

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

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 17 June 2021

Language: English

Classification: Public

Krasniqi Defence Response

**to the Appeal Against the “First Decision on Victims’ Participation” Pursuant to
Rule 113(6) of the Rules**

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws QC

Duty Victims’ Counsel

Dr Anni Pues

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson QC

Counsel for Rexhep Selimi

David Young

Counsels for Jakup Krasniqi

Venkateswari Alagendra, Aidan Ellis

I. INTRODUCTION

1. Pursuant to Rules 113(3) and 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence for Jakup Krasniqi (“Defence”) hereby respond to the legal grounds raised in the Appeal submitted by Duty Victims’ Counsel for the denied victim applicants¹ against the decision of the Pre-Trial Judge, which rejected their applications to be admitted as participating victims in the proceedings.²

2. The Defence submit that the Appeal should be rejected. The Pre-Trial Judge correctly concluded that Rule 113 of the Rules, read in the light of the framework for victim participation at the Kosovo Specialist Chambers (“KSC”), and consistent with the persuasive jurisprudence of the International Criminal Court (“ICC”) and the Special Tribunal for Lebanon (“STL”), requires that a victim applying to participate in the proceedings be a victim of a crime specifically charged in the Indictment.³ Since none of the denied applicants satisfy this test,⁴ the Pre-Trial Judge was correct to deny their applications.

II. PROCEDURAL HISTORY

3. On 4 January 2021, the Pre-Trial Judge issued the Framework Decision on Victims’ Applications.⁵

¹ KSC-BC-2020-06, IA005/F00004/RED, Duty Victims’ Counsel, *Public Redacted Version of the Appeal Against the “First Decision on Victims’ Participation” Pursuant to Rule 113(6) of the Rules (“Appeal”)*, 7 June 2021, public.

² KSC-BC-2020-06, F00257, Pre-Trial Judge, *First Decision on Victims’ Participation (“Impugned Decision”)*, 21 April 2021, confidential.

³ *Ibid.*, paras 45-49.

⁴ Appeal, para. 22.

⁵ KSC-BC-2020-06, F00159, Pre-Trial Judge, *Framework Decision on Victims’ Applications*, 4 January 2021, public.

4. On 21 April 2021, the Pre-Trial Judge rendered the Impugned Decision.⁶ In reliance on the requirement in Rule 113(1) that victims' applications must provide the location and date of an alleged crime, and on four persuasive decisions of the ICC, the Pre-Trial Judge held that "the crime(s) in relation to which an applicant claims to be a victim must fall under the material, geographical and temporal parameters of the charges, as specified in the Confirmed Indictment".⁷ The Pre-Trial Judge further held that "[a]ny interpretation otherwise would lead to the admission of VPPs who would not be linked to the charges specified in the Confirmed Indictment".⁸ Victims 08/06, 09/06, 10/06, 11/06, 13/06 and 14/06 do not claim to be victims of crimes within the temporal, geographic and material scope of the charges.⁹ Accordingly, the Pre-Trial Judge rejected those applications.¹⁰ The applications of nine other victims were granted.¹¹

5. On 7 June 2021, the Duty Victims' Counsel filed the Appeal against the First Decision on Victims' Participation pursuant to Rule 113(6) of the Rules.¹² On the same day, the President of the Specialist Chambers issued the Decision Assigning a Court of Appeals Panel.¹³

III. STANDARD OF REVIEW

⁶ Impugned Decision.

⁷ *Ibid.*, para. 45 (and fn. 48).

⁸ *Ibid.*, para. 45.

⁹ See Appeal, para. 22.

¹⁰ Impugned Decision, paras 48, 85(f). Victim 06/06's application was also rejected for the same reason and has elected not to appeal the Impugned Decision.

¹¹ Impugned Decision, para. 85(a).

¹² Appeal.

¹³ KSC-BC-2020-06, IA005/F00005, President, *Decision Assigning a Court of Appeals Panel*, 7 June 2021, public.

6. Appellants may challenge decisions on errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice.¹⁴ When alleging an error of law, the appellant must “identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision”.¹⁵ An error of fact will only be established “when no reasonable trier of fact could have made the impugned finding”.¹⁶

IV. APPLICABLE LAW

7. The Defence note that according to Rule 113(6) an appeal lies as of right from a decision denying a victim’s application.

8. Article 22 of the Law provides in relevant part:

1.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. Participation by a Victim by the Specialist Chambers shall not be a bar to providing testimony as a witness before the Specialist Chambers.

