

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

Filing Participant: Specialist Counsel for Hashim Thaçi

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**Thaçi Defence Response to the First Registry Report
on Victims' Applications for Participation in the Proceedings**

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I. INTRODUCTION

1. On 4 January 2021, the Pre-Trial Judge issued his Framework Decision on Victims' Applications.¹
2. On 18 February 2021, the Defence for Mr Hashim Thaçi ("defence") was notified of the First Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings ("VPO Report").² The Victims' Participation Office ("VPO") recommends that the Pre-Trial Judge admit 17 applicants as participating victims,³ and deny the admission of one applicant on the ground that the events described in the application form fall outside the temporal scope of the indictment.⁴
3. The VPO requests the non-disclosure to the public of identifying information of the 17 applicants, and that they each be assigned a pseudonym. In addition, the VPO requests that the Pre-Trial Judge grant protective measures under Rule 80(4)(d) of Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") and Rule 80(4)(e) to six of the applicants, who are either residing in Kosovo, or have family in Kosovo.⁵
4. The defence hereby submits its observations in response to the VPO Report pursuant to Rule 113 (3).

¹ KSC-BC-2020-06/F00159 ("Framework Decision").

² KSC-BC-2020-06/F00203, dated 15 February 2021, reclassified as public on 18 February 2021.

³ Victim-01/06, Victim-02/06, Victim-03/06, Victim-04/06, Victim-05/06, Victim-07/06, Victim-08/06, Victim-09/06, Victim-10/06, Victim-11/06, Victim-12/06, Victim 13/06, Victim-14/06, Victim-16/06, Victims-17/06, Victim-18/06 and Victim-19/06 (Group A). See VPO Report, para. 48.

⁴ Victim-06/06 (Group B). See VPO Report, para. 49.

⁵ Victim-09/06, Victim-10/06, Victim-11/06, Victim-12/06, Victim-14/06 and Victim-19/06. See VPO Report, paras 62-63.

II. APPLICABLE LAW

5. Pursuant to Article 22 of the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), "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." Rule 2 requires that a victim has suffered harm "as a direct result of a crime alleged in an indictment confirmed by the Pre-Trial Judge."

6. Rule 113 defines the conditions of admission of victims for participation in the proceedings. The VPO is charged with assessing victims' applications and providing recommendations on admissibility, common representation and protective measures. Rule 113(1) provides that "application forms shall not be disclosed to the Parties". Rule 113(3) states that "the Parties may only make submissions on legal grounds regarding admissibility and common representation." Pursuant to Rule 113(4), to determine whether a victim may participate in the proceedings, 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".⁶

III. DEFENCE SUBMISSIONS

A) ADMISSIBILITY OF VICTIM APPLICATIONS

7. The defence offers the following general submissions on the admissibility of victim applications in the present case.

⁶ See also Framework Decision, paras 28 et seq.

a. Incomplete or otherwise defective application forms should be dismissed

8. Unlike at the International Criminal Court (“ICC”),⁷ the KSC’s statutory framework prevents the parties from reviewing victim application forms⁸ and thereby acting as a safeguard by highlighting any incomplete, inconsistent or otherwise defective aspects of the application forms warranting their dismissal. As such, the obligation on the VPO is even greater as regards identifying such flaws and bringing these to the attention of the Pre-Trial Judge. While unable to make any observations on specific applications, the defence submits that victim applications must be dismissed in the following circumstances:

- When they are incomplete,⁹ including:
 - When an applicant fails to provide adequate proof of his or her existence and identity;¹⁰
 - Where an application fails to substantiate a familial or legal link with a child, for an application submitted on behalf of a child.¹¹
- Where inconsistencies exist between/within the identification documents and the application form;¹²

⁷ ICC Rules of Procedure and Evidence, Rule 68, “[...] the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber”.

⁸ Rule 113(1) “[...] Application forms shall not be disclosed to the Parties.”

⁹ ICC, *Situation en République Démocratique du Congo*, ICC-01/04-423-Corr, Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/[...] », 31 Janvier 2008, para. 14.

¹⁰ ICC, *Situation in Uganda*, ICC-02/04-101, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, paras 16-21, recognising that even with administrative challenges in Uganda “in principle, the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the holder.”

¹¹ ICC-01/04-423-Corr, para. 31; ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-579, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para. 37.

¹² ICC-01/04-01/07-579, para. 52.

