

In: KSC-BC-2020-06

The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: A Panel of the Court of Appeals Chamber

Judge Michèle Picard

Judge Emilio Gatti

Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Duty Victims' Counsel

Date: 7 June 2021

Language: English

Classification: Public

Public Redacted Version of the Appeal against the "First Decision on Victims' Participation" pursuant to Rule 113(6) of the Rules

Specialist Prosecutor's Office

Jack Smith

Duty Victims' Counsel

Dr Anni Pues

Victims' Counsel

Simon Laws QC

Head of Victims' Participation Office

Silke Studzinsky

Counsel for Hasim Thaçi

David Hooper QC

Counsel for Kadri Veseli

Ben Emmerson CBE QC

Counsel for Rexhep Selimi

David Young QC

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. Introduction

1. As Duty Counsel for denied applicants Victim-08/06, Victim-09/06, Victim-10/06, Victim-11/06, Victim-13/06 and Victim-14/06, I hereby submit an appeal against the First Decision on Victims' Participation (hereafter: 'First Decision')¹ issued by the Pre-Trial Judge pursuant to Rule 113 (6) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('Rules'). Victim-06/06 whose application falls outside the temporal jurisdiction of the KSC, accepts the decision of the PTJ and does not appeal the decision.

II. Procedural Background

2. On 26. October 2020, the Pre-Trial Judge confirmed the indictment in this case in a reasoned decision.
3. On 30 October 2020, the Specialist Prosecutor's Office (SPO) submitted the indictment as confirmed, with redactions as authorised by the Pre-Trial Judge.
4. On 4 January 2021, the Pre-Trial Judge rendered the Framework Decision on Victims' Applications.²
5. On 15 February 2021, the Victims' Participation Office (VPO) submitted eighteen applications for the status of a participating victims in the proceedings in the First Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings³ in which it recommended the admission of the denied applicants.

¹ KSC-BC-2020-06, Pre-Trial Judge, *First Decision on Victims' Participation*, 21 April 2021.

² KSC-BC-2020-06, Pre-Trial Judge, *Framework Decision on Victims' Applications*, 4 January 2021 (hereafter: Framework Decision).

³ KSC-BC-2020-06, Registrar, *First Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings*, 15 February 2021.

6. On 21 April 2021, the Pre-Trial Judge rendered the impugned First Decision on Victims' Participation.⁴
7. With assignment letter of 12 May 2021, Anni Pues was appointed as Duty Counsel for the denied applicants to assist them with the appeal.
8. The denied applicants Victims 08/06 and 13/06 were notified on 14 May 2021, and denied applicants Victims 09/06, 10/06 and 11/06 were notified on 17 May of the decision in their language. Victim 14/06 was notified of the decision on 4 June 2021 after a delay of nearly three weeks due to issues within the delivery services.
9. Due to the varying time limits and exceptional circumstances, the Motion on Clarification and Variation of the Time Limit was filed on Friday, 28 May 2021.
10. With the Decision on Counsel's Motion for Clarification and Variation of Time Limit on 31 May 2021, the Appeals Chamber set the time limit for the joint appeal of the denied applicants for 7 June 2021.

III. Applicable Law

11. Pursuant to Art 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.
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.
13. Pursuant to Rule 9 (2) of the Rules, this time limit runs from the first working day after the notification to the applicant of the decision; pursuant to rule 9 (5) (a) of the Rules, the Panel may extend the time limit upon showing of good cause.
14. Article 22 (3) of the Law determines that a victim's personal interest and rights in the criminal proceedings before the Specialist Chambers are notification,

⁴ First Decision.

acknowledgement and reparation as well as reasonable reparation to Victims from an accused who has pled or been adjudged guilty of a crime(s) which has directly resulted in harm to the Victims.

15. According to rule 113 (4) of the Rules sets out that in deciding whether a victim may participate in the proceedings, the Panel shall consider whether the applicant has provided *prima facie* evidence of the harm suffered as a direct result of a crime in the indictment.

16. The provisions in the Law and the Rules are governed by the foundational principles set out in article 3 (2) of the Law, which provides that the Specialist Chambers shall adjudicate and function in accordance with ‘international human rights law which sets criminal justice standards’.⁵

17. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter ‘UN Basic Principles’) provide

‘that the Basic Principles... identify existing legal obligations under international human rights law and international humanitarian law...

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted *collectively*...

