



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 4 January 2021

Language: English

Classification: Public

Framework Decision on Victims' Applications

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

- I. PROCEDURAL BACKGROUND..... 2
- II. APPLICABLE LAW 3
- III. DISCUSSION..... 5
 - A. Principles Governing the Victim Application Process 5
 - B. Information Provided to Would-Be Applicants 6
 - C. Collection of Applications 6
 - D. Submission of Applications..... 7
 - E. Assessment of Applications 11
 - 1. Admissibility of Applications..... 12
 - (a) Standard of proof: *prima facie* evidence..... 12
 - (b) Natural person..... 13
 - (c) Alleged crime(s) 13
 - (d) Personally suffered harm 14
 - (e) Direct result of a crime in the indictment 16
 - (f) VPO recommendation 16
 - 2. Grouping of Applicants 17
 - 3. Protective Measures 18
 - F. Role of the Parties in the Application Process 20
 - G. Remedy for Denied Applicants..... 21
- IV. DISPOSITION 22

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 22(1), 34(6), 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 23(5), 95(2)(i) and 113 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment ("Confirmed Indictment") against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi ("Mr Thaçi", "Mr Veseli", "Mr Selimi", and "Mr Krasniqi", respectively, and collectively referred to as the "Accused").²

2. On 30 October 2020, the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment,³ with redactions as authorised by the Pre-Trial Judge.⁴

3. On 4 and 5 November 2020, upon order of the Pre-Trial Judge,⁵ Mr Krasniqi, Mr Thaçi, Mr Veseli and Mr Selimi were arrested⁶ and transferred to the detention facilities of the Specialist Chamber ("SC") in The Hague, the Netherlands.⁷

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi* ("Confirmation Decision"), 26 October 2020, public.

³ KSC-BC-2020-06, F00034/A01, Specialist Prosecutor, *Indictment*, 30 October 2020, strictly confidential and *ex parte*. A public redacted corrected Confirmed Indictment, correcting certain clerical errors, was submitted on 4 November 2020, F00045/A03, public.

⁴ Confirmation Decision, para. 521(c)-(d).

⁵ KSC-BC-2020-06, F00027/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, public, with Annexes 1-8, public. Corrected versions of Annexes 7 and 8 were filed on 28 October 2020, *see* F00027/A07/COR/RED and F00027/A08/COR/RED, respectively.

⁶ KSC-BC-2020-06, F00044, Registrar, *Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4)*, 4 November 2020, public; F00049, Registrar, *Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4)*, 5 November 2020, public; F00050, Registrar, *Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4)*, 5 November 2020, public; F00051, Registrar, *Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4)*, 5 November 2020, public.

⁷ KSC-BC-2020-06, F00048, Registrar, *Notification of Reception of Jakup Krasniqi in the Detention Facilities of the Specialist Chambers*, 4 November 2020, public, with Annex 1, public; F00053, Registrar, *Notification of*

4. Between 9 and 11 November 2020, initial appearances were held for Mr Krasniqi,⁸ Mr Thaçi,⁹ Mr Veseli,¹⁰ and Mr Selimi.¹¹

II. APPLICABLE LAW

5. Pursuant to Article 22(1) of the Law and Rule 2 of the Rules, a victim is a natural person who has personally suffered harm, including physical, mental or material harm, as a direct result of a crime within the jurisdiction of the Specialist Chambers and alleged in an indictment confirmed by the Pre-Trial Judge.

6. Pursuant to Rule 113(1) of the Rules, after the confirmation of an indictment and sufficiently in advance of the opening of the case, a person claiming to be a victim of a crime alleged in the indictment may file an application for admission as a victim participating in the proceedings (“VPP”), specifying how he or she qualifies as a victim and providing the location and date of an alleged crime giving rise to harm.

7. Pursuant to Article 34(6) of the Law and Rule 23(5) of the Rules, the Victims’ Participation Office (“VPO”) administers, *inter alia*, the system of victim participation provided for in Article 22 of the Law and the Rules. The VPO provides assistance and advice to VPPs.

Reception of Hashim Thaçi in the Detention Facilities of the Specialist Chambers and Appointment of Counsel, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00054, Registrar, *Notification of Reception of Kadri Veseli in the Detention Facilities of the Specialist Chambers and Appointment of Counsel*, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00055, Registrar, *Notification of Reception of Rexhep Selimi in the Detention Facilities of the Specialist Chambers*, 5 November 2020, public, with Annex 1, public.

⁸ KSC-BC-2020-06, F00052, Pre-Trial Judge, *Decision Setting the Date for the Initial Appearance and Related Matters*, 5 November 2020, public, para. 21(a). *See also* Transcript (Mr Krasniqi), 9 November 2020, public.