- Where the harm alleged falls outside the temporal scope of the charges,¹³ or where the application fails to specify the date of the alleged event;¹⁴ and
- Where the harm alleged falls outside the geographical scope of the charges, or where the application fails to specify the location of the alleged event.¹⁵

b. Participating victims must be limited to those who have suffered harm as a direct result of a crime in the Indictment

9. In order for victim participation to be meaningful, it cannot be without limits. As noted by the Pre-Trial Judge in his Framework Decision, pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, the harm alleged by the applicants must be the **direct result of a crime in the indictment**.¹⁶ This approach is consistent with the practice at the ICC, where Chambers required a robust causal link between victim applicants and the alleged crimes.¹⁷ Victim applications were required to present *prima facie* evidence¹⁸ of “a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe [the accused] is criminally responsible and for whose commission the Chamber issued an

¹³ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-601-tEN, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, 20 October 2006, p. 12.

¹⁴ ICC, *Situation en République Démocratique du Congo*, ICC-01/04-423-Corr, *Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06*, para. 34.

¹⁵ ICC-01/04-01/07-579, para. 83.

¹⁶ Framework Decision, paras 38-39.

¹⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victim Participation of 18 January 2008, 11 July 2008, para. 62.

¹⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-807, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 30 June 2010, para. 92: The victim applications must provide “sufficient evidence to establish *prima facie* that the applicant is a victim under Rule 85(a) of the Rules, on the basis that he or she suffered personal harm as a result of crimes confirmed against the accused”.

arrest warrant”.¹⁹ In the *Katanga* case, for example, the Victim Participation and Reparations Section was instructed only to transmit applications which referred to acts in the confirmed charges, being the attack on the village of Bogoro on 24 February 2003.²⁰

10. Victim applicants were also required to provide *prima facie* evidence of a sufficient link between the harm suffered and the accused. In the *Al Bashir* case, for example, Pre-Trial Chamber I rejected applications for participation where the harm suffered did not appear to be linked to the forces under Al Bashir’s command, or were of a different nature from those specified in the arrest warrant.²¹

11. In this case, the VPO has adopted an approach to the scope of victims’ admission that is broad to the point of being unworkable. The VPO submits that an act falling within the scope of the indictment is “any event that could constitute a crime alleged in the Confirmed Indictment that occurred between March 1998 and September 1999 in the territory of Kosovo and northern Albania by or with the authorization or support of KLA members.”²² The VPO maintains that the alleged crime sites are not limited to those listed in the Confirmed Indictment, as the Indictment itself is not exhaustive as to crime scenes as indicated by the use of words

¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-172-tEN, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, Lubanga, 29 June 2006, p. 6.

²⁰ ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009, para. 74: the Trial Chamber II “consider[ed] it vital to define the territorial limits within which the crimes accepted in the Decision on the confirmation of charges were committed”. In this particular case, the Trial Chamber II ruled that “*les limites territoriales dans lesquelles ont été commis les crimes retenus dans la Décision relative à la confirmation des charges doivent s’entendre comme couvrant le village de Bogoro et son immédiate périphérie* » : ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1737, *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 22 December 2009, para. 21.

²¹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-93, Decision on 8 Applications for Victims’ Participation in the Proceedings, 9 July 2010.

²² VPO Report, para. 30.

“including” and “illustrative” to define the location of the alleged crimes.²³ As a result, the VPO submits that the Pre-Trial Judge should not consider himself limited by the events and sites expressly set out in the Indictment or its schedules.

12. The inclusion of non-exhaustive terms such as “including” and “illustrative” to refer to locations is impermissibly vague and thus defective and will be the subject of a forthcoming challenge by the defence under Rule 97(b) of the Rules.²⁴ The defence will not rehearse these arguments here prematurely but invites the Pre-Trial Judge to consider them in due course when it receives the defence challenge under Rule 97 (b) *before* ruling on these Observations.

13. Without prejudice to the forthcoming challenge to the form of the Indictment, the arguably defective Indictment cannot be used as a hook to expand victim participation beyond its reasonable and intended bounds, and encompass participation in these proceedings by anyone who alleges harm arising from any crime that occurred in Kosovo or Northern Albania between March 1998 and September 1999 regardless of whether the accused is charged with it. Such an approach would throw open the process of victim participation far beyond that which is meaningful or potentially manageable, and cannot be reconciled with the Framework Decision’s requirement that the harm alleged by the applicants must be the **direct result of a crime in the indictment**.²⁵ The defence offers more specific submissions on the temporal and geographical scope and relevant causal nexus below.

²³ VPO Report, paras 24-30.

²⁴ KSC-BC-2020-06/F00190/CONF/RED, Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, 5 February 2021, paras 140, 144.

