

**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:** Dr Fidelma Donlon

**Filing Participant:** Victims' Counsel

**Date:** 20 November 2023

**Language:** English

**Classification:** Public

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**Victims' Counsel's Response to the "Defence Objection to the Admissibility of  
Victims' Counsels Expert Witness Report and Request to Call the Expert Witness  
to Testify Live"**

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Simon Laws

## I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victim's Counsel responds to the "Defence Objection to the Admissibility of Victims' Counsels Expert Witness Report and Request to Call the Expert Witness to Testify Live".<sup>1</sup>
2. The Defence submits that (i) Dr Lerz's report is inadmissible, challenging its reliability and probative value;<sup>2</sup> and in the alternative (ii) that Dr Lerz should testify in-court to resolve "evident ambiguity" and pose additional questions on the accuracy and reliability in line with its right to confrontation.<sup>3</sup>
3. Victims' Counsel submits that these arguments are vague and unpersuasive, and that:
  - i) the Defence has had adequate opportunity to clarify any supposed ambiguity by submitting questions in writing,
  - ii) there is nothing to be gained from calling Dr Lerz to testify,
  - iii) conducting proceedings to resolve the issue of monetary harm in writing does not infringe upon the Accused's fair trial rights.

## II. CLASSIFICATION

4. This submission contains no confidential information and is filed publicly.

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<sup>1</sup> *Prosecutor v. Pjetër Shala*, KSC-BC-2020-04/F00711, Defence Objection to the Admissibility of Victims' Counsels Expert Witness Report and Request to Call the Expert Witness to Testify Live, 8 November 2023 ("Defence Objection and Request").

<sup>2</sup> Defence Objection and Request, paras 18-20.

<sup>3</sup> Defence Objection and Request, paras 21- 23.

### III. PROCEDURAL HISTORY

5. On 30 June 2023, Victims' Counsel submitted an expert report prepared by Dr Lerz ("the Report") which provided an estimate calculation of the income loss of Victims Participating in the Proceedings ("VPPs").<sup>4</sup>
6. On 10 and 12 July 2023, the Defence submitted that it does not accept the Report of Dr Lerz and expressed its intention to cross-examine him.<sup>5</sup>
7. On 21 July 2023, the Panel held that "reparations proceedings shall be conducted, as a general rule, predominantly in writing"<sup>6</sup> and indicated that it was "not persuaded by the Defence's submissions that not calling Stefan Lerz to testify in court interferes with the Accused's right to question witnesses against him or challenge the expert's report."<sup>7</sup> Furthermore, the Panel indicated that the Defence would have the opportunity to put any questions it wished and make any objections and/or observations in relation to the Report in writing, and that "thereafter the Panel may reassess eventually the need to call the expert to testify in court."<sup>8</sup>
8. On 20 September 2023, the Trial Panel ordered the Defence to submit written questions to Dr Lerz by 11 October 2023 and Victims' Counsel to transmit the responses of Dr Lerz by 1 November 2023.<sup>9</sup>
9. On 11 October 2023, the Defence submitted written questions to Dr Lerz.<sup>10</sup>

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<sup>4</sup> KSC-BC-2020-04/F00558/A04, 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, Annex four: Calculation of material damage and economic loss in two cases, 23 June 2023.

<sup>5</sup> KSC-BC-2020-04/F00578, Defence Notice on Evidence of Victims' Counsel's Expert Witness Pursuant to the Trial Panel's Order of 4 May 2023, 10 July 2023, para. 3; KSC-BC-2020-04/F00585, 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, 12 July 2023, para. 8.

<sup>6</sup> KSC-BC-2020-04/F00598, Decision on Victims' Counsel's request to call expert witness to testify, 21 July 2023, para. 10.

<sup>7</sup> Ibid., para. 11.

<sup>8</sup> Ibid.

<sup>9</sup> KSC-BC-2020-04, Oral Order, Transcript of 20 September 2023, T. 2459:5-2461:13.