⁹ KSC-BC-2020-06, F00057, Pre-Trial Judge, *Decision Setting the Date for the Initial Appearance and Related Matters*, 6 November 2020, public, para. 20(a). *See also* Transcript, 9 November 2020 (Mr Thaçi), public.

¹⁰ KSC-BC-2020-06, F00060, Pre-Trial Judge, *Decision Setting the Date for the Initial Appearance and Related Matters*, 6 November 2020, public, para. 20(a). *See also* Transcript, 10 November 2020, public.

¹¹ KSC-BC-2020-06, F00061, Pre-Trial Judge, *Decision Setting the Date for the Initial Appearance and Related Matters*, 6 November 2020, public, para. 20(a). *See also* Transcript, 11 November 2020, public.

8. Pursuant to Rule 113(2) of the Rules, the VPO registers and assesses the applications and files them before the Pre-Trial Judge together with a recommendation on admissibility and common representation, and on a request for protective measures under Rule 80 of the Rules, as applicable.
9. In accordance with Rule 113(1)-(3) of the Rules, the Parties do not have access to the application forms and receive only a confidential report of the VPO submission, on the basis of which they can make submissions on legal grounds regarding admissibility and common representation.
10. In accordance with Rule 113(4)-(5) of the Rules, the Pre-Trial Judge shall consider whether the applicant has provided *prima facie* evidence of the harm suffered as a direct result of a crime in the indictment and shall render a reasoned decision granting or denying admission in the proceedings. The Pre-Trial Judge shall also decide on common representation and any requests for protective measures. The decision shall be notified to the applicant, the VPO and the Parties.
11. In accordance with Article 22(4) of the Law, VPPs shall form one group unless a Panel orders that they should be divided into more than one group. Pursuant to Rule 113(8) of the Rules, the Pre-Trial Judge, in consultation with the VPO, shall decide whether to divide VPPs into groups having common representation, and taking into consideration any conflicting interests that may hinder common representation, any similar interests that may facilitate common representation and the rights of the Accused and the interests of a fair and expeditious trial.
12. Pursuant to Rule 113(6) of the Rules, denied applicants may appeal as of right the decision of the Pre-Trial Judge within fourteen days of notification. A Party may seek certification of the same decision, but only on grounds of an error of law.

III. DISCUSSION

A. PRINCIPLES GOVERNING THE VICTIM APPLICATION PROCESS

13. The legal framework of the SC provides for several procedural steps to be taken by the Pre-Trial Judge, the Parties and Victims' Counsel, where applicable, between the initial appearance of the Accused and the transmission of the case file to the Trial Panel, in accordance with Rule 98 of the Rules. One of these steps concerns the determination of applications for admission as victim participating in the proceedings, as provided by Rule 95(2)(i) of the Rules.

14. The VPO plays a central role in the victims' application process by, *inter alia*, collecting applications and submitting them before the Pre-Trial Judge, making recommendations on admissibility and common representation as well as on requests for protective measures for applicants. Other units of the Registry may also be involved in various aspects of the application process. Additionally, the SPO should indicate to the VPO any person who has suffered harm as a direct result of a crime in the Confirmed Indictment. To ensure the efficiency and expeditiousness of the victims' application process and to assist the VPO and all other stakeholders involved in this process, the Pre-Trial Judge considers it necessary to provide timely and detailed guidance, with clear, streamlined instructions for the application of the relevant provisions.¹²

15. Furthermore, to enable VPO to perform its functions as provided in Article 34(6) of the Law and Rule 113(2) of the Rules, the Pre-Trial Judge finds it appropriate to provide access to the VPO to the un-redacted versions of the Confirmed Indictment

¹² KSC-BC-2020-05, F00055, Pre-Trial Judge, *Framework Decision on Victims' Applications* ("Mustafa Victims' Applications Decision"), 27 November 2020, public, para. 14. Similarly, ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, *Decision Establishing Principles on the Victims' Application Process* ("Ntaganda Principles Application Process"), ICC-01/04-02/06-67, 28 May 2013, para. 3; *Prosecutor v. Ongwen*, Pre-Trial Chamber II, *Decision Establishing Principles on the Victims' Applications Process* ("Ongwen Principles Application Process"), ICC-02/04-01/15-205, 4 March 2015, paras 1-2.

and the Confirmation Decision.¹³ The Pre-Trial Judge reminds the VPO of the strictly confidential classification of the aforementioned filings and instructs it to refrain from disclosing to any person information subject to redactions contained in the corresponding public versions.¹⁴

B. INFORMATION PROVIDED TO WOULD-BE APPLICANTS

16. Timely and effective outreach action aimed at informing would-be applicants about the SC mandate and its victims' participation regime is critical.¹⁵ In this regard, the Pre-Trial Judge advises that, whenever practicable, the VPO should provide would-be applicants with complete, accurate, concise and accessible information regarding, *inter alia*: (i) the SC mandate; (ii) the material, temporal and geographic parameters of the crimes confirmed in the SC indictment, to the extent permitted by the applied redactions; (iii) the steps in the application process; (iv) the main features of the victims' participation regime; and (v) the SC reparations regime.¹⁶

C. COLLECTION OF APPLICATIONS

17. The Pre-Trial Judge emphasises that, whenever practicable, the VPO should assist the applicants in filling out the four-page "Application for Admission as a Victim Participating in Proceedings" form, available on the SC website ("Application Form").