3.A Victim’s personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation. The Specialist Chambers’ Rules of Procedure and Evidence shall include provisions relating to the 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. They shall also determine the content and procedure for submission and acceptance of any application to participate in the proceedings and declaration of damage.

7.In its judgment, a Trial Panel may, either upon request or on its own motion in exceptional circumstances, include a decision on the scope and extent of any damage, loss and injury to, or in respect of, Victims and will state the principles on which it is acting. Alternatively, if such a decision would unduly prolong the criminal proceedings, a Trial Panel may limit its decision to the identity of Victims of any crimes established in its judgment.

¹⁴ KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi’s Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 4 (applying *mutatis mutandis* the standard of review set out in Article 46(1) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) to interlocutory appeals).

¹⁵ KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, para. 12.

¹⁶ *Ibid.*, para. 13.

8. In the event that a Trial Panel or Court of Appeals Panel of the Specialist Chambers adjudges an accused guilty of a crime, it may make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims collectively or individually.

9. Rule 2(1) of the Rules provides that a Victim is “[a] natural person who has suffered physical, material, or mental harm as a direct result of a crime alleged in an indictment confirmed by the Pre-Trial Judge”.

10. Rule 86 requires the SPO to file an indictment and Rule 86(3) provides in relevant part:

- (3) The indictment filed pursuant to Article 38(4) of the Law shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law.

11. Rule 113 provides in relevant part:

- (1) After confirmation of the indictment by the Pre-Trial Judge pursuant to Rule 86 and sufficiently in advance of the opening of the case pursuant to Rule 124, 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, specifying how he or she qualifies as a victim and providing the location and date of an alleged crime giving rise to harm. Application forms shall not be disclosed to the Parties.
- (4) 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.

12. Rule 114 provides:

[...]

- (2) Victims’ Counsel shall have the right to make opening and closing statements, and may be present at pre-trial and trial proceedings if deemed necessary by the Panel, in order to ensure the personal interests and rights of victims participating in the proceedings, in accordance with Article 22(3) of the Law.

[...]

- (4) Whenever the personal interests of victims participating in the proceedings are affected, and unless otherwise provided in the Rules, Victims' Counsel may, under the control of the Panel:
- (a) make oral and written submissions; and
 - (b) ask questions of witnesses.

Where necessary and depending on the circumstances, the Panel shall issue specific guidelines regulating the participation of victims in the proceedings, in accordance with Article 22(3) and (6) of the Law.

- (5) Where evidence was not produced by the Parties or the produced evidence does not adequately address the impact the alleged crimes have on the personal interests of victims participating in the proceedings, Victims' Counsel may request the Panel to order the submission of relevant evidence or call witnesses to testify. In such cases, the Panel may order Victims' Counsel to disclose relevant material to the Parties, if this material is in his or her custody or control.

13. Rule 158(1) provides that

[a]fter the closing of the case, the Panel shall retire to deliberate *in camera* in order to pronounce a judgment on the charges in the indictment. The deliberations shall remain strictly confidential.

V. SUBMISSIONS

A. THE IMPUGNED DECISION CORRECTLY HELD THAT THE LEGAL FRAMEWORK OF THE KSC REQUIRES THAT THE HARM TO A VICTIM APPLICANT RESULTS FROM A CRIME WITHIN THE PRECISE PARAMETERS OF THE CHARGES

14. The Appeal should be rejected. Rule 113(1) provides that a person "claiming to be a victim of a crime alleged in the indictment" may apply to be admitted as a participating victim. The core issue raised by this appeal is whether a "crime alleged in the indictment" means a crime specifically alleged in the indictment in the sense that it is within the temporal and geographic parameters of the charges (as the Impugned Decision held), or has a broader meaning such as crimes within the statement of crimes at paragraph 172 of the Indictment or within the contextual

elements of the crimes (as the Appeal variously contends).¹⁷ The Defence submit that the Pre-Trial Judge's interpretation of Rule 113(1) was correct, consistent with the framework of victim participation at the KSC and the preponderance of international jurisprudence.

15. Since this single issue is determinative of all of the Grounds of Appeal raised by Duty Victims' Counsel for the denied victim applicants, the Defence will address the correct interpretation of Rule 113(1) immediately (see paras 16 – 22) and then address additional arguments in relation to each ground of appeal where necessary (see paras 23 – 31).