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law

For purposes of the present document, victims are persons who individually or *collectively* suffered harm... through acts or omissions that

⁵ Art. 3 (2) (e) of the Law.

constitute gross violations of international human rights law, or serious violations of international humanitarian law.’⁶

IV. Preliminary remarks on the applicable principles of interpretation

18. According to the foundational principles set forth in Article 3 of the Law, the Court shall adjudicate in accordance with customary international law⁷ and international human rights law.⁸ Henceforth, the interpretation of Article 22 of the Law needs to follow the rules set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which reflects customary international law.⁹ This specifically requires a textual analysis and consideration of the object and purpose of the agreement that led to the establishment of the Kosovo Specialist Chambers. Within this frame, the interpretation must give weight to international human rights law and aim to best realise applicable human rights.

19. The Appeal Brief entails a general discussion of the relevant legal issues in the impugned decision. These are of fundamental importance for this case and the development of victims’ participation at the KSC in general. Ultimately, the questions discussed will determine whether the KSC develops a practice of enabling or limiting victims’ participation. Additionally, it includes a brief

⁶ UN General Assembly, Resolution A/RES/60/147, ‘Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005. (Emphasis of the word *collectively* added.)

⁷ Art 3(2)(d).

⁸ Art 3(2)(e).

⁹ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at p. 46, para. 65; *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, at pp. 109–110, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 625, at pp. 645–646, para. 37; *LaGrand* (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466, at p. 501, para. 99.

discussion of specificities in the individual applications that go beyond the general legal considerations provided in the subsequent sections.

V. Grounds of appeal

a. The Pre-Trial Judge erred in the determination of the relevant temporal, geographical and material scope of the indictment.

20. The Pre-Trial Judge found that the crimes from which the denied applicants suffered harm would 'not fall under the temporal, geographical and material scope of the charges, as specified in the Confirmed Indictment'.¹⁰

21. The temporal scope, the indictment period, has been specified as 'at least March 1998 through September 1999' and geographically extends to Kosovo and Northern Albania'.¹¹ Materially, the charges cover war crimes and crimes against humanity through, *inter alia*, imprisonment/illegal or arbitrary arrest and detention, persecution, enforced disappearance and murder.¹² All the denied applicants have provided *prima facie* evidence of the harm that they have suffered as a direct result of a crime that occurred within those said parameters.

22. The denied applicants have suffered from the following crimes:

- Victim-08/06 suffered harm from the crime of enforced disappearance and detention, starting on [REDACTED] in [REDACTED], Kosovo.
- Victims-09/06, 10/06 and 11/06 (a family unit) suffered harm from enforced disappearance, starting on [REDACTED] in [REDACTED], Kosovo.
- Victim-13/06 suffered harm from illegal or arbitrary arrest and detention and ultimately enforced disappearance, starting from [REDACTED], in [REDACTED], Kosovo.

¹⁰ First Decision, para 48.

¹¹ Indictment, para 16.

¹² Indictment, para 172.

- Victim-14/06 suffered harm from murder on [REDACTED] in [REDACTED], Kosovo.

None of these specific events are listed in Schedule A-C of the indictment.

23. However, the indictment alleges that it was the common purpose of the JCE formed by the accused to unlawfully intimidate, mistreat, commit violence against, and remove those deemed to be opponents through the entirety of the indictment period.¹³ The SPO alleges that JCE Members and Tools detained, mistreated, and/or killed hundreds of Opponents.¹⁴ Those '[i]ncidents of enforced disappearance of persons *include* those identified in Schedule C'¹⁵, making clear that those listed are exemplary rather than exhaustive, 'illustrative of a wider campaign of persecution against Opponents'.¹⁶ The denied applicants all suffered from those incidents that formed part of the alleged campaign of criminal conduct.
24. Relevant for victim participation are the crimes alleged in the indictment and not the specific charges. Notably, Article 22 (1) of the Law refers to a '*crime* within the jurisdiction of the Specialist Chambers and alleged in the indictment'; and Rule 113 (2) of the Rules also refers to a '*crime* in the indictment' rather than 'scope of the charges'.¹⁷ The Pre-Trial Judge erred when applying the latter as a standard against which to assess the victim applications.
25. Crimes are the legal characterization of the facts investigated; however, these are distinct to the charges.¹⁸ This distinction is also evident within the Law itself, as article 39 specifically refers to the 'charges' in the indictment multiple times. Article 39 (2) of the Law, for example, provides that the 'Pre-Trial Judge shall

¹³ Indictment, para 32.

¹⁴ Indictment, para 37.

¹⁵ Indictment, para 171.

¹⁶ Indictment, para 57.

¹⁷ Emphasis added.

