 October 2023, at 13:35; Email from Victims' Counsel Team to the Thaçi Defence, sent on 19 October 2023, at 12:55; Email from the Thaçi Defence to Victims' Counsel Team, received on 19 October 2023, at 21:04.

⁸ See para. 13 below.

A. Victims' Counsel's standing to question witnesses is not limited only to victims or relatives of victims

9. The Defence notes at the outset of its Notice of Objection that neither W03780 nor W04147 are victims in these proceedings nor relatives of victims.
10. Victims' Counsel, whilst accepting that fact, submits that this information is of no relevance for his request to cross-examine W03780 and W04147. Neither the Rules nor the Order on the Conduct of Proceedings limit the standing of Victims' Counsel to question witnesses to those who are dual status witnesses or relatives thereof.⁹

B. The test of "sufficiently relevant to the interests of victims" is erroneous and not founded in law or practice

11. The Thaçi Defence argues that the information provided by Victims' Counsel in the Seventh Notification does not allow an assessment of "whether the areas that Victims' Counsel wants to question the witnesses about are sufficiently relevant to the interests of the victims, and therefore whether questioning of these witnesses by Victims' Counsel is sufficiently justified".¹⁰ However, it fails to explain: a) how it understands the notion of "sufficiently relevant to the interests of the victims", and b) why the information provided by Victims' Counsel is insufficient.
12. Victims' Counsel submits that it is patently obvious that: (i) the crime of arbitrary detention committed directly against VPPs, and the reasons for their detention and release; and (ii) the crimes of enforced disappearance, arbitrary detention, and/or murder of individuals closely connected to VPPs (who for years have been living without knowing the reasons and circumstances in which their loved ones have vanished), are relevant to the interests of victims in

⁹ Rule 114; Order on the Conduct of Proceedings, paras 34-35.

¹⁰ Notice of Objection, para. 9.

these proceedings. It is difficult to imagine issues of greater relevance to VPPs, and they fall squarely within the victims' interests, including the right to truth.

13. Trial Panel I in the *Salih Mustafa* case (and subsequently, in the *Pjetër Shala* case) noted and explained the intertwined relationship between the personal interests and rights of victims as provided in the Law:

9. Article 22(3) of the Law refers to three distinct "personal interest and rights in the criminal proceedings": notification, acknowledgement, and reparation.

10. As a preliminary matter, the Panel notes that the Law does not explain the distinction it makes between the "personal interests" and the "rights" of the victims. The Panel understands in this context that the existence of "personal interests" allows victims to exercise procedural "rights" before the KSC.

[...]

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.¹¹

14. In other words, at the KSC, a VPP's personal interest in "acknowledgement" encompasses both the right to truth in the determination of the charges and the

¹¹ *Prosecutor v Salih Mustafa*, KSC-BC-2020-05/F00152, Decision on victims' procedural rights during trial, 12 July 2021; *Prosecutor v Pjetër Shala*, KSC-BC-2020-04/F00433, Decision on victims' procedural rights during trial and related matters, 24 February 2023, paras 18-19, 25-26.

ability to participate meaningfully in the proceedings in a manner that contributes to this determination.

15. In practice, Victims' Counsel in both the *Mustafa* and *Shala* cases, has been able to cross-examine witnesses called by the Parties without prior notification or request, and without the need to justify any of their questioning. This approach has not led to any violations or limitations of the fair trial rights of the defendants in these two cases.

16. Refusing Victims' Counsel the possibility to cross-examine W03780 and W04147 as requested in the Seventh Notification would ignore VPPs' interests and deprive them of the possibility to exercise their rights in this case.

C. Victims' Counsel's questioning of W03780 and W04147 will not lead to any limitation of the Defence's right to cross-examine these witnesses or to have adequate time to prepare for such cross-examination

17. The Thaçi Defence argues that "as part of its right to have sufficient time to prepare for cross-examination, the Defence is entitled to receive adequate notice from Victims' Counsel about potential areas of questioning so that the Defence may be prepared to conduct its own cross-examination on those same areas, if necessary."¹²

18. According to the Defence, whenever Victims' Counsel intends to question a witness in relation to specific victims or VPPs, the identities of these victims or VPPs should be disclosed to the Defence sufficiently in advance of cross-examination in order to allow the Defence to prepare accordingly in a meaningful way.¹³ The Defence submits that this "would involve a variation of the protective measures in place, when appropriate, to be requested by Victims' Counsel and decided by the Trial Panel sufficiently in advance to allow the Defence to prepare for cross-examination."¹⁴

¹² Notice of Objection, para. 12.