16. Read in context, Rule 113(1) does require that victims admitted to participate in the proceedings suffered harm from a specific crime alleged in the Indictment. The Law and the Rules are not treaties to which the Vienna Convention on the Law of Treaties applies,¹⁸ but rather national legislation of Kosovo to be construed in accordance with Article 3(2) of the Law and Rule 4 of the Rules. The correct construction of Rule 113(1) should be informed, first, by the wording of Rule 113 itself. Rule 113 provides that a victim application must "provid[e] the location and date of an alleged crime". Reading "a crime alleged in the indictment" together with the requirement to provide the "location and date of an alleged crime", makes it clear that the Rules require the Applicant to have suffered harm from a specific crime alleged in the Indictment; the only reason to require the Applicant to identify the location and date is for the purpose of comparing the application with the crimes specifically alleged in the Indictment.

17. Second, the Impugned Decision's interpretation of Rule 113(1) is consistent with the architecture of the Law and the Rules in relation to victim participation. The

¹⁷ Impugned Decision, para. 45; Appeal, para. 32.

¹⁸ *Contra* Appeal, para. 18.

parameters of trial at the KSC are drawn by the Indictment. Each of the provisions in relation to the participatory rights of victims is predicated on the assumption that the personal interests of participating victims are directly affected by the crimes actually alleged in the indictment, which will be the subject matter of the trial. Allowing participatory rights to the denied victim applicants would necessarily mean allowing participatory rights to victims of crimes which are outside the scope of the confirmed Indictment. That would be wrong and inconsistent with the rights of the Accused, as the Appeal appears to accept to some extent in stating that the scope of the charges is limited by the Indictment and cannot be changed by the decision on victim participation.¹⁹ In particular:-

- a. The parameters of the trial are defined by the Indictment. Rule 86(3) provides that the Indictment must contain “a concise statement of the facts of the case and of the crime(s) with which the suspect is charged”. The Indictment defines the scope of the trial.²⁰ Only evidence relevant to the charges in the Indictment may be adduced at trial.²¹ Rule 158(1) provides that the trial judgment will be pronounced “on the charges in the indictment”. All the submissions and evidence at trial are thus confined by relevance to the Indictment.²² Victim participation too is defined in Rule 2 by reference to the confirmed indictment;
- b. During the trial phase when the personal interests of participating victims are affected, Duty Victims’ Counsel may make oral and

¹⁹ Appeal, para. 29.

²⁰ See ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-325, Pre-Trial Chamber I, *Decision on the Date of the Confirmation of Charges Hearing and Proceedings Leading Thereto*, 14 December 2012, para. 27.

²¹ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber I, *Decision on Ntabakuze Motion to Deposit Certain United Nations Documents*, 19 March 2007, para. 2.

²² See ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1476, Trial Chamber IX, *Decision on Defence Motions Alleging Defects in the Confirmation Decision*, 7 March 2019, para. 29.

written submissions and ask questions.²³ The personal interests of participating victims are “notification, acknowledgement and reparation”.²⁴ But the trial must only consider the allegations actually made in the Indictment, preventing the Trial Chamber from exploring what is alleged to have happened to the denied victim applicants. The personal interests of the denied victim applicants will never be affected by a trial which keeps within the parameters of the crimes charged in the Indictment. Nor will they be assisted in their stated desire for answers,²⁵ by a trial that cannot address the specific facts of their cases;

- c. Similarly, Rule 114(5) provides that where the evidence “does not adequately address the impact the alleged crimes have on the personal interests of victims participating in the proceedings, Victims’ Counsel may request the Panel to order the submission of relevant evidence or call witnesses”. The right to request the admission of additional evidence on the impact of the crimes on the victims presupposes that that evidence would be within the scope of the trial (as defined by the Indictment). Presenting additional evidence about the impact of crimes on the denied victim applicants would be outside the scope of the trial because it would not relate to the charges in the Indictment;
- d. Article 22(3) provides for “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”. Pursuant to Rule 158(1), the judgment will only determine the charges actually pleaded in the

²³ Rule 114(4) of the Rules.

²⁴ Article 22(3) of the Law.

²⁵ Appeal, paras 41-42.

Indictment. The denied victim applicants will have no possibility of reparation because the alleged crimes resulting in harm to them are outside the specific charges in the Indictment on which the Trial Panel must rule;

- e. Article 22(7) then provides that in the Judgment, the Trial Panel may “include a decision on the scope and extent of any damage, loss and injury to, or in respect of, Victims”. Again, that can only apply to victims within the scope of the Indictment because otherwise any such decision by the Trial Panel would exceed the proper scope of the trial.