¹³ The indicated filings are: KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*; F00034/A01, Specialist Prosecutor, *Indictment*, 30 October 2020, strictly confidential and *ex parte*.

¹⁴ *Mustafa* Victims' Applications Decision, para. 15.

¹⁵ *Mustafa* Victims' Applications Decision, para. 16. *Similarly*, ICC, *Ntaganda* Principles Application Process, para. 12; *Ongwen* Principles Application Process, para. 10.

¹⁶ *Mustafa* Victims' Applications Decision, para. 16. *Similarly*, ICC, *Ntaganda* Principles Application Process, para. 13; *Ongwen* Principles Application Process, para. 12; *Prosecutor v. Yekatom and Ngaïssona*, Pre-Trial Chamber II, *Decision Establishing the Principles Applicable to Victims' Application for Participation* ("*Yekatom and Ngaïssona* Principles Application Process"), ICC-01/14-01/18-141, 5 March 2019, para. 12.

Such assistance, be it in person or remotely, as the case may be, should entail a brief description of the content of the Application Form and the application process and, to the extent necessary, guidance in filling out the individual sections of the Application Form.¹⁷ However, victims are also free to fill in the Application Form on their own or with the assistance of a counsel. While applicants are encouraged to submit individual Applications Forms, this does not prevent a group of applicants having suffered similar harm as a direct result of the same crime, such as family members, from using one Application Form collectively. However, in this case, the requirements of a complete application must be fulfilled, as provided in paragraph 22, for each applicant.¹⁸

18. In light of the above, the Pre-Trial Judge instructs the VPO to report on the manner in which the applications have been received,¹⁹ the number of applications received and the time period in which such applications were received, as provided in paragraph 24.

D. SUBMISSION OF APPLICATIONS

19. Applications may be submitted to the Pre-Trial Judge until the submission of the Defence filing pursuant to Rule 95(5) of the Rules, which is the final deadline for applications submitted during the pre-trial phase. After that date, the VPO may submit the applications to the Trial Panel, as determined by that Panel.

20. Pursuant to Rule 113(2) of the Rules, before submitting the applications to the Pre-Trial Judge, the VPO must register and assess the received applications. This

¹⁷ *Mustafa* Victims' Applications Decision, para. 17. *Similarly*, ICC, *Ntaganda* Principles Application Process, para. 26; *Ongwen* Principles Application Process, para. 23.

¹⁸ Each applicant in the collectively filled out Application Form shall be assigned a separate pseudonym, as provided in paragraph 21.

¹⁹ This may include, for instance, whether the applications were received by post, email or submitted in person, by the applicant or through a third party.

entails a process in which the VPO (i) registers the received applications and assigns a pseudonym to each applicant; (ii) reviews the content of the received applications in order to identify any missing, incomplete and/or inaccurate information; (iii) where necessary, reverts to the applicants to request additional information or material to render the application complete; and (iv) prepares the applications for submission, as provided below.

21. As regards pseudonyms, the Pre-Trial Judge instructs the VPO to assign each applicant a number, irrespective of whether the applicants have requested protective measures or not. The pseudonym so assigned should be used as the sole identifier of the victim in public and (strictly) confidential filings, unless otherwise ordered by the competent Panel.²⁰

22. To render an application complete, the Pre-Trial Judge considers that at least the following requirements must be met: (i) there is sufficient proof of identity and, where relevant, kinship and/or legal guardianship; (ii) personal details are complete; (iii) all relevant sections of the Application Form are filled in; (iv) the date/period and location of the crimes as well as the harm suffered are sufficiently clearly indicated; (v) relevant and sufficient documentation has been submitted, to the extent possible; and (vi) the application is signed by the applicant or his/her legal guardian.²¹

23. The VPO should endeavour to submit only complete applications to the Pre-Trial Judge. To this effect, the VPO should expeditiously screen the applications and, if necessary, revert to the applicants to request additional information or material to make the applications complete. Where, in the VPO's view, an application is manifestly outside the scope of the confirmed charges, the VPO should nevertheless ensure that the requirements under (i)-(iv) and (vi) of paragraph 22 are fulfilled. Where, despite the VPO's best efforts, an application cannot be completed, the VPO

²⁰ *Mustafa* Victims' Applications Decision, para. 21.