¹⁸ *Co-Prosecutors v Ieng (Sary), Ieng (Thirith), Nuon (Chea) and Khieu (Samphan)* Decision on appeals against orders of the co-investigating judges on the admissibility of civil party applications, 002/19-09-2007-ECCC, 24 June 2011, para 39: 'Rule 23bis(1)(b) does not require a causal link between the harm and the facts investigated, it explicitly requires a causal link between the harm and an of *the crimes alleged*. Crimes being the legal characterizations of the facts investigated, the term "crimes" cannot be identified or replaced with the term "facts."' (Hereafter 'ECCC Appeals Decision Case 02'.)

confirm the indictment. If he or she is not so satisfied, the indictment or charges therein shall be dismissed.’ The textual difference shows that the basis on which the admission of victims as participants in the proceedings (‘crimes in the indictment’) are assessed cannot be equated with the scope of the charges in the indictment. What matters are the crimes in the indictment - war crimes and crimes against humanity through, *inter alia*, imprisonment/illegal or arbitrary arrest and detention, persecution, enforced disappearance, and murder. These are precisely the crimes, which caused the denied applicants harm and for which *prima facie* evidence was provided.

26. The distinct character between the ‘crime’ in Article 22 and the ‘charges’ in Article 39 of the Law also becomes evident, when reviewing the respective procedural functions of both provisions.
27. The charges in the indictment have a limiting function in that they determine the factual basis of the accused’s criminal responsibility. Hence, the accused is to be ‘informed of the charges against him’¹⁹, as the information not just of the abstract crimes but the factual underpinnings are critical for fairness of the proceedings.²⁰ Only the information on the facts combined with their potential legal qualification enables the accused to prepare a defence. The charges also serve a limiting function. Rule 158 (1) of the Rules clarifies that the judgement shall be based on ‘the *charges* in the indictment.’²¹ This principle of law is also reflected in other sources of international law. Article 74 (2) of the Rome Statute of the International Criminal Court explicitly provides that the Trial Chamber’s ‘decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.’

¹⁹ Art. 39(4) of the Law.

²⁰ Art. 6 (3) of the European Convention on Human Rights: ‘Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him...’

²¹ Emphasis added.

28. In contrast, the ‘crime within the jurisdiction of the Specialist Chambers’ in Article 22 (1) of the Law determines victim participation. This is conditional, however, on the required link that the crime needs to be ‘alleged in an indictment.’ Rule 113 (4) of the Rules specifies further that ‘the harm suffered ...[must be] a direct result of a crime in the indictment.’ The term ‘crime in the indictment’ is broader, as it does not contain the same specific factual limitations set out above. The indictment specifies the crimes materially through the statement of crimes²², whereas the descriptions of individual incidents form those charges necessary to fully inform the accused enabling them to prepare their defence and ensure a fair trial.
29. The defence argued in this context that admission of the applicants would widen the charges and henceforth breach the fair trial rights of the accused.²³ However, participating victims are not impacting on the scope of the charges. Victim applications merely serve as a procedural mechanism to allow victims to participate in proceedings.²⁴ The scope of the charges is limited through the indictment and cannot be changed by the decision on victims’ participation.
30. Additionally, at this point a general remark about any impact on fair trial rights of the accused. Victim participation as provided before the KSC provides several mechanisms to mediate between the rights of victims and of the accused, e.g., victim representation through common representation for a group of victims. Also, the Law does not automatically trigger a right to reparations for victims. Article 22 (3) (‘reasonable reparations’) and (8) (‘may make an order ... specifying appropriate reparations’) of the Law equips the judges with discretion as to the nature and extent of reparations granted to the victims. Therefore, no fair trial

²² Indictment, para 172.

²³ First Decision, para 40.

²⁴ *Prosecutor v Ntaganda*, Decision on victims' participation in trial proceedings, ICC-01/04-02/06-449, 06 February 2015, para 36: ‘[I]t is recalled that chambers have only been evaluating victim applications to a *prima facie* standard for the purposes of participation; they are not making any concrete determination on the veracity of the claims therein. Unless these applications are submitted and discussed as evidence during the trial, the Chamber also cannot base its trial judgment on them.’

considerations can justify curtailing victims' rights by interpreting the notion of the 'crime' in Article 22 of the Law overly narrowly.

31. Henceforth, it is the legal characterization of the investigated factual situation (the 'crimes') rather than the factual situation itself (the 'charges'), that should have been considered by the Pre-Trial Judge.²⁵

b. The Pre-Trial Judge erred when concluding that incidents which caused victims' suffering and which form part of the contextual element of crimes against humanity would not be part of the crime alleged in the indictment.