18. The entire architecture of the Law and the Rules in relation to victim participation assumes that the victims’ personal interests are directly affected by the specific charges in the Indictment. That specific connection to the charges in the Indictment ensures that the victims may participate effectively in trial proceedings, seek the truth and ultimately seek reparations in a manner which does not expand the scope of the trial beyond the charges in the Indictment (which would obviously be inconsistent with the rights of the accused).

19. Third, the Impugned Decision is consistent with the preponderance of international jurisprudence. The KSC is, of course, not bound by the decisions of international courts or tribunals, though it may be assisted by them in determining issues of international law.²⁶ The consistent jurisprudence of the ICC has been that participating victims must actually be linked to the specific charges. Thus in *Lubanga*, the Appeals Chamber held that “the participation of victims in the trial proceedings

²⁶ Article 3(3) of the Law.

[...] is limited to those victims who are linked to the charges”.²⁷ Its reasoning, identical to that submitted in the previous paragraph, is that only victims of the crimes charged would be able to show that the trial affects their personal interests.²⁸ In *Ntaganda*, the Trial Chamber followed the “established jurisprudence of the Court” that the harm must be “a result of an incident falling within the parameters of the confirmed charges”.²⁹ In an earlier decision in that case, this analysis led the Single Judge to compare the applications against the specific villages mentioned in the Document Containing the Charges.³⁰ In *Yekatom and Ngaïssona*, the Trial Chamber confirmed that “the scope of the charges is determined by the Confirmation Decision. Accordingly, any applications by victims to participate in the current proceedings are to be assessed against the parameters set out in that decision”.³¹ The Trial Chamber highlighted the importance of assessing “the specific information provided by the applicants and the link between the alleged harm suffered and the parameters of the charges”.³² In that case, applicants which fell outside the specific geographic scope of the charges were rejected.³³ Finally, in *Al Hassan*, the Pre-Trial Chamber noted that the harm to a victim must result from “an incident falling within the temporal, geographic and material parameters of the *Al Hassan* case”.³⁴ This established jurisprudence is wholly consistent with the Impugned Decision and inconsistent with the Appeal.

²⁷ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, 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 Decision”), 11 July 2008, para. 58.

²⁸ *Ibid.*, para. 62.

²⁹ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, Trial Chamber VI, *Decision on Victims’ Participation in Trial Proceedings* (“Ntaganda Decision”), 6 February 2015, para. 43.

³⁰ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, Pre-Trial Chamber II, *Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings*, 15 January 2014, para. 57.

³¹ ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-738, Trial Chamber V, *Decision on Victims’ Participation in Trial Proceedings* (“Yekatom and Ngaïssona Decision”), 23 November 2020, para. 20. See further ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-267, Pre-Trial Chamber II, *Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings*, 26 August 2011, para. 60.

³² *Yekatom and Ngaïssona Decision*, para. 21.

³³ *Ibid.*, paras 30-33.

³⁴ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-37-tENG, Pre-Trial Chamber I, *Decision Establishing the Principles Applicable to Victims’ Applications for Participation*, 24 May 2018, para. 48.

20. Moreover, the STL has taken exactly the same approach as the ICC and the Impugned Decision. The Pre-Trial Judge in *Ayyash et al.* initially held that the critical issue was whether “the particular circumstances of the harm suffered – that is, where and when it occurred – correspond *prima facie* to those of the Attack”.³⁵ The Pre-Trial Judge later clarified that “the causal link required between the harm suffered and an ‘attack within the Tribunal’s jurisdiction’ must be read as requiring a nexus between the harm alleged and a *crime* specifically charged in the Indictment”.³⁶

21. Finally, the Defence submit that the interpretation in the Impugned Decision is also necessary for the practical management of the trial. The position adopted by the Appeal, namely that any victim of a crime within the *chapeau* of a widespread and systematic attack on the civilian population or any alleged victim of crimes committed by the KLA against opponents should be accepted as a participating victim, would potentially open victim participation at trial to a large number of applicants including in cases far removed from any Indictment charge or location. Not only would that be practically unworkable, but it would risk prejudice to the Accused because participation by those victims would take the trial away from the contents of the Indictment.