²¹ *Mustafa* Victims' Applications Decision, para. 22.

should nevertheless submit it before the Pre-Trial Judge, indicating the measures taken to complete the application and the reasons for their failure. Ultimately, all applications, whether complete or not, should be submitted to the Pre-Trial Judge, unless they are withdrawn by the applicants.

24. As regards the preparation of the applications for submission, the Pre-Trial Judge considers that, in accordance with Rule 113(2) of the Rules, the VPO should submit a consolidated filing (“Report to the PTJ”),²² including in particular the following:

- (a) a report indicating:
 - (i) the manner in which the applications have been received, the number of applications received and the time period in which such applications were received;
 - (ii) the main steps of the assessment conducted by the VPO to ascertain the completeness of applications;
 - (iii) the number, as the case may be, of: (i) submitted complete applications and (ii) submitted incomplete applications and a summary of the reasons why the VPO nevertheless elected to submit them. In its last Report to the PTJ, before the final deadline provided in paragraph 19, the VPO should also indicate the number of any incomplete applications not submitted and whether the VPO envisages any further steps to be taken to ensure their completeness;
- (b) a summary of the recommendations on admissibility of the applications, taking into account the criteria provided in paragraphs 28-40;
- (c) a summary of the recommendations on grouping for the purpose of common representation, taking into account the criteria provided in paragraphs 42-43;

²² *Mustafa Victims’ Applications Decision*, para. 24.

(d) a summary of the requested protective measures, taking in consideration the criteria provided in paragraphs 45-48;

(e) annexes, as follows:

- a. an annex with confidential and *ex parte* tables indicating, as the case may be, the number and details of applicants recommended for admission – Group A, not recommended for admission – Group B or in relation to whom the VPO makes no recommendation – Group C;
- b. confidential and *ex parte* annexes, per each submitted application, consisting of a concise “Application Summary” prepared by the VPO. The “Application Summary” must indicate the following information, taking in consideration the criteria provided in paragraphs 28-48:
 - (i) the assigned pseudonym of the applicant;
 - (ii) personal details of the applicant, including family name, first name, date and place of birth, citizenship, language(s) spoken, and whether the applicant is a direct or indirect victim;
 - (iii) a detailed but concise description of the incident(s), including geographical and temporal parameters, pertaining to the crime(s) in the confirmed indictment, and the alleged perpetrator(s) or group(s) held responsible, if known;
 - (iv) the harm suffered, including a summary of the documentation submitted to demonstrate the harm suffered, to the extent available, and the causality between the incident(s) and the suffered harm;
 - (v) the VPO recommendation as to admissibility;
 - (vi) where relevant, the applicant’s request for protective measures and the VPO’s assessment and recommendation in that regard; and

- (vii) the VPO recommendation as to grouping, indicating the applicant's background, language, geographical location, potential conflict of interest, and any preferences/opinions stated by the applicant regarding legal representation.

25. Concomitantly with the submission of the Report to the PTJ, the VPO shall upload in Legal Workflow confidential and *ex parte* material, as follows:

- (a) an Application Form,²³ indicating for the applicant the same pseudonym as that provided in the corresponding annexed Application Summary; and
- (b) supporting documentation, if any, uploaded, organised and identified in such a manner as to indicate unequivocally the applicant to whom it belongs.²⁴

26. The Pre-Trial Judge further considers that such Reports to the PTJ should be submitted by the VPO periodically, pursuant to the timeline provided in paragraph 56.

E. ASSESSMENT OF APPLICATIONS

27. The VPO is instructed to conduct the preliminary assessment regarding the admissibility of applications, the grouping of applicants and the requested protective measures.

²³ In Legal Workflow, each Victim Entity (meta data category in Legal Workflow) should have in its Document List the corresponding Application Form. Applications Forms in Groups A and C should be uploaded with a revised translation. Application Forms in Group B may be uploaded with a draft or a revised translation.

²⁴ In Legal Workflow, all supporting documentation belonging to a Victim Entity should be listed in a numbered fashion. Where one and the same supporting document belongs to more than one Victim Entity, it should be listed for all such Victim Entities. The Pre-Trial Judge invites the VPO to upload draft translations to all supporting material, to the extent practicable.

1. Admissibility of Applications

28. In accordance with Article 22(1) of the Law and Rules 2, 113(1) and (4) of the Rules, a victim applicant is admitted to participate in the proceedings if there is *prima facie* evidence that:

- (a) the applicant is a natural person;
- (b) the applicant described acts in the application that appear to constitute a crime within the scope of the Confirmed Indictment;
- (c) the applicant has personally suffered harm; and
- (d) the harm was the direct result of a crime in the Confirmed Indictment.²⁵

(a) Standard of proof: *prima facie* evidence

29. Pursuant to Rule 113(4) of the Rules, the Pre-Trial Judge assesses the submitted information and supporting material on a *prima facie* basis.²⁶ Accordingly, the Pre-Trial Judge reviews the submitted information and supporting material on a case-by-case basis,²⁷ taking into account: (i) all relevant circumstances as apparent at first sight;²⁸ and (ii) the intrinsic coherence of the application.²⁹

²⁵ *Mustafa* Victims' Applications Decision, para. 27.