²⁵ Framework Decision, paras 38-39.

i. Temporal scope

14. Mr Thaçi is charged with crimes allegedly committed between March 1998 and September 1999, therefore any application claiming harm on the basis of events which occurred outside of this temporal scope, such as the one of Applicant Victim-06/06,²⁶ must be dismissed.

ii. Geographical scope

The VPO should be ordered to disclose the exact location of the alleged crimes mentioned in the victim applications.

15. The defence notes that the VPO has not disclosed, in its Report, the location of the alleged crimes mentioned by the applicants. For applicants Victim-01/06, Victim-02/06, Victim-03/06, Victim04/06 and Victim-05/06, the VPO refers only to a “same detention site listed in the Confirmed Indictment, within the indictment period”.²⁷ With regard to Victim-07/06, the VPO notes that the applicant alleges several crimes “in an unknown location in Kosovo within the indictment period.” For the remaining applicants, the VPO simply indicates that they allege events “on the territory of Kosovo” within the indictment period,²⁸ thereby encompassing an area of 10,887 km².

16. While Rule 113(2) provides that the VPO shall submit to the Parties a confidential report, “without providing any identifying information of the applicants”, the defence submits that in general, the location of an alleged crime is not identifying in itself, especially in the absence of any details regarding the alleged crime, such as the date. As such, the location of the alleged crimes should be disclosed to the defence to ensure the fairness of the proceedings,²⁹ and to allow it to

²⁶ VPO Report, para. 39.

²⁷ VPO Report, para. 38.

²⁸ VPO Report, paras 38-47.

²⁹ See Framework Decision, para. 52: “the withholding of information from the Parties must be consistent with the rights of the Accused and the fairness of proceedings.”

submit meaningful observations on the legal grounds regarding admissibility, and in particular on the geographical scope of the Indictment. In his Framework Decision, the Pre-Trial Judge himself ordered that the VPO Report to the Parties includes “the alleged crimes or crime sites as well as the alleged perpetrator(s).”³⁰ At a minimum, if the precise location is not given because it would permit to identify the victim, the VPO should justify it and provide sufficient details so as to assess whether the alleged crimes fall within the geographical scope of the Indictment.

The geographical scope of the indictment must be defined strictly

17. In addition, the defence submits that the geographical scope against which the VPO has assessed the applications is too broad and exceeds the charges as confirmed against Mr Thaçi. It should be interpreted strictly and limited to the specific crime sites listed in the Confirmed Indictment,³¹ both in fairness to the Accused and for the proper administration of justice.³²

18. Practically, if this wide geographical scope were to be retained, this would mean that applicants could allege harm on the basis of any events at locations not listed in the Confirmed Indictment. This would then require these applicants to present *prima facie* evidence not only of the harm suffered, but the existence of the crime or event itself, as well as its link with Mr Thaçi, or at least with the KLA. 20 years after the alleged events, this would not only probably exceed their capacity, it would undoubtedly delay the process.

19. As such, the defence submits that applicant victims should be required to demonstrate *prima facie* evidence of harm arising from charged crimes alleged to have occurred at sites expressly listed in the Confirmed Indictment, in particular in its Schedules A, B and C.

³⁰ Framework Decision, para. 50(c).

³¹ KSC-BC-2020-06/F00134.

³² ICC-01/04-01/07-1491-Red-tENG, para. 74; ICC-01/04-01/07-1737, para. 21.

20. The defence also submits that when an applicant alleges a crime “in an unknown location in Kosovo”, such as Victim-07/06, his application should be dismissed as insufficiently precise; the lack of specific location does not allow the Pre-Trial Judge to control the geographical scope of the alleged crimes nor to assess the intrinsic coherence of the application.³³

iii. Causal nexus between harm suffered and crimes set out in the Indictment

21. As noted by the Pre-Trial Judge in his Framework Decision, pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, the harm alleged by the applicants must be the direct result of a crime in the indictment.³⁴ A causal link must exist between the crimes charged and the harm alleged, both for direct and indirect victims.³⁵ The causality between the commission of the crime and the harm suffered by the applicant shall be assessed on a case-by-case basis, in light of the information available in the application form and the supporting material, when available. The applicant does not need to demonstrate that the alleged crimes charged by the SPO are the only or substantial cause of the harm suffered by the applicant; it is sufficient if the applicant demonstrates that the alleged crimes could have objectively contributed to the harm suffered. Nonetheless, when the harm alleged by the applicant is remote in relation to the alleged crimes, his or her application for participation will be rejected.³⁶

³³ See Framework Decision, para. 29.