22. For all those reasons, the Defence submit that the fundamental problem with the Appeal is that the Pre-Trial Judge’s conclusion on the critical legal issue was correct, consistent with the framework for victim participation at the KSC, and consistent with the preponderance of international jurisprudence. It is part of the criteria to be

³⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Pre-Trial Judge, *Decision on Victims’ Participation in the Proceedings*, 8 May 2012, para. 51.

³⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Pre-Trial Judge, *Fourth Decision on Victims’ Participation in the Proceedings*, 2 May 2013, para. 15.

admitted as a victim participating in the proceedings that the victim suffered harm from a crime specifically charged in the Indictment. No error of law was made.

B. RESPONSE TO GROUND A

23. Ground A of the Appeal should be dismissed. The Impugned Decision was correct to deny the applications as they did not relate to crimes specifically charged in the Indictment. The Defence rely on the submissions in paragraphs 16 – 22 above. In addition:

- a. The only international authority said to support the Appeal is one decision from the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).³⁷ Not only is the ECCC Decision merely one decision which is out of step with the remaining international jurisprudence,³⁸ but it is based on the radically different procedural rules applicable to the ECCC. In particular, the Defence note that the Internal Rules were “modelled after the Cambodian Procedural Code (CPC) which was in turn modelled upon the French Law (FL)”.³⁹ This resulted in a distinctive procedure with, for instance, Co-Investigating Judges,⁴⁰ which is wholly different from that applicable at the KSC. The reasoning underpinning the ECCC Decision relies on the “inherent specificity” of the ECCC⁴¹ and the principle of “national reconciliation” which was fundamental to the establishment of the ECCC.⁴² The regime of victim participation at the ECCC is different from the KSC, in

³⁷ ECCC, *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications* (“ECCC Decision”), 24 June 2011. See Appeal, paras 25, 31.

³⁸ See paras 19-20 above.

³⁹ ECCC Decision, para. 68.

⁴⁰ ECCC Internal Rules, Rule 14.

⁴¹ ECCC Decision, para. 63.

⁴² *Ibid.*, para. 65.

particular in that a victim “has no right to individual and material compensatory damages”.⁴³ Accordingly, this ECCC Decision should not be determinative of the position at the KSC;

- b. Further, in seeking to draw a distinction between the crimes in the Indictment (*e.g.* murder) and the charges in the Indictment (*e.g.* a specific murder at a specific location and time),⁴⁴ the Appeal overlooks the implications of the role played by the specific charges in defining the scope of the trial and the Judgment. Material which is not relevant to the specific charges is outside the scope of the trial. Victims whose personal interests lie outside the scope of the specific charges will therefore inevitably find that their interests are not engaged by the trial.⁴⁵ Accordingly, applying a technical distinction between crimes and charges in order to broaden the scope of the victims admitted to participate in the trial, would actually be inconsistent with the framework of victim participation;
- c. Whilst it is correct that the Indictment uses open ended terms such as “include” which appear to broaden the scope of the Indictment,⁴⁶ that reflects a defect in the pleading rather than a solid foundation on which to assert a broader right for victims to participate. The Defence Preliminary Motion on this issue is pending.⁴⁷

C. RESPONSE TO GROUND B

⁴³ ECCC Decision, para. 70. *See* ECCC Internal Rules, Rules 23(1)(b) and 23 *quinquies*(1).

⁴⁴ Appeal, paras 24-27.

⁴⁵ Lubanga Decision, para. 62.

⁴⁶ Appeal, para. 23.

⁴⁷ KSC-BC-2020-06, F00221, Krasniqi Defence, *Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment*, 15 March 2021, public, paras 14, 58-60.

24. Ground B of the Appeal should be dismissed. The Impugned Decision was correct not to regard a link to the *chapeau* of crimes against humanity as sufficient to grant the applications. In addition to the arguments submitted at paragraphs 16 – 22 above, the Defence highlight that:-

- a. The Appeal is not able to cite to a single international precedent in Ground B in which a victim has been allowed to participate in proceedings on the basis of a connection to the *chapeau* rather than the specific charges.⁴⁸ The absence of even a single authority in support reveals the weakness of the submission;
- b. Although the submissions in support of the Appeal are focussed on the contextual elements of crimes against humanity, if the legal submission that the Pre-Trial Judge erred in failing to take into account the contextual element of war crimes and crimes against humanity is correct, then that would apply equally to war crimes.⁴⁹ The contextual element for war crimes is the existence of an armed conflict.⁵⁰ The result would be that any person claiming to be a victim of the armed conflict would be able to apply to participate in the proceedings. That would greatly expand the boundaries of victim participation in a manner inconsistent with the architecture of the Rules and the Law on victim participation (see paragraphs 17 – 18 above).