¹³ Notice of Objection, para. 13.

¹⁴ Notice of Objection, para. 13.

1. "Adequate notice": Victims' participation is subject to supervision by the Panel and not the Defence

19. Victims' Counsel notes that the Order on the Conduct of Proceedings requires a "brief indication of the issue" in respect of which Victims' Counsel intends to ask questions going beyond harm.¹⁵ This has been provided in the Seventh Notice. The Taçi Defence requests something quite different. It asserts, contrary to the Order on the Conduct of Proceedings, and without any jurisprudence to substantiate its claim, that fair trial standards entitle it "to receive adequate notice from Victims' Counsel about potential areas of questioning," and the identity of the victims and the VPPs concerned.¹⁶
20. The Defence's submission stretches the right to prepare one's defence and to cross-examine witnesses beyond the actual content of these guarantees. These fair trial rights do not grant the Defence the right to receive prior specific notice of Victims' Counsel's areas of questioning.
21. The right to examine witnesses "require[s] that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings".¹⁷
22. The right to adequate time and facilities does not confer on a party the right to full knowledge of every matter to be raised by another party or participant during the course of the trial. As noted by the Appeals Panel, "[w]hat constitutes 'adequate time and facilities' cannot be assessed in the abstract, but will depend on the specific circumstances of the case."¹⁸

¹⁵ Order on the Conduct of Proceedings, para. 35.

¹⁶ Notice of Objection, paras 2, 12, 13.

¹⁷ KSC-BC-2020-06/IA028/F00011, Decision on Taçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, 4 July 2023 ("Appeals Panel Decision"), para. 48. See also, ECHR, *Al-Khawaha and Tahery v The United Kingdom*, Applications nos. 26766/05 and 22228/06, Grand Chamber Judgement, 15 December 2011, §118.

¹⁸ Appeals Panel Decision, para. 45. See also, ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 February 2014, para. 30.

23. The Thaçi Notice of Objection thus misrepresents the scope of the right to prepare one's defence. It also constitutes a belated attempt to re-draft the Order on the Conduct of Proceedings and should be dismissed on this ground alone. Furthermore, it mistakes the role and function of Victims' Counsel, which is not to take part in the proceedings subject to the approval of the Defence, but to do so in the interests of the VPPs and subject to the control of the Panel.

2. "Advance disclosure of VPP identities": this is unnecessary in principle and unworkable in practice

24. Disclosure of a single status VPP's identity will only sometimes be required in consequence of a Victims' Counsel's request pursuant to para. 35 of the Order on the Conduct of Proceedings. This is because Victims' Counsel's questions concerning interests of VPPs will rarely require naming them directly, or even concern individual VPPs, as some issues may affect a group or class of VPPs. As in the case of Victims' Counsel's intended cross-examination of W03780, questions concerning the circumstances of detention, enforced disappearance or murder of direct victims have nothing to do with the identity of VPPs but relate to the crimes committed against direct victims. The disclosure of the identities of the VPPs whose interests are concerned would, therefore, add nothing to the proceedings or to Defence preparations.

25. In rare situations in which Victims' Counsel intends to cross-examine a witness concerning a specific named VPP, the Defence will ordinarily be entitled to disclosure of this VPPs' identity. This is also an inevitable consequence of the fact that such questioning by Victims' Counsel will reveal the VPP's identity. It is of note that, after six months of trial, this situation has occurred with only one VPP [REDACTED]. Victims' Counsel currently anticipates that there will be few, if any, further occurrences.