32. It is submitted that the Pre-Trial Judge erred when determining that '[g]eneric references in the Confirmed Indictment to other crimes as part of any background information or description of the contextual elements of war crimes or crimes against humanity do not fall under the scope of Rules 2 and 113(1) of the Rules, regardless of whether such references relate to crimes similar to those forming the charges.'²⁶ The Appeals Brief focuses in this context on Article 13 of the Law, as this is the crime that all victim applications are linked to. The position in the impugned decision is based on an erroneous understanding of crimes against humanity. The contextual element is a constituent part of the crime, and all denied applicants suffered from incidents that – although not explicitly listed in Schedules A-C – form part of the contextual element of crimes against humanity as alleged in the indictment.

33. Crimes against humanity are more than the sum of the underlying acts. Article 13(1) of the Law requires 'any of the following acts when committed as part of a widespread or systematic attack'. The crime contains two distinct constituting elements, (1) the specified underlying acts and (2) the chapeau element of the crime. Both elements appear as equally important for the determination of crimes

²⁵ See similarly ECCC Appeals Decision Case 02, para 25.

²⁶ First Decision, para 45.

against humanity. The ICC Trial Chamber found in its decision against *Ongwen* that Article 7 of the Rome Statute 'is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts.'²⁷ The policy requirement 'ensures that the multiple acts forming the course of conduct are linked. It ensures that acts which are unrelated or perpetrated by individuals acting randomly on their own are excluded.'²⁸ This contextual element is delineated as follows in this case: It is the widespread or systematic attack against the civilian population deemed opponents in Kosovo and Northern Albania from March 1998 to September 1999.²⁹ No single event, such as a specific murder listed in the charges, would suffice to form the charge of crimes against humanity as a JCE. Yet, victims that suffered harm from such murder would rightly be admitted as participants. As an *argumentum e contrario*, victims who have suffered harm from the chapeau element of the crime must equally be admitted as participating victims.

c. *The Pre-Trial Judge erred in law about the required nexus between participating victims and the crimes alleged in the indictment.*

34. The impugned decision states that 'any interpretation [that would allow references to background information or contextual elements] would lead to the admission of VPPs who would not be *linked* to the charges specified in the Confirmed Indictment.' Beyond the errors outlined above on the distinction between crimes and charges as well as the concept of crimes against humanity, the Pre-Trial Judge

²⁷ *Prosecutor v Ongwen* Trial Judgment, ICC-02/04-01/15-1762-Red 04-02-2021, 4 February 2021, para 2674 (hereafter: *Ongwen* Trial Judgement); *Prosecutor v Ntaganda* Trial Judgement, ICC-01/04-02/06-2359, 8 July 2019, para 662.

²⁸ *Ongwen* Trial Judgement, para 2678; similar also *Prosecutor v Katanga*, Trial Judgement, ICC-01/04-01/07-3436-tENG, 20 April 2015, para 1113; see similarly *Prosecutor v Hagetekomana*, Appeals Chamber Judgement, ICTR-00-55B-A, 8 May 2012, para 61-62. See also ICC, Elements of Crime Art 7, Crimes against Humanity, para 1-3.

²⁹ Indictment, para 16-17.

omitted to consider victims' internationally recognized rights and interests, although the KSC shall adjudicate and function in accordance with international human rights law.³⁰ The interpretation of the legal framework and specifically the link required between the suffering the denied applicants experienced and the indictment needs to give effect to the internationally recognized victims' rights to truth, justice, and reparations.³¹

Acknowledging collective suffering

35. One critical component in the development of victims' right in international law is the recognition of suffering not only at the individual level but also collective forms of victimisation through gross human rights violations. The UN Basic Principles acknowledge that contemporary forms of victimization, 'while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted *collectively*.'³² Victims in international law are therefore not only persons who suffered harm on an individual basis but also those who suffered *collectively*.³³ The Pre-Trial Judge did not recognize this collective dimension, although it is clearly described in the indictment.

'All acts and omissions charged as crimes against humanity in this indictment were part of the widespread or systematic attack direct against Opponents. The crimes followed a consistent pattern, *impacted the victims' wider families and communities*, and were intended to serve as a warning and to *exert pressure on the targeted population as a whole*, deterring opposition to, and enforcing absolute unity behind, the KLA/PGoK.'³⁴

³⁰ Art. 3 (2) (2) of the Law.