<sup>10</sup> KSC-BC-2020-04/F00687, Defence Submission of Written Questions for Victims' Counsel's Expert Witness with Confidential Annex I, 11 October 2023.

10. On 27 October 2023, Victims' Counsel transmitted to the Panel the written answers of Dr Lerz to the Defence's questions and submitted that in light of the answers, there is no need to call Dr Lerz in person for cross-examination.<sup>11</sup>
11. On 9 November 2023, Victims' Counsel was notified of the Defence Objection and Request, which was filed on 8 November 2023.<sup>12</sup>

#### IV. SUBMISSIONS

##### A. Dr Lerz's Report is admissible

12. The Defence objects to the admissibility of the Report on the basis that it is unreliable and its probative value, if any, is outweighed by its prejudicial effect.<sup>13</sup>
13. According to the Defence, the Report is unreliable because it lacks sources, and the data used in the Report demonstrates a lack of scientific methodology that is required to render expert opinion evidence admissible.<sup>14</sup> Specifically, the Defence argues that "the Report is based on general statistical data and no actual data and information relating to the personal circumstances of the alleged victims"<sup>15</sup> such as such as "salary sheets and employment contracts".<sup>16</sup> This, according to the Defence, "renders the Report overly broad and general and its conclusions with respect to the alleged victims in this case unreliable."<sup>17</sup>
14. In response to the Defence's claim that Dr Lerz "was not given any specific and objective information of the alleged victims",<sup>18</sup> Victims' Counsel emphasises that

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<sup>11</sup> KSC-BC-2020-04/F00696, Victim's Counsel's Submission of Expert's Answers to Written Questions from the Defence with Confidential Annex 1, 27 October 2023.

<sup>12</sup> Defence Objection and Request, 8 November 2023.

<sup>13</sup> Defence Objection and Request, para. 16, and para. 20.

<sup>14</sup> *Ibid.*, para. 17.

<sup>15</sup> Victims' Counsel objects to the use of the term "alleged victims" by the Defence. Victims represented by Victims' Counsel have been admitted to participate in these proceedings. This has not been challenged and is unquestionable. It is the responsibility of the Accused for these crimes that is alleged until proven beyond reasonable doubt and not the status of the victims.

<sup>16</sup> Defence Objection and Request, para. 17, see also para. 18.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, para. 18.

VPPs are under no obligation to provide such documentation.<sup>19</sup> Further, in the *Salih Mustafa* case the Trial Panel held that “[i]n the absence of any documentation, a victim’s coherent and credible account may be accepted as sufficient evidence to support a request for reparations on a balance of probabilities.”<sup>20</sup>

15. Moreover, the absence of financial records is unsurprising after the period of time that has elapsed. In the case of V01/04 in particular, the opinion of Dr Lerz is principally concerned with the extended period during which V01/04 was not working: by definition, there can be no business records relating to this period. Instead, the Trial Panel has heard the testimony of all of the VPPs in relation to their material harm, and this testimony has provided the basis for much of Dr Lerz’s work. It is for the Panel to decide if it accepts this testimony, and if so, to what extent.
16. As to the methodology and sources used to prepare the Report, Dr Lerz explained clearly the methodology and sources on which he relied in preparation of his expert opinion and the method of calculation that he applied. Dr Lerz explicitly noted in the report that due to the limited information he had available to prepare his report, his “calculation can be only regarded as a rough approximation of the real situation.”<sup>21</sup> He responded exhaustively to the Defence questions in this regard. Therefore, contrary to the Defence’s submissions, the Report contains sufficient information as to the sources used in support of its conclusions. Furthermore, having explained the limitations he faced in preparation of the Report, Dr Lerz has shown that his “conclusions were drawn independently and impartially”.<sup>22</sup>

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<sup>19</sup> KSC-BC-2020-04, In-court oral order, Transcript of 4 May 2023, Public, 1356:11 – 1361:6.