26. However, when it is necessary for such disclosure to be made, Victims' Counsel does not agree that he is under an obligation to seek a variation of protective measures in advance of the hearing as suggested by the Defence.
27. The Defence Notice of Objection overlooks two factors which are critical in light of VPPs' safety and security. First, the need to cross-examine by Victims' Counsel pursuant to para. 35 will not be apparent until after the SPO's direct examination. Second, the Panel's practice has been only to take a decision as to whether Victims' Counsel may cross-examine after the SPO's direct examination is over.¹⁹ Victims' Counsel respectfully suggests that this is the only appropriate moment where that decision can be taken.
28. Victims' Counsel cannot be required to reveal the identities of VPPs who have been granted anonymity as a protective measure in these proceedings before it is clear that such disclosure is required. It cannot be incumbent on Victims' Counsel to disclose the identity of a VPP only to find that it was done needlessly (either because the points have been covered by the SPO, or because the Panel refuses permission to cross-examine). The decision to waive his or her protective measures is not taken lightly by a VPP. These measures have been granted under Article 23 for good reason given the background of intimidation in this case and the VPPs' security concerns. It is not right to expect them to make a decision to waive their protective measures when it is unclear that it is necessary to do so.
29. Victims' Counsel further submits that disclosure of VPPs identities in advance of examination of the witness in court is not necessary for the purpose of litigating a request to cross-examine before the Panel. Knowing the identity of a VPP in

¹⁹ KSC-BC-2020-06, Transcript of 20 March 2023, T. 2074:5-17 ("JUDGE GAYNOR: So would you like the Panel to issue its decision on your request to put those questions to that witness at the conclusion of the SPO's direct examination or when exactly? MR. LAWS: Yes. Yes, that would seem to us to be the appropriate moment at which to make a final decision, because it will only be at that stage that we can be completely clear that everything we want to ask has been asked. JUDGE GAYNOR: Right. MR. LAWS: And, of course, the SPO have many, many more issues to deal with with this witness than we do. JUDGE GAYNOR: Very well. Well, thank you. We accept your proposal for how you want to proceed, and we would encourage you and direct you to follow the same approach...").

advance will not assist the Defence in preparing their submissions as to the relevance of Victims' Counsel's intended questioning.

3.If granted, Victims' Counsel's request to cross-examine W04147 and W03780 would not impinge on the fair trial rights of the accused

30. Specifically, with regard to the two witnesses concerned by the Notice of Objection, the Defence submits that:

- a. In relation to W04147, the identity of the VPP in relation to which Victims' Counsel intends to question this witness has been known to the Defence only since 18 October 2023;
- b. In relation to W03780, Victims' Counsel refers to a "considerable number of VPPs" who were detained and/or whose relatives were arrested and killed or disappeared in circumstances over which this witness is expected to testify, yet none of which are known to the Defence.²⁰

31. As for the request to question W04147, Victims' Counsel submits that the identity of the VPP concerned will have been known to the Defence for at least several weeks by the time that the witness testifies. This witness gives evidence of limited scope about [REDACTED]. The statements of this witness have been in the Defence's possession for many months. No reasonable complaint of a lack of time to prepare can be made by the Defence in those circumstances.

32. As for the request to question W03780, Schedule B to the Amended Indictment lists 25 direct victims of murder at the Volljakë/Volujak cave, on 26 or 27 July 1998.²¹ Schedule A to the Amended Indictment indicates that between 16 to 26 or 27 July 1998, there were at least 48 known victims of arbitrary detention at the former police station in Malishevë/Mališevo.²² There are at least three dual

²⁰ Notice of Objection, para. 14.

²¹ KSC-BC-2020-06/F01210/A01, Annex 1 to Prosecution submission regarding Indictment redactions, 13 January 2023, Schedule B, pp. 62-63, rows 10 and 11.


²² KSC-BC-2020-06/F01210/A01, Annex 1 to Prosecution submission regarding Indictment redactions, 13 January 2023, Schedule A, p. 56, row 7.1 and paras 67, 153-154; KSC-BC-2020-06/F01594/A03,

status victims (whose identities are known to the Defence) who were affected by these events and have a legitimate interest in them. How the Defence's position could be improved in any way by the further disclosure of the names of additional, single status VPPs (who will not be the direct subject of cross-examination) is wholly unclear and is notably unexplained in the Thaçi Defence Notice of Objection.

V. CONCLUSION

33. For all the foregoing reasons, Victims' Counsel will invite the Panel to reject the objections notified by the Thaçi Defence and permit the cross-examination of W03780 and W04147 as requested by Victims' Counsel and to hold that no further disclosure of VPP identities be made.

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3 November 2023

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Annex 3 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, 9 June 2023, paras 368 *et seq.*