³⁴ Framework Decision, paras 38-39.

³⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1813, Redacted version of "Decision on 'indirect victims'", 8 April 2009, para. 45.

³⁶ *Prosecutor v. Gbabgo*, ICC-02/11-01/11-138, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012.

c. Indirect victims

22. The defence submits that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims. The VPO submits that in the case of a murder or disappearance, the moral or material harm of close family members of the direct victim can be presumed and does not need to be separately supported.³⁷ However the Pre-Trial Judge has stated that both material and mental harm must be described in detail by the applicants and has provided examples of admissible evidence.³⁸ The defence submits that only first-degree relatives could be presumed to have a special bond of affection with the direct victim and that any alleged material harm must be supported.

23. Indirect victims should also be required to submit a proof of kinship with the direct victim and, where relevant, of the alleged death of their relative;³⁹ a death certificate may not be sufficient if the applicant does not justify his/her family link as well.

24. Given that an applicant must have *personally* suffered harm, applications filed on behalf of a deceased person should also be dismissed; to be admissible, the application should be filed in the applicant's *own* name and allege, eventually, a *personal* harm resulting from the death of his/her relative.⁴⁰

d. Dual status of victim/witness

25. The defence observes that, in accordance with Rule 113(1), victim application forms have not been disclosed to either the defence or the SPO. Nevertheless, in

³⁷ VPO Report, para. 35.

³⁸ Framework Decision, paras 36-37.

³⁹ ICC, Prosecutor v. Kony & all, ICC-02/04-179, Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, paras 1-2.

⁴⁰ ICC-01/04-01/07-579, paras 62-63.

order to ensure the fairness of the proceedings, the defence submits that it is entitled to immediate disclosure of the application forms of any participating victims who may be called by the SPO as witnesses in the proceedings.⁴¹ Therefore, the defence asks the Pre-Trial Judge to order the VPO to disclose to both parties the application forms of the applicants who have already been interviewed by the SPO as witness, whose material has been disclosed to the defence and/or who are mentioned in the Confirmed Indictment or the SPO Rule 86(3)(b) Outline.⁴²

B) COMMON REPRESENTATION

26. At this stage, the Defence has no observations on the common representation of victims.

C) PROTECTIVE MEASURES

27. The VPO submits that the identity of the applicants should not be disclosed to the public, and that six of the applicants (either residing in Kosovo or with family residing in Kosovo) should remain anonymous vis-à-vis the Accused and his Counsel,⁴³ on the ground that there would be “objectively justifiable risks to all applicants, without the need for applicants to specifically list concrete threats against them”, in light of the “concerns over a dangerous climate of intimidation of witnesses and victims in Kosovo and the fact that Kosovo is a small country, where people live in tight-knit communities and the Accused have immense influence, connections, resources, and support structures, affect all victims applying for participation.”⁴⁴

⁴¹ See ICC, *Prosecution v. Lubanga*, ICC-01/04-01/06-1637, Decision on the defence application for disclosure of victims applications, 21 January 2009, paras 9-13, where the Prosecution was ordered to disclose to the defence the unredacted version of the victim-witness applications.

⁴² KSC-BC-2020-06/F00136.

⁴³ VPO Report, paras 61-62.

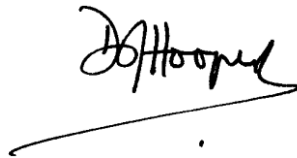
⁴⁴ VPO Report, paras 59-60.

28. The VPO's request for full anonymity of six applicants should be dismissed. Unsubstantiated allegations of victim intimidation are insufficient to justify this extreme measure, particularly in the absence of any explanations as to why these six applicants should benefit from additional protective measures. The fact that an applicant lives in Kosovo or has family in Kosovo is not a sufficient ground to warrant the non-disclosure of his/her identity to the defence, especially when the applicant has not alleged any concrete threat against them or established that there is a real risk of interference should their identities be known.

29. Last, the defence notes that the Pre-Trial Judge may deem it appropriate to seek the views of the parties on the participatory rights of the victims at the pre-trial stage in light of their status, given that the scope of participation will differ as between anonymous and non-anonymous victims⁴⁵ and for victims who have the dual status of victim and witness.⁴⁶

[Word count: 3 638]

Respectfully submitted,



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Friday, 26 February 2021

At London, United Kingdom

⁴⁵ See, *inter alia*, ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-537, Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims.

⁴⁶ See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008, para. 134; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1379, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008.