D. RESPONSE TO GROUND C

⁴⁸ Appeal, paras 32-33.

⁴⁹ *Ibid.*, para. 32.

⁵⁰ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 29 January 2007, para. 286.

25. Ground C of the Appeal should also be rejected. As set out in paragraphs 16 – 22 above, the Impugned Decision applied the law correctly. Moreover, the Impugned Decision did not fail to give effect to collective suffering.⁵¹ The Impugned Decision was not required to discuss victims' issues in a general sense or in the abstract, but rather was required to resolve the concrete question of which victims should be admitted to participate in this specific criminal trial. 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 primarily define the content of the rights of victims to a remedy and to reparation.⁵² They cannot assist in defining the group of participating victims for the purpose of a specific trial. Nor can the Appeal's reference to notions of collective suffering cure the core problem that the denied applications were not victims of crimes specifically charged in the Indictment and hence the content of the trial will not relate to their personal interests.

26. The Defence have already addressed the ECCC Decision relied upon in the Appeal, which is an outlier in terms of the international jurisprudence and which rests upon the very different legal framework applicable at the ECCC. The Special Jurisdiction for Peace in Colombia also represents a distinct system from the KSC. The very fact that the Special Jurisdiction of Peace in Colombia permits collective entities to participate in proceedings⁵³ is itself a clear example of the differences between this jurisdiction and the KSC. Article 22(1) of the Law makes it clear that victims within the KSC framework are limited to natural persons. Accordingly, the procedures applicable at the Special Jurisdiction for Peace in Colombia offer no assistance in determining the correct interpretation of the Law and the Rules.

⁵¹ *Contra Appeal*, para. 35.

⁵² *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*, UNGA Resolution 60/147, 16 December 2005, A/RES/60/147, paras 10-23.

⁵³ *Appeal*, para. 37.

27. The ICC jurisprudence is uniform and is not solely shaped by a case-by-case approach.⁵⁴ The cases cited in paragraph 19 above show a consistency of approach and demonstrate that the Chambers of the ICC themselves regard the law on questions of victim participation as settled or “established”.⁵⁵ The Fourth Decision on Victims’ Participation in *Bemba*⁵⁶ is not an exception to the established practice at the ICC, but reflects the fact that a more flexible position can be adopted at an early stage of the proceedings before specific charges are confirmed.⁵⁷ Indeed, the *Bemba* Decision actually cites to the above *Lubanga* Decision which represents the established law on this issue.⁵⁸ It then applies the *Lubanga* Decision in the procedural context of that case, which was prior to the confirmation hearing and therefore at a time when the legal characterisation of the charges had yet to be determined.⁵⁹ The Single Judge had to determine whether the victims fell within the “factual scope” of the case at a preliminary stage at which the precise scope to the case had yet to be defined, which explains why a broader test appeared to be applied in that instance.⁶⁰ After the charges were confirmed, the Trial Chamber in *Bemba* applied the *Lubanga* Decision and required for victim participation evidence that “he or she suffered personal harm as a result of crimes confirmed against the accused”.⁶¹ This case has moved beyond the procedural stage reflected in the *Bemba* Decision. The denied victim applicants submitted their applications after the Indictment had been confirmed. As a result of the confirmation of the Indictment, the scope of the charges (and the trial) in this case

⁵⁴ *Contra Appeal*, para. 40.

⁵⁵ Ntaganda Decision, para. 43.

⁵⁶ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-320, Pre-Trial Chamber III, *Fourth Decision on Victims’ Participation* (“Bemba Decision”), 12 December 2008.

⁵⁷ *Contra Appeal*, fn. 44.

⁵⁸ Bemba Decision, para. 62.

⁵⁹ *Ibid.*, para. 63.

⁶⁰ *Ibid.*

⁶¹ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-807-Corr, Trial Chamber III, *Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings*, 12 July 2010, para. 92.

is clear and victims who fall outside that scope have no legitimate interest in participating in the trial.

