



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06

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

Registrar: Fidelma Donlon

Date: 16 July 2021

Original language: English

Classification: Public

Decision on Appeal Against “First Decision on Victims’ Participation”

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 7 June 2021 by the Counsel for Denied Applicants, Victims 08/06, 09/06, 10/06, 11/06, 13/06 and 14/06 (“Denied Applicants”² and “Appeal”,³ respectively), against the “First Decision on Victims’ Participation” (“Impugned Decision”).⁴ The Denied Applicants request the Panel to reverse the Impugned Decision and to admit them as victims participating in the proceedings (“VPPs”) of this case.⁵ Veseli and Krasniqi both responded that the Appeal should be rejected (“Veseli Response” and “Krasniqi Response”, respectively).⁶ The other Accused and the Specialist Prosecutor’s Office (“SPO”) did not file responses to the Appeal. The Denied Applicants did not reply.

I. BACKGROUND

1. On 30 October 2020, the SPO submitted the indictment as confirmed (“Indictment”).⁷

¹ F00005, Decision Assigning a Court of Appeals Panel, 7 June 2021.

² F00293, Notification of Assignment of Counsel to Denied Applicants, 12 May 2021, para. 8.

³ F00004/RED, Public Redacted Version of the Appeal against the “First Decision on Victims’ Participation” pursuant to Rule 113(6) of the Rules, 7 June 2021 (original version filed on 7 June 2021) (“Appeal”).

⁴ F00257/RED, Public Redacted Version of the First Decision on Victims’ Participation, 21 April 2021 (original version filed on 21 April 2021) (“Impugned Decision”).

⁵ Appeal, para. 51.

⁶ F00006, Veseli Defence Response to Duty Counsel for Victim-Applicants’ Appeal - KSC-BC-2020-06/IA005-F00004/RED (“Veseli Response”), 15 June 2021, para. 7; F00007, Krasniqi Defence Response to the Appeal Against the “First Decision on Victims’ Participation” Pursuant to Rule 113(6) of the Rules, 17 June 2021 (“Krasniqi Response”), para. 32.

⁷ F00034/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*); F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2021) (“Indictment”).

2. On 4 January 2021, the Pre-Trial Judge issued a framework decision on victims' applications for participation in the proceedings ("Framework Decision").⁸

3. On 21 April 2021, the Pre-Trial Judge issued the Impugned Decision, in which he, *inter alia*, rejected as inadmissible the applications of the Denied Applicants.⁹

II. STANDARD OF REVIEW

4. The Court of Appeals Panel established a standard of review for interlocutory appeals in its first decision and applied it subsequently, including in this case.¹⁰

5. The Court of Appeals Panel recalls that, according to Rule 113(6) of the Rules, denied applicants may appeal as of right the decision denying their admission and common representation in the proceedings.¹¹

III. DISCUSSION

6. In ground of appeal (a), the Denied Applicants allege that, contrary to the Pre-Trial Judge's findings, the crimes from which they suffered harm falls under the temporal, geographical and material scope of the war crimes and crimes against humanity alleged in the Indictment.¹² In ground of appeal (b), the Denied Applicants argue that victims having suffered harm as a result of the chapeau element of the crimes against humanity alleged in the Indictment should be admitted as VPPs.¹³

⁸ F00159, Framework Decision on Victims' Applications, 4 January 2021 ("Framework Decision").

⁹ Impugned Decision, para. 85. The Panel notes that Victim 06/06, whose application was also rejected in the Impugned Decision, accepts the decision of the Pre-Trial Judge; see Appeal, para. 1.

¹⁰ KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, paras 4-7; F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021), paras 4-7; F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021), paras 4-7; F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021), paras 4-7.

¹¹ See also Rule 113(5) of the Rules.

¹² Appeal, paras 20-21, referring to Impugned Decision, para. 48. See also Appeal, paras 22-31.

¹³ Appeal, paras 32-33, referring to Impugned Decision, para. 45.

Furthermore, it is submitted in ground of appeal (c) that the Pre-Trial Judge's interpretation of the nature of the required link between the harm suffered by the victims and the Indictment was erroneous.¹⁴ The Court of Appeals Panel will first address grounds of appeal (a)-(c) together, as they relate to the Pre-Trial Judge's interpretation of the requirement that "the harm suffered [by a victim] [be] a direct result of a crime in the indictment".¹⁵

7. In ground of appeal (d), the Denied Applicants argue that the Pre-Trial Judge failed to recognise the continuing nature of the crime of enforced disappearance and the impact on the Denied Applicant's ability to provide certain information.¹⁶ In ground of appeal (e), it is submitted that each of the Denied Applicants had demonstrated that their applications should be granted.¹⁷ The Court of Appeals Panel will address grounds of appeal (d) and (e) together, as they relate to the Pre-Trial Judge's assessment of the applications filed by the Denied Applicants.

