

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: 4 December 2023

Language: English

Classification: Public Redacted

Public Redacted Version of the Corrected Version of Victims' Counsel's Response to the Defence "Submissions Regarding the Confidentiality of the Identity of the Defence Expert on Reparations"

Specialist Prosecutor's Office
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Counsel for Victims
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"), as well as the Trial Panel's instruction of 1 December 2023,¹ Victim's Counsel submits his response to the Defence's "Submissions Regarding the Confidentiality of the Identity of the Defence Expert on Reparations".²
2. Victims' Counsel objects to the relief sought by the Defence Submissions as factually and legally unfounded, and requests the Panel to order the Defence to submit a lesser redacted version of filings F00725RED, F00716RED and F00698RED with the expert's name unredacted.

II. CLASSIFICATION

3. This filing is submitted as confidential pursuant to Rule 82(4) of the Rules. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 30 June 2023, Victims' Counsel submitted an expert report prepared by Dr Lerz which provided an estimate calculation of the income loss of Victims Participating in the Proceedings ("VPPs").³
5. On 13 November 2023, the Defence submitted its own expert report prepared by the Defence expert on material harm.⁴ The name of the Defence

¹ *Prosecutor v. Pjetër Shala*, KSC-BC-2020-04, Email from Trial Panel I, 1 December 2023 at 12:20.

² KSC-BC-2020-04/F00731, Submissions Regarding the Confidentiality of the Identity of the Defence Expert on Reparations, 1 December 2023 ("Defence Submissions" or "Submissions").

³ 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.

⁴ KSC-BC-2020-04/F00716, Defence Submission of an Expert Report for the Purpose of the Reparations Proceedings with Confidential Annex 1, 13 November 2023; KSC-BC-2020-04/F00716/A01, Annex 1 to Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings, Profit loss

expert has been redacted in public redacted versions of this and other filings.⁵

6. On 27 November 2023, Victims' Counsel filed his initial submissions on the Defence Expert Report and submitted his questions for the Defence expert in a confidential annex 1.⁶
7. On 29 November 2023, the Trial Panel instructed Defence Counsel to present a short filing setting out the reasons for which the identity of the Defence expert witness should be protected.⁷
8. On 30 November 2023, the Defence for Mr Shala filed the Defence Submissions, providing a purported justification for the anonymity of [REDACTED], requesting anonymity for [REDACTED], and asking that the Trial Panel reclassify Victims' Counsel's filing F00728 as confidential (notified to Victims' Counsel on 1 December 2023).⁸
9. On 1 December 2023, Trial Panel I directed Victims' Counsel to respond to the Defence Submissions by 4 December 2023 at 12h00.

IV. SUBMISSIONS

10. Victims' Counsel responds to the Defence Submissions on four distinct points: (i) that the Defence submissions, to the extent that that they are non-responsive to the question posed by the Panel, must be dismissed; (ii) that the Defence cannot unilaterally impose protective measures as it sees fit; and (iii) the Defence draws a false equivalence between the Defence expert

calculation report and opinion regarding Victim V01/04 and Victims V2/04 to V2/08 ("Defence Expert Report").

⁵ KSC-BC-2020-04/F00725/Red, Defence Request to Amend its Witness and Exhibit Lists with Confidential Annex I, 23 November 2023; KSC-BC-2020-04/F00716/Red, Public Redacted Version of Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings with Confidential Annex 1, 13 November 2023; KSC-BC-2020-04/F00698/Red, Public Redacted Version of Defence Request to Amend the Exhibit List with Confidential Annex I, 27 October 2023.

⁶ KSC-BC-2020-04/F00728, Victims' Counsel's questions for Defence expert with confidential annex 1, 27 November 2023 ("Victims' Counsel's Submission of Questions").

⁷ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3874:2-24.

⁸ Defence Submissions.

witness and other factual witnesses; (iv) the Defence's invocation of Rule 114(3) is wholly irrelevant to the issues at hand.