³¹ See with an overview M. Cherif Bassiouni, 'International Recognition of Victims' Rights' in M. Cherif Bassiouni (ed.) *International Criminal Law Vol III* (Martinus Nijhoff) 2008, 635.

³² Basic Principles, Preamble.

³³ Basic Principles para 8.

³⁴ Indictment, para 17. Emphasis added.

35. The denied applicants not only suffered as individuals, who lost their family members, but this suffering was exacerbated through the climate of oppression and fear, of which the disappearance and murder of their family members was one part.
36. The dimension of collective victimization finds increasing recognition in case law across different jurisdictions. The Extraordinary Chambers in the Courts of Cambodia (ECCC) reasoned that crimes such as genocide and crimes against humanity represent mass atrocities, which require specific consideration.³⁵ The level of fear within a population from either witnessing crimes or because of the knowledge of the policies directed against the civilian population may cause harm that justifies admission as civil parties in the proceedings before the ECCC.³⁶ The situation in Kosovo is comparable to the situation in Cambodia, which was addressed by the ECCC. Although the context in Cambodia was somewhat different as the entire population within the country was affected, here smaller collectives were affected, namely all those deemed opponents to the KLA. Collective suffering is not a matter of quantity alone. The effects of the systematic oppression were the same, anybody could have been considered a traitor or opponent of the KLA and be targeted. The harm suffered by the denied applicants and the facts on which the indictment is built are linked through the collective experience. Anyone could have been deemed an opponent, the diversity of the background of those lost by the denied applicants makes this clear.
37. The Special Jurisdiction of Peace in Colombia, which is a transitional justice setting aimed at addressing over 50 years of armed conflict in Colombia, provides for comparable provisions to article 22 of the Law in article 3 of Law 1922 of 2018.³⁷

³⁵ ECCC Appeals Decision Case 02, para 44.

³⁶ ECCC Appeals Decision Case 02, para 45.

³⁷ Article 3 provides: '...After the receipt of a case ...by the respective Chamber... a person who claims to be a victim of a crime and who wishes to participate in the proceedings, must present evidence...'. Translation author's own. The original text is available at <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=87544>.

Against the background of the collective suffering within different parts of the population, the courts in Colombia implement a broad concept of victim participation. Entire collective entities such as indigenous people³⁸ or political parties³⁹ are admitted for participation in the proceedings. The key argument for this approach is that the internationally recognised rights of victims to truth and justice can best be realised through the participation of victims in the proceedings.⁴⁰ '[P]articipation is directly related to the rights to truth, justice, reparation and non-repetition: (i) it is essential to realize the right to justice, since it constitutes a component of due process; (ii) develops the right to search for the truth within the framework of respect for dignity, honour and memory, (iii) it is essential for reparation in a restorative justice process and (iv) generates an essential dialogue to avoid the repetition of the victimizing events.'⁴¹

38. The practice in both jurisdictions is linked to the practice of the KSC in being specifically created to address past atrocities, serving as one element in broader transitional justice processes. The KSC will not only have to serve as a criminal court tasked with establishing the individual responsibility of the accused. While this is its most essential function, it will also have to acknowledge, that the trial proceedings will contribute to societal narratives.⁴² The charges have been determined based on prosecutorial discretion; they had to be selected based on evidentiary choices. This is inevitable in any criminal process. These choices have

³⁸ Jurisdicción Especial Para la Paz República de Colombia, Salas de Justicia, Sala de Reconocimiento de Verdad, de responsabilidad y de determinación de los hechos y conductas, Auto No. 02 de 2020, Bogotá D.C., 17 January 2020. (hereafter: JEP No.02 de 2020)

³⁹ Jurisdicción Especial Para la Paz República de Colombia, Salas de Justicia, Sala de Reconocimiento de Verdad, de responsabilidad y de determinación de los hechos y conductas, Auto No. 02 de 2018, Bogotá D.C., 21 October 2018.

⁴⁰ JEP No.02 de 2020, III. 1.1 (with further references to the Colombian Constitutional Court): 'The right of victims to participate in judicial proceedings "is a central axis of their legitimacy, especially in processes related to serious human rights violations and violations of International Humanitarian Law."' (Translation author's own.)

⁴¹ Ibid.

⁴² See Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending War and Building Peace* (Oxford University Press, 2016), 5, 15 with further references on the effects of judicial proceedings in determining narratives.

established the charges and will form the basis for the determination of the individual guilt of the accused and – if found guilty – determine their punishment. This retributive element of justice, however, is complemented in the Law with some features of restorative justice through provisions for victim participation and reparations. Although these are in their form highly juridified, they must be made meaningful.