28. Moreover, the reasoning in the *Lubanga* Decision, although cited at length in the Appeal⁶² is entirely consistent with the Impugned Decision. The ICC Appeals Chamber in that decision explained that only victims within the parameters of the charges have a personal interest in the trial proceedings.⁶³ The Defence agree with and adopt that reasoning, which is equally applicable to the framework of the Law and the Rules. That is exactly why the Impugned Decision was correct to deny these victim applicants: the harm that they claim to have suffered is outside the scope of the trial which is defined only by the charges in the indictment; these proceedings will not help the denied victim applicants to uncover who was responsible for the harm that they claim to have suffered because that harm is outside the scope of the trial.

E. RESPONSE TO GROUND D

29. Ground D of the Appeal should be dismissed. The Impugned Decision did not err in failing to recognise the nature of the crime of enforced disappearance for the following reasons:-

- a. The “extreme seriousness” of the crime was not relevant to the decision;⁶⁴ whether an application establishes that a person was a victim of a crime charged in the Indictment does not depend on the gravity of the crime;
- b. The continuing nature of the crime of enforced disappearance was likewise irrelevant.⁶⁵ Unless the evidence shows that at some stage the continuing

⁶² Appeal, paras 40-41.

⁶³ *Lubanga* Decision, para. 62.

⁶⁴ *Contra* Appeal, para. 43.

⁶⁵ *Contra* Appeal, para. 45.

crime fell within the crimes specifically alleged in the Indictment, the fact that it is 'continuing' adds nothing to the analysis;

- c. Finally, the Appeal argues that the nature of the crime of enforced disappearance limits the victims' ability to identify whether the crimes fall within the Indictment because the victims may not know where an individual was detained.⁶⁶ However, the applicable threshold of *prima facie* evidence is low.⁶⁷ This standard is applied equally to all crimes; it would be anomalous if victims of enforced disappearance benefitted from a lower standard of proof and would open the gateway to applications unconnected with the subject matter of this trial. Further, it is not correct that the victims have no access to any evidence which could establish a link to the charges in the Indictment. The victims must know when and where the relevant individuals were detained. If that evidence suggested a *prima facie* link to the crimes charged in the Indictment, then the applications would have been granted. Since it did not,⁶⁸ the applications were correctly denied.

F. RESPONSE TO GROUND E

30. Ground E should be rejected. The Impugned Decision correctly applied the law to the denied victim applicant. The Defence rely on the legal submissions set out at paragraphs 16 – 22 above.

31. The crimes that each denied victim applicant claims to have suffered are simply outside the scope of the charges in this case and their applications were rightly rejected. Thus:-

⁶⁶ Appeal, para. 44.

⁶⁷ Impugned Decision, para. 43.

⁶⁸ *Ibid.*, paras 48-49.

- a. Victim 08/06 did not identify a link to a location specified in the Indictment at a time specified in the Indictment.⁶⁹ Identifying a connection to an Indictment location but at a time different from the crimes actually charged at that location, remains outside the scope of the crimes charged in the Indictment;
- b. Victims 09/06 – 11/06 similarly were rightly rejected because they cannot show *prima facie* evidence of a crime within the confirmed indictment. The alleged crime plainly occurred before the crimes alleged in the Indictment in that location;
- c. Victim 13/06 claims that a person disappeared at a time when at least one detention centre existed in the municipality.⁷⁰ That is not sufficient to show *prima facie* evidence that the crime was within the charges in the Indictment. In the absence of some further indication of connection to that detention centre (e.g. geographical proximity) the mere fact that the Indictment alleges that there was a detention centre in the municipality does not provide *prima facie* evidence that the person was ever detained at that location;
- d. Victim 14/06 identifies no link to a crime charged in the Indictment.⁷¹ Claiming to be a victim of the crime of murder somewhere in Kosovo within the broad time period of the Indictment, is obviously not enough. The parameters of trial are not defined by the crime of murder but by the specific crimes of murder alleged in the confirmed Indictment.

⁶⁹ See Appeal, para. 47.

⁷⁰ *Ibid.*, para. 49.

⁷¹ *Contra* Appeal, para. 50.

VI. CONCLUSION

32. The scope of victim participation in the proceedings, like the scope of the trial and the judgment itself, is confined to the charges in the Indictment. The Impugned Decision correctly rejected the applications of the denied victim applicants because the crimes that they allege fall outside the scope of the Indictment and hence the trial. The Appeals should be rejected.

Word count: 5,808



Venkateswari Alagenda

Thursday, 17 June 2021

Kuala Lumpur, Malaysia.



Aidan Ellis

Thursday, 17 June 2021

London, United Kingdom.