11. First, and at the outset, it is submitted that the question of the classification of Victims' Counsel's Submissions pursuant to Rule 82(4) is irrelevant for the Panel's determination as to whether the Defence expert should be granted protective measures pursuant to Rule 80 of the Rules or not.
12. Nonetheless, the Defence Submissions purport to address the issue of whether Victims' Counsel was correct to file F00728 as public.⁹ The Trial Panel did not invite submissions on this topic and the resolution of this issue can have no bearing on whether [REDACTED] should be granted protective measures. It is submitted that this argument should be disregarded on the basis that is not responsive to the question posed by the Panel.
13. Second, the Defence for Mr Shala did not seek any protective measures for the Defence expert prior to the Defence Submissions of 30 November 2023. Neither did the Defence indicate that its expert had expressed any security concerns in relation to being instructed to provide an expert opinion for the purpose of reparations proceedings in the case against Mr Shala. Therefore, it is unclear on what basis the Defence redacted the expert's name from all public submissions it had made prior to 30 November 2023.¹⁰ By doing so the Defence unilaterally decided to protect the expert's identity without making an application for protective measures to the Panel, as required by Rule 80 of the Rules. It cannot be argued that other parties and participants are bound by the Defence's attempt to grant protective measures to a witness as it sees fit.
14. During the hearing on 29 November 2023, and only upon inquiry from the Panel, the Defence suggested that the expert requires protective measures

⁹ Defence Submissions, para. 9.

¹⁰ *Supra* fn 5.

- due to [REDACTED] as it is better not to “take any risk, if any”.¹¹ The Defence’s further written submissions of 30 November do not give any individualized reasons, other than the expert’s personal preference, that would justify the request to protect [REDACTED] identity from the public.¹²
15. Third, Victims’ Counsel reiterates his earlier submissions with regard to [REDACTED].¹³ Contrary to what is suggested by the Defence, it is not Victims’ Counsel’s submission that “witnesses called by the Defence enjoy some special privilege, which protects them from harassment or intimidation”.¹⁴
16. Rule 80 provides that witnesses can be provided appropriate measure of protection if they are at risk on account of their testimony. The Defence Submissions have failed to explain how the expert’s opinion in the reparation proceedings could put the expert at any risk. Specifically, and contrary to the Defence Submissions,¹⁵ one cannot draw a parallel between the situation of a witness involved in events directly relevant to the charges against Mr Shala, and the situation of the Defence expert on reparations. The Defence expert’s opinion has nothing to do with the determination of the guilt or innocence of Mr Shala.
17. The argument that the Defence Expert requires protective measures is further undermined by the expert’s own description of [REDACTED] methods, which included interviewing [REDACTED].¹⁶ [REDACTED].
18. Fourth, and finally, at no point has Victims’ Counsel argued that because VPPs have a right to be informed about the proceedings, the identity of the Defence expert should be public (as suggested, with no explanation, at

¹¹ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3872:21-25.

¹² Defence Submissions, para. 12. [REDACTED].

¹³ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3873: 16-23.

¹⁴ Defence Submissions, para. 10.

¹⁵ Defence Submissions, para. 10.

¹⁶ Defence Expert Report, p. 4, see also Victims’ Counsel’s Submission of Questions, annex 1, question 20.

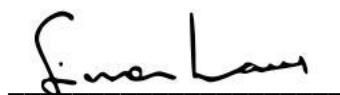
paragraph 13 of the Defence Submission). It is rather the principle of the publicity of criminal proceedings and the need for public scrutiny of criminal trials that motivates Victims' Counsel opposition to the notion that an expert witness should be permitted to provide evidence anonymously.¹⁷ [REDACTED], unlike other Defence witnesses, had a perfect right to decline an offer to provide evidence in this case [REDACTED].

V. RELIEF

19. Victims' Counsel respectfully requests the Trial Panel to:

- i) deny the relief sought by the Defence Submissions; and
- ii) order the Defence to file a lesser redacted version of filings F00725RED, F00716RED and F00698RED, providing the name of the Defence expert witness.

Word count: 1491



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4 December 2023

At The Hague, the Netherlands.

¹⁷ KSC-BC-2020-04, Transcript, 29 November 2023, T. 3873:10-15.

Explanatory Note:

- An inadvertent error is corrected in paragraph 3
- *A public redacted version will be filed in due course.* is substituted for *Victims' Counsel does not object to its reclassification as public.*