39. Viewed together with the need to realise victims' rights when people have suffered collectively requires a broader approach to victim participation than that in the impugned decision. The proceedings before the KSC need to provide an understanding of the broader context and for that it is important to allow more victims' voices to be heard. It will possibly be the last opportunity after 22 years to address the injustices that happened and ensure that not only the individual trauma but also the collective dimension of the suffering comes to the fore. This is the only chance for the KSC to contribute to an essential societal dialogue about what happened in 1998 and 1999.

Victims' personal interests

40. Moving from the collective dimension of victim participatory processes to the more individualised approach, the impugned decision refers in the discussion as to the required link to the ICC's jurisprudence.⁴³ The ICC's approach to victim participation is not uniform but shaped by a case-by-case approach.⁴⁴ Having said that, the Appeals Chamber decision in *Lubanga*⁴⁵, also referred to, has provided the

⁴³ First Decision, para 45, fn 48.

⁴⁴ *Prosecutor v Bemba Gombo*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 15 December 2008, para 62-67 provides one example of ICC practice in which a link to the chapeau element of the specific charges of crimes against humanity seems to suffice, when materially the crimes alleged in the indictment are sufficient, as is the case here.

⁴⁵ *Prosecutor v Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 ICC-01/04-01/06-1432, 11 July 2008 (hereafter 'Lubanga AC Decision').

key influence in shaping the procedural regime at the ICC and is critical for the discussion of a necessary link between the harm suffered and the crime in the indictment. The Appeals Chamber found in the case against *Lubanga* that victim participation based on article 68 (3) of the Rome Statute requires a link between the harm the victim suffered, and the crimes charged.⁴⁶ The Appeals Chamber argued that only victims of crimes within the parameters of the charges can have a demonstrable personal interest in participating in the trial proceedings. The essence of this decision is that a legally justifiable interest in the trial proceedings is necessary for victims to participate. The Appeals Chamber limited the Trial Chambers' very broad approach that admitted victims who had suffered from different crimes.

41. Applying the rationale of the *Lubanga* Appeals Chamber decision to the current setting, the Pre-Trial Judge disregarded the denied applicants' legal interest in the trial proceedings. The denied applicants have all suffered from the crimes charged, namely the crimes against humanity of persecution, of murder, and of enforced disappearance. Their very real and raw suffering is related to the crimes in the indictment and, as demonstrated above, within the parameters of the indictment. What will be discussed in the courtroom matters significantly to the denied applicants. The Trial Chamber will be required to examine the entire indictment period to establish the systematic nature and the patterns of violence that occurred. These examinations will be of key importance to the denied applicants. Receiving information about the trial⁴⁷ and the evidence heard would provide them with a better understanding of the patterns of violence that they suffered from. After more than 22 years of uncertainty, the trial proceedings would be a last chance learn more about the details of what happened and who is allegedly responsible for the systematic violence, murder, and the enforced disappearances. Ultimately, for the denied applicants the interest in participating in the case lies in 'finding

⁴⁶ Lubanga AC Decision, para 65.

⁴⁷ As one of the key function of victim participation before the KSC, art. 22(3) of the Law.

some answers'⁴⁸, developing a better understanding of what happened to the disappeared fathers and husbands, for whom the applicants could never start grieving, because their fates are still unknown. To speak with the words of one of the denied applicants: 'It would ease our pain that we did something to shed light on his disappearance.'

42. The hope to shed light on what happened highlights the imperative to realise the victims' internationally recognized human rights to truth and justice.⁴⁹ Victim participation can provide one stepping-stone in the realisation of the right to truth – to better understand what happened – through participating in the proceedings and be kept informed about the developments in the proceedings through the Victims' Counsel.⁵⁰ The role of providing information by Counsel to participating victims will make judicial proceedings, remotely conducted in The Hague, much more accessible and understandable to the victims.

d. The Pre-Trial Judge erred when not recognizing the specific nature of the crime of enforced disappearance.

43. The impugned decision does not give effect to the necessary human rights protection in cases of enforced disappearances. Internationally, the specific and

⁴⁸ One of the denied applicants quoted here.