²⁶ The term *prima facie* means "at first sight; on the face of it; as it appears at first without investigation". See OED Online. Oxford University Press, September 2020. Web. 29 December 2020, <https://www.oed.com/view/Entry/151264?redirectedFrom=prima+facie#eid>

²⁷ *Mustafa* Victims' Applications Decision, para. 28. Similarly, STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, *Decision on Victims' Participation in the Proceedings* ("*Ayyash et al.* Decision on Victim Participation"), 8 May 2012, para. 62.

²⁸ *Mustafa* Victims' Applications Decision, para. 28. Similarly, ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, *Decision on Victim's Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings*, ICC-02/11-01/11-138, 4 June 2012, para. 21.

²⁹ *Mustafa* Victims' Applications Decision, para. 28. Similarly, ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, *Fourth Decision on Victims' Participation* ("*Bemba* 4th Decision on Victim Participation"), ICC-01/05-01/08-320, 12 December 2008, para. 31; *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, *Decision on Victim's Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings*, ICC-02/11-01/11-138, 4 June 2012, para. 21.

(b) Natural person

30. Pursuant to Article 22(1) of the Law and Rule 2 of the Rules, only natural persons are permitted to participate as VPPs in SC proceedings. Legal persons are thus excluded from participation. In order to submit a valid application, a natural person must have legal capacity.³⁰ As indicated in the Application Form, if the applicant is under 18 years of age or an adult declared as lacking legal capacity, he or she must be represented by a parent or a legal guardian.³¹

31. Applicants may submit as proof of identity: (i) identification documents, such as national identity cards, passports, residence cards, driving licences; and (ii) where identification documents are not available, any other reliable document(s) which contain information identifying the applicant, such as medical certificates, work identification documents, records issued by local authorities. Where the applicant is represented by a parent or a legal guardian, the following documents may be submitted as proof of legal guardianship: birth certificates, identity cards indicating parentage or legal guardianship, court decisions regarding guardianship, other records issued by local or national authorities.³²

(c) Alleged crime(s)

32. Pursuant to Article 22(1) of the Law and Rule 113(4) of the Rules, an applicant must aver to have been victim of one or more crimes in the indictment. In this context, “crime” pertains to any of the crimes reflected in the Confirmed Indictment. The

³⁰ See Law No. 2004/32 on Family Law providing in Article 15(2)-(3) that legal capacity is obtained upon the completion of the eighteenth year of age.

³¹ Application Form, Section 4.

³² *Mustafa Victims’ Applications Decision*, para. 30. *Similarly, STL, Ayyash et al. Decision on Victim Participation*, para. 33.

Applicant must describe, as specifically as possible, the place and time of the event and, if possible, any alleged perpetrator present at the scene or involved in the event.³³

(d) Personally suffered harm

33. Pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, an applicant must have personally suffered harm, including physical, mental or material harm, as a direct result of a crime in the indictment.

34. In relation to the harm having been suffered *personally* by the victim, this denotes a requirement that the harm is suffered *by* the applicant, *i.e.* his or her physical or psychological well-being or economic situation is affected. This may include harm suffered by victims subjected to the acts of the perpetrator(s) (“direct victims”)³⁴ or suffered by individuals in a close personal relationship with the direct victim killed or injured by the perpetrator(s) (“indirect victims”).³⁵

35. As regards physical harm, applicants must provide a description of the specific bodily injury, detailing, to the extent possible, the type, gravity, body region and number of injuries as well as their effects on the victim’s health, ability to work and well-being.³⁶ As proof of the physical harm, applicants may submit, to the extent

³³ *Mustafa Victims’ Applications Decision*, para. 31.

³⁴ *Mustafa Victims’ Applications Decision*, para. 33. Similarly, ICC, *Prosecutor v. Lubanga*, Appeals Chamber, *Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008* (“Lubanga Appeal Decision on Victim Participation”), ICC-01/04-01/06-1432, 11 July 2008, para. 32; *Prosecutor v. Lubanga*, Trial Chamber I, *Redacted Version of “Decision on ‘Indirect Victims’”* (Lubanga Decision on Indirect Victims), ICC-01/04-01/06-1813, 8 April 2009, para. 44; ECCC, *Co-Prosecutors v. Kaing*, Supreme Court Chamber, *Appeal Judgment* (“Duch Appeal Judgment”), 3 February 2012, para. 416; STL, *Ayyash et al.* Decision on Victim Participation, para. 39.