<sup>20</sup> *Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00517/RED/COR, Corrected version of Public redacted version of Reparation Order against Salih Mustafa With 4 Annexes strictly confidential and *ex parte*, 6 April 2023, para. 122.

<sup>21</sup> ERN: V40000018-V40000018.

<sup>22</sup> ICTY, *Prosecutor v. Paole Strugar*, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, para 58. See also, Defence Objection and Request, footnote 14.

17. Victims' Counsel re-submits that the Report and his estimates are intended to show the extent of individual material harm suffered by VPPs in consequence of the crimes charged against the Accused, as would have been done in regular injury/compensation proceedings. These estimates are to serve as a reference point for the Trial Panel in its assessment of harm suffered by the VPPs and the determination of adequate/appropriate reparations.
18. The Report is therefore reliable, relevant and has the necessary probative value to render it admissible for the purpose of determining the material aspect of the harm suffered by VPPs in this case.

**B. There is no need to call Dr Lerz to testify**

19. Victims' Counsel submits that Rule 149 regulates generally the evidence of expert witnesses in proceedings before the Kosovo Specialist Chambers. However, in the context of Dr Lerz's expert opinion, this provision needs to be applied in conjunction with Rule 168, which regulates reparations proceedings and which is *lex specialis* to Rule 149. As noted by the Trial Panel, pursuant to Rule 168, reparation proceedings (unlike criminal proceedings determining guilt), "shall be conducted, as a general rule, predominantly in writing."<sup>23</sup>
20. The Defence argues that if the Report is admitted into evidence, Dr Lerz must be called to testify live, otherwise the Accused's right to confront witnesses against him, guaranteed by the European Convention on Human Rights and by the Law, will be compromised.<sup>24</sup>
21. The issue of admission into evidence of statements of witnesses who did not attend the trial arises when the evidence in question is the "sole or "decisive"

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<sup>23</sup> KSC-BC-2020-04/F00598, Decision on Victims' Counsel's request to call expert witness to testify, 21 July 2023, paras 10-11. See also, *Specialist Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00425, Decision appointing a financial expert and setting out further procedural steps with regard to reparation proceedings, 1 June 2022, para. 10.

<sup>24</sup> Defence Objection and Request, paras 21 and 24.

evidence or if it “carried significant weight” in the conviction of the accused.<sup>25</sup> The right of a defendant to cross-examine witnesses (which is not unlimited) pertains specifically to criminal proceedings aimed at determining the guilt or innocence of the accused.

22. Reparations proceedings, like compensation proceedings, are civil in nature. The civil limb of Article 6 of the European Convention on Human Rights, in relation to the parties’ right to call witnesses, guarantees that when courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant’s ability to present arguments in support of his case.<sup>26</sup> Specifically in relation to parties’ rights concerning expert reports, a party must be: (i) given an opportunity to acquaint themselves with the expert opinion, (ii) allowed to be heard or to file written pleadings in relation to the expert opinion, (iii) and formulate their objections to the opinion.<sup>27</sup>

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<sup>25</sup> ECtHR, *Al-Khawaja and Tahery* [GC], Applications nos. 26766/05 and 22228/06, Judgment of 15 December 2011, §§ 118-119; ECtHR, *Schatschaschwili v. Germany* [GC], Application no. 9154/10, Judgment of 15 December 2015, §§ 100-109.

<sup>26</sup> ECtHR, *Wierzbicki v. Poland*, Application no. 24541/94, Judgement of 18 June 2002, § 45: “In the circumstances of the present case, the Court is satisfied that the domestic courts examined the applicant's requests to have witnesses called and gave detailed reasons for their refusals, which, in the Court's view, were not tainted by arbitrariness. For these reasons, the refusal to take evidence proposed by the applicant did not amount to a disproportionate restriction on his ability to present arguments in support of his case in the proceedings.”