⁴⁹ Based on the right to an effective remedy under Article 8 Universal Declaration of Human Rights (UDHR), 217 A (III), 10 December 1948; Article 13 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), CETS No.5; and Article 2(3) International Convention of Civil and Political Rights, UN Treaty Series Vol.999, p171, 16 December 1966. *Velásquez Rodríguez v Honduras*, Judgement, Series C No.7 (IACtHR, 29 July 1988), paras.174-175; *Aksoy v. Turkey*, App no 21987/93 (ECtHR, 18 December 1996), para.98. These rights are supported by victimological research of conflict situations on victims' needs, see Ernesto Kiza, Corene Rathgeber, and Holger Rohne, *Victims of War: War-Victimization and Victims' Attitudes Towards Addressing Atrocities*, (Hamburger Edition 2006) asserting that 'the prevalent purpose [for victims] of taking action against the perpetrators is to reveal the truth about the past'. See also Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26 *Criminal Law Forum*, 255-289; M. Cherif Bassiouni, *International Recognition of Victims' Rights*, *Human Rights Law Review* 6 (2006) 203-279.

⁵⁰ Rule 114(3), 2. Sentence of the Rules.

extreme seriousness of the crime of enforced disappearance has been acknowledged, emphasising the right of victims to justice and reparations.⁵¹ The denied applicants - except for Victim-14/06 - suffered harm from the crime of enforced disappearance of their close relatives.

44. The heinous nature of the crime of enforced disappearance becomes apparent, when the relatives of those who were disappeared cannot know the whereabouts of the person. When a victim cannot know the specific detention site because any information was denied, this excludes the ability to provide *prima facie* evidence that would provide a sufficiently strong link to the indictment under the interpretation in the impugned decision. The victims cannot know whether their relative was held in one of the listed detention sites during the time listed in the charges. Also, regarding the temporal link, the impugned decision has not considered that the crime of enforced disappearance is a continuing crime.
45. Acts 'constituting enforced disappearance shall be considered a *continuing offence* as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.' The character of enforced disappearance as a continuous crime has also been confirmed in case law⁵² and other international instruments⁵³. If this lack of knowledge regarding the whereabouts and therefore the inability to provide specific information that could link the incident to specific crimes sites and dates as charged, this leads to exclusion from access to justice. It ultimately perpetuates the effects of the crime, as 'one of the constitutive elements of enforced disappearances is that the person

⁵¹ International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177, the Convention has 98 signatories and 63 state parties to date. See also UN GA Resolution 47/133 on the Protection of All Persons from Enforced Disappearance, 18 December 1992.

⁵² Inter-American Court of Human Rights, *Terrones Silva y otros v Perú*, Judgement of 26 September 2018, para 28; Peru, Supreme Court of Justice, National Criminal Chamber, *Chuschi* case, Case No 105-04, Judgement of 5 February 2007, p 30.

⁵³ Art 8 (1)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance: 'taking into account its continuous nature'.

is placed “outside the protection of the law”.⁵⁴ The fate or the whereabouts of the person are concealed, creating a legal limbo and total defencelessness. Also, ‘family members are prevented to exercise their rights ... due to the legal uncertainty created by the absence of the disappeared person.’⁵⁵

46. Yet, the object and purpose of establishing the KSC is in part aimed at addressing enforced disappearances. The Parliamentary Assembly of the Council of Europe stated that it is critical to uncover the truth, specifically considering the context of the enforced disappearances that occurred and have left the fate of many unclear.⁵⁶ ‘[E]nabling victims’ families to mourn at last are vital preconditions for reconciliation between the communities and a peaceful future in this region of the Balkans.’⁵⁷ This rationale is relevant for the interpretation of the KSC framework. The KSC is an internationalised court, as international judges exercise adjudicative functions and must apply international law. The object and purpose – although different actors might have had different motivations regarding the establishment of the Court – must be taken into account when interpreting the Law. Therefore, the task to ensure justice for victims of enforced disappearances and contributing to reconciliation is vital. Although the latter is a hugely difficult task, the only chance will be to interpret the Law in a way that enables rather than limits victim participation.

⁵⁴ United Nations General Assembly, Report of the Working Group on Enforced or Involuntary Disappearances, General comment on the right to recognition as a person before the law in the context of enforced disappearances, A/HRC/19/58/Rev.1, 2 March 2012, page 10, para 1.

⁵⁵ Ibid, page 11, para 5.