³⁵ *Mustafa Victims’ Applications Decision*, para. 33. Similarly, ICC, *Lubanga Appeal Decision on Victim Participation*, paras 1, 32; *Lubanga Decision on Indirect Victims*, paras 44, 50; ECCC, *Duch Appeal Judgment*, para. 417; STL, *Ayyash et al.* Decision on Victim Participation, para. 39; ICC, *Prosecutor v. Abdallah Banda*, Trial Chamber IV, *Decision on 19 Applications to Participate in the Proceedings*, ICC-02/05-03/09-528, 12 December 2013, para. 26; STL, *Ayyash et al.* Decision on Victim Participation, para. 67; STL, *Prosecutor v. Ayyash*, Pre-Trial Judge, *Decision Relating to Victims’ Participation in the Proceedings and Their Legal Representation* (“2020 Ayyash Decision on Victim Participation”), 17 April 2020, para. 25.

³⁶ Application Form, Section 2.3.

available, medical certificates (hospital records, radiography or other medical scan results, physician's reports, etc.), medication prescriptions, photographs or any other records attesting the bodily injury suffered.³⁷

36. As regards mental harm, applicants must provide a description of the specific psychological suffering, detailing, to the extent possible, its nature, gravity and manifestations as well as its effects on the victim's health, ability to work and well-being.³⁸ As proof of the mental harm, applicants may submit, to the extent available, attestations issued by qualified professionals, such as doctors, psychologists, psychiatrists or counsellors or any other records attesting the psychological suffering.³⁹

37. As regards material harm, applicants must provide a description of the specific property or pecuniary damage or loss, detailing, to the extent possible, the number and category/type of damaged, destroyed or lost goods, the type and proportion of the suffered damage or loss as well as the impact on the victim's livelihood.⁴⁰ As proof of the material harm, applicants may submit, to the extent available, records attesting personal property and/or prior income together with documentation demonstrating the material harm suffered, such as insurance claims, estimates or receipts for repairs, photographs, receipts of unemployment benefits and other relevant documents.⁴¹

³⁷ *Mustafa Victims' Applications Decision*, para. 34. *Similarly*, STL, *Ayyash et al. Decision on Victim Participation*, para. 67; 2020 *Ayyash Decision on Victim Participation*, para. 36.

³⁸ Application Form, Section 2.3.

³⁹ *Mustafa Victims' Applications Decision*, para. 35. *Similarly*, STL, *Ayyash et al. Decision on Victim Participation*, para. 79; 2020 *Ayyash Decision on Victim Participation*, para. 43.

⁴⁰ Application Form, Section 2.3.

⁴¹ *Mustafa Victims' Applications Decision*, para. 36. *Similarly*, STL, *Ayyash et al. Decision on Victim Participation*, paras 74-75; 2020 *Ayyash Decision on Victim Participation*, paras 38-40.

(e) Direct result of a crime in the indictment

38. Pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, the harm suffered must be the direct result of a crime in the indictment.

39. The harm is the direct result of the crime where, in the circumstances prevailing at the relevant place and time and taking in consideration the personal situation of the victim, the acts or omissions of the perpetrator(s) would most likely bring about that harm, as viewed by an objective observer.⁴² Applicants must indicate the causal link between the harm and the crime in the Confirmed Indictment by providing a description of the events, detailing, to the extent possible, the acts or omissions that caused the harm, the place, time, unfolding and duration of the events as well as any other relevant circumstances.⁴³

(f) VPO recommendation

40. The VPO shall submit all applications, regardless of whether, in its view, they are admissible (Group A) or not (Group B), or whether they are to be deferred to the determination of the Pre-Trial Judge (Group C). Before submitting the applications, however, the VPO may advise the applicants of the criteria under Article 22(1) of the Law and may give applicants the opportunity to supplement or withdraw such applications, if they so wish.

41. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on admissibility taking in consideration the aforementioned criteria.

⁴² *Mustafa Victims' Applications Decision*, para. 38. *Similarly, albeit in the Rome Statute context: ICC, Bemba 4th Decision on Victim Participation*, para. 77.

⁴³ Application Form, Section 2.2.

2. Grouping of Applicants

42. In accordance with Article 22(4) of the Law and Rule 113(2) and (8) of the Rules, the VPO shall make a recommendation on common representation. It may propose that applicants, recommended to be admitted (Group A) or in relation to whom the VPO has deferred to the determination of the Pre-Trial Judge (Group C), form one group, represented by a common Victims' Counsel, or several groups, each commonly represented. To this effect, it may consider the criteria set out in Rule 113(8) of the Rules.