A. THE PRE-TRIAL JUDGE'S INTERPRETATION OF THE REQUIREMENT THAT THE HARM SUFFERED BE A DIRECT RESULT OF A CRIME IN THE INDICTMENT (GROUNDS (A)-(C))

1. Submissions

8. The Denied Applicants submit that the Pre-Trial Judge erred in finding that the crimes as a result of which they suffered harm would "not fall under the temporal, geographical and material scope of the charges, as specified in the Confirmed Indictment", although they provided *prima facie* evidence showing the contrary.¹⁸

9. The Denied Applicants acknowledge that the events underlying their respective applications are not listed in Schedules A-C of the Indictment.¹⁹ However,

¹⁴ Appeal, paras 34-42.

¹⁵ Rule 113(4) of the Rules.

¹⁶ Appeal, paras 43-46.

¹⁷ Appeal, paras 47-50. See also Appeal, para. 51.

¹⁸ Appeal, paras 20-22, referring to Impugned Decision, para. 48. See also Appeal, paras 23-31.

¹⁹ Appeal, para. 22.

they submit that the reference in the Indictment to a wide campaign of persecution against opponents and the statement that the “[i]ncidents of enforced disappearance of persons *include* those identified in Schedule C” shows that the list of incidents is not exhaustive but exemplary.²⁰

10. The Denied Applicants argue that the Pre-Trial Judge erred in relying on the “scope of the charges” and failed to distinguish the “charges” from the “crimes” alleged in the Indictment; they submit that the former defines and limits the factual basis of the accused’s responsibility, while the latter is broader and determines victims’ participation.²¹ According to them, the crimes alleged in the Indictment are war crimes and crimes against humanity through, *inter alia*, imprisonment / illegal or arbitrary arrest and detention, persecution, enforced disappearance, and murder.²² These are precisely the crimes which caused the Denied Applicants harm and for which *prima facie* evidence was provided.²³ The Denied Applicants further challenge an argument made by one of the Accused before the Pre-Trial Judge.²⁴

11. The Denied Applicants further submit that the Pre-Trial Judge erred when concluding that references to the context elements of crimes against humanity:

[D]o 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. Any interpretation otherwise would lead to the admission of VPPs who would not be linked to the charges specified in the Confirmed Indictment.²⁵

12. The Denied Applicants argue that they suffered as a result of incidents that form part of the chapeau element of crimes against humanity, i.e. the “widespread or systematic attack directed against any civilian population”.²⁶ They further argue that

²⁰ Appeal, para. 23, referring to Indictment, paras 32, 37, 57, 171 (emphasis added in the Appeal).

²¹ Appeal, paras 24-29, 31.

²² Appeal, para. 25.

²³ Appeal, para. 25.

²⁴ Appeal, paras 29-30.

²⁵ Appeal, paras 32, 34, referring to Impugned Decision, para. 45.

²⁶ Appeal, paras 32-33. See also Article 13(1) of the Law.

the Pre-Trial Judge's interpretation of the nature of the required link between the victims' suffering and the Indictment fails to take into consideration their collective suffering as well as their personal interests.²⁷ On the collective suffering, the Denied Applicants rely notably on the United Nations General Assembly 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 ("UN Basic Principles"),²⁸ the jurisprudence of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and of the Special Jurisdiction for Peace in Colombia (Jurisdicción Especial para la Paz, "JEP").²⁹ On the personal interest of the victims, the Denied Applicants submit that the Pre-Trial Judge failed to apply the rationale of the International Criminal Court ("ICC") Appeals Chamber in the *Lubanga* case.³⁰

13. Veseli responds that the Denied Applicants merely disagree with the Pre-Trial Judge's findings and seek to create a new and speculative category of victims that is not contemplated in the statutory framework of the Specialist Chambers.³¹ He submits that the Panel should reject the Denied Applicants' suggestion that victims who have suffered no direct harm as a result of the alleged criminal conduct of an accused, should be allowed to assist in establishing the truth of the charged crimes and be entitled to reparation.³²

14. Krasniqi responds that the Denied Applicants fail to demonstrate an error in the Pre-Trial Judge's interpretation of a "crime alleged in the indictment" pursuant to

²⁷ Appeal, paras 34-42.