⁵⁶ Parliamentary Assembly of the Council of Europe, Resolution 1782 (2011) ‘Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo Council of Europe’, 25 January 2011, para 16. (hereafter: Council of Europe)

⁵⁷ Ibid, para 18.

e. Errors in the individual assessment of victim applications

47. Regarding denied applicant Victim 08-06, the victim suffered harm from illegal arrest, detention and enforced disappearance, starting on [REDACTED] with subsequent information based on hearsay that the victim's family member was transferred to [REDACTED]. While within the broad geographical scope of the indictment, the named locations do only appear in the specific lists of detentions sites for other time periods. However, considering the nature of enforced disappearances and giving effect to the victim's right, this broad link must suffice. Also, the crime against humanity of inhumane acts and cruel treatment does not require a clear link to specific sites. The indictment specifies that '[w]hen family members and others sought information concerning arrested, abducted or detained, JCE Members and Tools frequently refused to respond, or provided false or misleading information.'⁵⁸ *Prima facie*, evidence was provided by the denied applicant that the inquiries were without any success. Therefore, the decision to reject the application of victim 08/06 contains errors in law and fact.
48. Regarding denied applicants Victims-09/06, -10/06 and -11/06 (a family unit), the assessment was erroneous in law and fact. The [REDACTED] of the denied applicants, a [REDACTED], enforcedly disappeared within the indictment period. The indictment charges the accused with the crime of persecution through, *inter alia*, illegal or arbitrary arrests and enforced disappearance⁵⁹ and specifies that such acts allegedly aimed at 'removing those deemed opponents. Such opponents included ...persons associated with the LDK...'⁶⁰ As said above, the [REDACTED], hence deemed an opponent, which demonstrates the very close material link to the indictment. Geographically, the arbitrary arrest and enforced disappearance occurred in [REDACTED] in Kosovo, which is where one of the detention sites

⁵⁸ Indictment, para 96.

⁵⁹ Indictment, para 57, 58 lit a. and lit c.

⁶⁰ Indictment, para 32. Also para 171.

listed in Schedule A was allegedly situated.⁶¹ The disappearance happened on [REDACTED], slightly earlier than the specified facts that allege an illegal detention site in [REDACTED] as '[b]etween *at least* November 1998 and June 1999'.⁶² The continuous crime of enforced disappearance therefore continued throughout the charged period, which – considering the specific nature of the crime – ought to be treated on a *prima facie* basis as within the scope of the specific charges. Furthermore, phrase 'at least' in the indictment clarifies that this does not exclude the operation of this detention site out with this time-period. Also, the charge of persecution explicitly covers the entire indictment period.⁶³ Hence, the disappearance of the [REDACTED] of applicants Victims-09/06-11/06 began on [REDACTED], continued throughout November 1998 and June 1999, and has not ceased to date.⁶⁴ All three denied applicants have suffered as a direct result of a crime within the jurisdiction of the Specialist Chambers, alleged in the indictment, and even within the scope of the specific charges.

49. Regarding denied applicant Victims-13/06, the assessment was erroneous in law and fact. Victim-13/06 suffered harm from illegal or arbitrary arrest and detention and ultimately enforced disappearance, starting from [REDACTED], in [REDACTED], Kosovo. *Prima facie*, the information that [REDACTED] disappeared in the municipality of [REDACTED] at a time when at least one illegal detention facility was allegedly existing in the municipality⁶⁵, should suffice for the necessary link. Considering the specific difficulties for victims of enforced disappearance to know about the whereabouts of the disappeared, the available information ought to be enough to avoid perpetuating the effects of the crime.

⁶¹ Indictment, Schedule A 6.2.

⁶² Indictment, para 75 (emphasis added).

⁶³ Indictment, para 57.

⁶⁴ UN GA, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26 January 2011, General Comment, para 39: 'Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.'

⁶⁵ Indictment, 10.2 in Schedule A.

50. Regarding Victim-14/06, the assessment was erroneous in law. Victim-14/06 suffered harm from murder on [REDACTED] in [REDACTED], Kosovo. The crime of murder is charged as having occurred '[d]uring the Indictment Period [including the date when the murder occurred] JCE Members and Tools, through their acts and omissions, caused the death of persons in Kosovo....'.⁶⁶ Denied applicant Victim-14/06 is of Serbian ethnicity; the killing of the family member follows the pattern charged in the Indictment: 'removing those deemed to be opponents...including...persons of Serbian... ethnicit[y]...'⁶⁷

VI. Conclusion

51. As demonstrated, the First Decision on Victim Participation is erroneous in law and fact. The Appeals Chamber should seize the chance to provide an interpretation and clarification of the Law and the Rules that will enable victim participation at the KSC. It is therefore respectfully requested that

- a. the Appeals Chamber reverse the impugned decision and
- b. admit the denied applicants as participating victims in the case.

Word count: 6,752



Dr Anni Pues

Duty Victims' Counsel

Monday, 7 June 2021

The Hague, Netherlands

⁶⁶ Indictment, para 136.

⁶⁷ Indictment, para 32.