43. A need to divide applicants into more than one group arises when the situation or the specificity of the victims is so different that their interests are irreconcilable,⁴⁴ making their common representation impracticable. That being said, mere dissimilarity between the personal situations of the victims may not suffice to create more than one group. Accordingly, the fact that victims suffered different forms of harm, were subjected to different crimes, have different ethnicities, reside in different areas, originate from different countries, speak different languages, have different political views, or have an additional interest or view, which is not shared but not disputed by other victims, may not automatically warrant separate representation.⁴⁵ Conversely, where several of the aforementioned considerations overlap, namely, that the victims suffered harm as a direct result of distinct crimes, which took place in different circumstances, on different dates and in different locations, using distinct *modi operandi* and targeting different individuals, the division of victims in more than

⁴⁴ *Mustafa Victims' Applications Decision*, para. 42. Similarly, ICC, *Prosecutor v. Abdallah Banda and Jerbo*, Trial Chamber IV, *Decision on Common Legal Representation ("Banda and Jerbo Decision")*, ICC-02/05-03/09-337, 25 May 2012, para. 42.

⁴⁵ *Mustafa Victims' Applications Decision*, para. 42. Similarly, ICC, *Banda and Jerbo Decision*, para. 42; STL, *Ayyash et al. Decision on Victim Participation*, para. 124. See also ICC, *Prosecutor v. Kosgey and Sang*, Registry, *Summary of Information Relevant to the Grouping of Victims*, ICC-01/09-01/11-243-Anx2, 1 August 2011, paras 2-3, 7-11; *Prosecutor v. Muthaura et al.*, Registry, *Summary of Information Relevant to the Grouping of Victims*, ICC-01/09-02/11-214-Anx2, 5 August 2011, paras 2-3, 8-12; *Prosecutor v. Abdallah Banda and Jerbo*, Registry, *Summary of Information Relevant to the Grouping of Victims*, ICC-02/05-03/09-203-Anx2-Red, 25 August 2011, para 5.

one group may be warranted.⁴⁶ The same applies where one fundamental consideration makes their interests irreconcilable, such as some of the victims having caused harm to other victims.⁴⁷

44. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on grouping for the purpose of common representation taking in consideration the aforementioned criteria.

3. Protective Measures

45. In accordance with Rules 80 and 113(2) and (5) of the Rules, the VPO shall make recommendations as to the applicants' requests for protective measures if necessary for their protection, safety, physical and psychological well-being, dignity and privacy. These recommendations shall pertain to all applicants, namely: (i) applicants recommended to be admitted (Group A) and those in relation to whom the VPO has deferred to the determination of the Pre-Trial Judge (Group C); and (ii) by virtue of the confidentiality of the application process, any rejected applicants (Group B).⁴⁸

46. Pursuant to Rule 80(4)(a), (d) and (e) of the Rules, the measures relevant at this stage of proceedings are the following: the redaction of names and identifying information from the SC public records (Rule 80(4)(a)(i)); non-disclosure to the public of any records identifying the applicant (Rule 80(4)(a)(ii)); the assignment of a pseudonym (Rule 80(4)(a)(vi)); non-disclosure to the Accused by Specialist Counsel of any material or information that may lead to the disclosure of the identity of the

⁴⁶ *Mustafa Victims' Applications Decision*, para. 42. Similarly, STL, 2020 *Ayyash Decision on Victim Participation*, para. 66.

⁴⁷ *Mustafa Victims' Applications Decision*, para. 42. Similarly, ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, *Order on the Organisation of Common Legal Representation of Victims*, ICC-01/04-01/07-1328, 22 July 2009, para. 12(c); *Prosecutor v. Ntaganda*, Pre-Trial Chamber I, *Decision Concerning the Organisation of Common Legal Representation of Victims*, ICC-01/04-02/06-160, 2 December 2013, paras 10, 23.

⁴⁸ *Mustafa Victims' Applications Decision*, para. 44.

applicant (Rule 80(4)(d)); or, in exceptional circumstances, and subject to any necessary safeguards, the non-disclosure to the Parties of any aforementioned material (Rule 80(4)(e)).

47. The Pre-Trial Judge recalls the legal test for determining if certain information may be withheld from the receiving Party,⁴⁹ which entails an assessment of whether:

- (i) the disclosure of the information in question poses an objectively justifiable risk to the protected person or interest;
- (ii) the protective measure is strictly necessary.⁵⁰ Thus, if less restrictive protective measures are both sufficient and feasible, such protective measures must be chosen; and
- (iii) the protective measure is proportionate in view of the prejudice caused to the Accused and a fair trial.⁵¹

48. In case an applicant has not requested any Rule 80 protective measures, the VPO is instructed to make recommendations as to whether and which specific protective measures the Pre-Trial Judge shall adopt on his own motion, considering the stage of the proceedings and other relevant considerations.⁵²

49. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on protective measures, as provided in paragraph 46, taking in consideration the aforementioned legal test.