²⁸ United Nations, General Assembly, A/RES/60/147, 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, 16 December 2005.

²⁹ Appeal, paras 35-37. The Denied Applicants refer to: the preamble and para. 8 of the UN Basic Principles recognising that victimisation may be directed against groups of persons who are targeted collectively; the jurisprudence of the ECCC recognising the dimension of collective victimisation and; the JEP where collective entities were admitted to participate in the proceedings.

³⁰ Appeal, paras 40-41.

³¹ Veseli Response, paras 2, 5.

³² Veseli Response, paras 3-4, 6.

Rule 113(1) of the Rules as requiring an applicant to have suffered harm from a specific crime within the precise parameters of the charges in the Indictment.³³ This requirement is supported by the preponderance of international jurisprudence. It 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.³⁴ In his view, the Denied Applicants' suggested interpretation to include, *inter alia*, alleged victims of the chapeau element of crimes against humanity, would be wrong and inconsistent with the rights of the Accused.³⁵

15. Addressing further specific arguments made by the Denied Applicants, Krasniqi submits that the use of open-ended terms, such as "include" is a defect in the Indictment that has been addressed in a Defence motion, currently pending.³⁶ He also submits that the Impugned Decision is consistent with ICC jurisprudence (including that cited in the Appeal) and was not required to discuss victims' issues in a collective sense or in the abstract, but rather had to determine whether each applicant should be admitted to participate in this trial.³⁷

2. Assessment

16. The Panel will first address the question of the meaning of "a crime alleged in the indictment" in the context of Rules 2 and 113(1) of the Rules, defining respectively the notion of victim and the notion of VPP. The Panel rejects the Denied Applicants'

³³ Krasniqi Response, paras 14, 16, 22-23, 32.

³⁴ Krasniqi Response, paras 18-20, 22. See also Krasniqi Response, paras 27-28, 32. In response to the Denied Applicants' arguments on the collective suffering, Krasniqi underlines that the reference to the ECCC is not helpful in the present context as the regime of victim participation at the ECCC is different from the one at the Specialist Chambers, notably because at the ECCC a victim has no right to individual and material compensatory damages; see Krasniqi Response, para. 23(a). See also Krasniqi Response, para. 26.

³⁵ Krasniqi Response, paras 17, 21, 24.

³⁶ Krasniqi Response, para. 23(c).

³⁷ Krasniqi Response, paras 25-28. Krasniqi further argues that the authorities quoted by the Denied Applicants pertain to other contexts and cannot assist in defining the group of participating victims for the purpose of a specific trial at the Specialist Chambers; see Krasniqi Response, paras 25-26.

argument that the reference to “a crime alleged in the indictment” must be understood as war crimes and crimes against humanity through, *inter alia*, imprisonment / illegal or arbitrary arrest and detention, persecution, enforced disappearance, and murder.³⁸ The Panel rather agrees with the Pre-Trial Judge 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 Indictment.³⁹

17. This interpretation is supported by the jurisprudence of other courts, despite different procedural contexts. At the ICC, the Appeals Chamber held that the participation of victims in the trial proceedings is limited to those victims who are linked to the charges.⁴⁰ At the Special Tribunal for Lebanon (“STL”), the Pre-Trial Judge 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”.⁴¹ At the ECCC, the Pre-Trial Chamber found that victims wishing to participate in proceedings must demonstrate that the harm suffered is not merely linked to any crime within the ECCC’s jurisdiction and held that “the applicant must demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes alleged against the charged person(s)”.⁴²

³⁸ Appeal, para. 25.

³⁹ Impugned Decision, para. 45.

⁴⁰ ICC, *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 Victims’ Participation of 18 January 2008, 11 July 2008 (“*Lubanga Appeal Decision*”), paras 2, 58, 62. See also ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-738, Decision on Victims’ Participation in Trial Proceedings, 23 November 2020, paras 20-21; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, para. 27; ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-267, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, para. 60.

⁴¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Fourth Decision on Victims’ Participation in the Proceedings (“*Ayyash et al. Fourth Decision on Victims’ Participation*”), 2 May 2013, para. 15.