<sup>27</sup> ECtHR, *Feldbrugge v. the Netherlands*, Application no. 8562, Judgement of 29 May 1984, § 44: “It is not within the province of the Court to review in isolation the Netherlands institution of the permanent medical expert (see, mutatis mutandis, the Bönisch judgment of 6 May 1985, Series A no. 92, p. 14, para. 27). The Court confines itself to noting that the permanent medical expert cannot himself determine a dispute (contestation) over a civil right. The sole responsibility for taking the decision falls to the President of the Appeals Board, even when - as in the instant case - he does no more than ratify the opinion of the expert.

Secondly, there has been no breach of the principle of equality of arms inherent in the concept of a fair trial (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 28). The Occupational Association did not enjoy a procedural position any more advantageous than Mrs. Feldbrugge’s, in that had the experts expressed an opinion unfavourable to its standpoint, the Association would likewise have been unable to present oral or written arguments or to challenge the validity of the unfavourable opinion. No lack of fair balance thus obtained between the parties in this respect.

On the other hand, the procedure followed before the President of the Appeals Board by virtue of the Netherlands legislation was clearly not such as to allow proper participation of the contending

23. In light of this standard, Victims' Counsel reiterates that it calls Dr Lerz as an expert witness for the purposes of reparations only, and not for the purpose of determination of the guilt or innocence of the Accused.
24. The Defence has been provided with Dr Lerz's report and presented its questions to Dr Lerz in writing. Dr Lerz responded exhaustively. The Defence has submitted its objections to the Report and presented its own expert evidence in response to Dr Lerz's expert opinion.
25. There is nothing in Dr Lerz' responses to the Defence's questions that suggests ambiguity or incompleteness of his answers to the Defence questions. The Defence failed to explain why it considers that Dr Lerz's answers are "insufficient and leave[.] the parties with evident ambiguity".<sup>28</sup> The Defence did not provide any examples of such insufficiency or ambiguity.
26. Victims' Counsel reiterates his earlier submissions on this matter: in light of the answers provided by Dr Lerz, the assessment of material harm will not be further facilitated by oral evidence from him.
27. Finally, Victims' Counsel notes that since the Defence Objection and Request was filed, the Defence has filed a report from their own expert addressing Dr Lerz's opinion and the issue of material harm.<sup>29</sup> The Panel will therefore have the Defence's arguments available to it in assessing the Report. It is of particular note that the Defence expert, while taking issue with the Report in a number of respects, nonetheless arrives at a figure for material harm in respect of V01/04 which, while significantly less than that given by Dr Lerz, would be very

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parties, at any rate during the final and decisive stage of that procedure. To begin with, the President neither heard the applicant nor asked her to file written pleadings. Secondly, he did not afford her or her representative the opportunity to consult the evidence in the case-file, in particular the two reports - which were the basis of the decision - drawn up by the permanent experts, and to formulate her objections thereto. Whilst the experts admittedly examined Mrs. Feldbrugge and gave her the opportunity to formulate any comments she might have had, the resultant failing was not thereby cured. In short, the proceedings conducted before the President of the Appeals Board were not attended, to a sufficient degree, by one of the principal guarantees of a judicial procedure."

<sup>28</sup> Defence Objections and Request, para. 22.

<sup>29</sup> KSC-BC-2020-04/F00716/A01, Annex 1 to Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings with Confidential Annex 1, 13 November 2023.

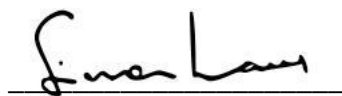


significant if it was to be awarded to V01/04 by the Panel in respect of material harm only.<sup>30</sup> With regard to the areas of dispute relating to V02/04 to V08/04, these are also capable of fair resolution without the need for oral evidence. Further time and resources should not, in those circumstances, be expended on disputes which will ultimately prove to be academic in nature.


## V. RELIEF

28. For the foregoing reasons, Victims' Counsel respectfully re-submits that the record is complete with respect to Dr Lerz's evidence, that his report is admissible, and that there is no need to call him for cross-examination.

**Word count: 2667**



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20 November 2023

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<sup>30</sup> Ibid., page 19.