⁴⁹ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public, para. 85. See also KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, para. 76.

⁵⁰ Article 21(6) of the Law.

⁵¹ Rule 80(1) of the Rules.

⁵² *Mustafa Victims' Applications Decision*, para. 47.

F. ROLE OF THE PARTIES IN THE APPLICATION PROCESS

50. The Pre-Trial Judge recalls that, pursuant to Rule 113(1) of the Rules, Application Forms are not disclosed to the Parties. The VPO is required, however, as provided in Rule 113(2) of the Rules, to submit to the Parties a confidential summary of its Report to the PTJ (“Report to the Parties”). This report shall be filed concurrently with the Report to the PTJ; alternatively, the VPO may indicate whether the Report to the PTJ can be re-classified so that it be shared with the Parties, provided it does not contain identifying information warranting redactions. The Report to the Parties should include the following information, without providing identifying information on the applicants:

- (a) a summary of the collection process of applications;
- (b) the total number of applications received and the number of applications submitted to the Pre-Trial Judge;
- (c) the alleged crimes or crime sites as well as the alleged perpetrator(s);
- (d) the number of direct and indirect victims whose applications have been submitted, and the type of documentation accepted to prove identity, kinship, guardianship;
- (e) the types of harm alleged and the type of documentation accepted to prove such harm;
- (f) a summary of the VPO recommendation on admissibility, indicating the number of applications proposed to be admitted (Group A), rejected (Group B) or deferred to the determination of the Pre-Trial Judge (Group C), with a general description of the reasons for each group;
- (g) a summary of the VPO recommendation on grouping for the purpose of common representation, with a general description of the reasons thereof; and

(h) a summary of the protective measures requested and the VPO recommendations thereon.⁵³

51. On the basis of the Report to the Parties and in accordance with Rule 113(3) of the Rules, Parties may make submissions on legal grounds regarding admissibility and common representation, namely on the application and interpretation of the criteria provided in paragraphs 28-39 and 42-43.

52. Bearing in mind that the withholding of information from the Parties must be consistent with the rights of the Accused and the fairness of proceedings, the Pre-Trial Judge considers that Rule 113(3) of the Rules does not preclude the Parties from making submissions on the interpretation and application of the criteria provided in paragraphs 45-48 in relation to any requests for protective measures under Rule 80(4)(d) or (e) of the Rules.⁵⁴

53. In light of the above, the Pre-Trial Judge orders the Parties to file their submissions on the VPO recommendations regarding admissibility, common representation and protective measures within ten (10) days of having been notified of the Report to the Parties.

54. The Pre-Trial Judge further recalls that, pursuant to Rule 113(6) of the Rules, Parties may seek certification to appeal the decision on victims' participation, but only on grounds of an error of law.

G. REMEDY FOR DENIED APPLICANTS

55. Pursuant to Rule 113(6) of the Rules, applicants may appeal as of right a decision of the Pre-Trial Judge denying their applications. Such appeals must be submitted before the Court of Appeals Panel within 14 days of the decision denying the

⁵³ *Mustafa* Victims' Applications Decision, para. 49.

⁵⁴ *Mustafa* Victims' Applications Decision, para. 51.

application. The Pre-Trial Judge recalls in this regard that, pursuant to Rules 9(2) and 113(5) of the Rules, the aforementioned time limit runs from the first working day after the notification to the applicant of the decision denying admission.

IV. DISPOSITION

56. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **DIRECTS** the Registrar to make available the un-redacted versions of the Confirmed Indictment and the Confirmation Decision to the VPO, as provided in paragraph 15;
- b. **ORDERS** the VPO to refrain from disclosing to any person information subject to redactions in the public versions of the Confirmed Indictment and the Confirmation Decision;
- c. **ORDERS** the VPO to file its Report to the PTJ following the instructions and guidelines as set out in this decision, by 15 February 2021;
- d. **ORDERS** the VPO to file its Report to the Parties concurrently with the Report to the PTJ, or to indicate whether the Report to the PTJ can be reclassified so that it be shared with the Parties and, if possible, the public;
- e. **ORDERS** the VPO to file further Reports to the PTJ, if any, on a regular basis, and the latest by the submission of the Defence filing pursuant to Rule 95(5) of the Rules;
- f. **ORDERS** the VPO to file its further Reports to the Parties, corresponding to its further Reports to the PTJ, as indicated in paragraph 56.d; and
- g. **ORDERS** the Specialist Prosecutor and the Defence for the Accused to file submissions pursuant to Rule 113(3) of the Rules, if any, within ten (10) days

of the notification of each Report to the Parties or, as the case may be, the reclassified version of each Report to the PTJ.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 4 January 2021
At The Hague, the Netherlands.