⁴² ECCC, *Co-Prosecutors v. Ieng et al.*, 002/19-09-2007-ECCC/OCIJ, Public Redacted Decision on Appeals Against Co-Investigating Judges’ Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, para. 28. The Panel further notes that Internal Rule 23bis(1)(b) of the ECCC was adopted on 9 February 2010 to include the

18. According to Article 22(3) of the Law, “[a] Victim’s personal interest and rights in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation.” The same article 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”. The Panel concurs with Veseli’s and Krasniqi’s interpretation on this point, namely that “acknowledgment” and “reparation” can only relate to direct harm flowing from conduct imputed to an accused regarding a crime charged in an indictment.⁴³ In addition, the Panel finds that extending the status of VPP to victims of crimes that have not been expressly charged against an accused and, ultimately, found to have been proven by judges, would run the risk of imposing on an accused the unfair burden of having to provide reparation to victim(s) in relation to crime(s) for which he or she has not been found guilty.⁴⁴

19. Finally, the Panel notes the Denied Applicants’ submission, contrary to an argument made by one of the Accused before the Pre-Trial Judge, that their admission as VPPs would not widen the scope of the charges nor impact the Accused’s fair trial rights.⁴⁵ The Denied Applicants however fail to identify the findings they intend to challenge or to articulate any error on the part of the Pre-Trial Judge in that respect. Accordingly, the Panel dismisses these submissions.⁴⁶

following wording: “[i]n order for Civil Party action to be admissible, the Civil Party applicant shall: [...] b) demonstrate as a direct consequence of at least one of the crimes *alleged against the Charged Person* that he or she has in fact suffered physical, material or psychological injury [...] (emphasis added); see ECCC, Internal Rules, Rule 23bis(1)(b).

⁴³ See Veseli Response, para. 6; Krasniqi Response, para. 17(d).

⁴⁴ See Rule 158(1) of the Rules providing that after the closing of the case, the Panel shall retire to deliberate to pronounce a judgement “on the *charges in the indictment*” (emphasis added). See also Rule 167(2) of the Rules providing that “[f]or the purposes of a claim for compensation made before domestic courts, the Judgment transmitted under paragraph (1) shall be final and binding as to the criminal responsibility of the convicted person for such harm suffered.

⁴⁵ Appeal, paras 29-30, referring to Impugned Decision, para. 40, which summarises the submissions presented by Krasniqi according to whom the admission of the Denied Applicants would expand the parameters of the case beyond the charges; see F00209, Krasniqi Defence Response to the First VPO Report, 1 March 2021, para. 21.

⁴⁶ See e.g. KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions (“*Gucati and Haradinaj* Appeal Decision on Preliminary Motions”), 23 June 2021, para. 15.

20. The Panel will now address the Denied Applicants' argument that they suffered as a result of incidents that form part of the chapeau or context element of crimes against humanity and that these incidents should have been properly considered by the Pre-Trial Judge.⁴⁷ The Panel's finding that the participation of victims in the trial proceedings is limited to those victims who are linked to the crimes charged, necessarily relates to the alleged conduct of the Accused. The purpose of having to demonstrate the existence of a "widespread or systematic attack directed against any civilian population", as required under Article 13(1) of the Law, is to describe the context in which the Accused's conduct must take place.⁴⁸ It is not intended to create a category of crimes which is distinct or independent from the underlying crimes. A crime against humanity is composed of both the underlying crime (e.g. murder) *and* the context element. Therefore, the existence of the context element alone cannot suffice to justify the status of VPP. Even if the Denied Applicants suffered as a result of incidents falling under the chapeau element of crimes against humanity, if these incidents are not connected to the precise conduct of the Accused in relation to the underlying crimes charged against him or them, they are not relevant to deciding on victims' participation.

21. Having found that the Pre-Trial Judge did not err in finding that the crime(s) in relation to which an applicant claims to be a victim must fall under the parameters of the charges in the Indictment,⁴⁹ the Panel turns to address the Denied Applicants' arguments that the list of crimes provided in the Indictment is not exhaustive.⁵⁰ The Panel notes Krasniqi's argument that the use of open-ended terms, such as "include"

⁴⁷ Appeal, paras 32-33.

⁴⁸ See e.g. ICC, Elements of Crimes, Article 7 (Crimes against humanity), para. 2 ("The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population."). See also Article 13(1) of the Law.

⁴⁹ Impugned Decision, para. 45.

⁵⁰ Appeal, para. 23.

is a defect in the Indictment that has been raised in a Defence preliminary motion, currently pending.⁵¹

22. The Panel is of the view that this issue is determinative for the outcome of this Decision and therefore must be addressed at this juncture. The Panel will however limit its assessment to the specific instance identified by the Denied Applicants. In that regard, paragraph 171 of the Indictment provides that “[i]ncidents of enforced disappearance of persons *include* those identified in Schedule C, and described in paragraphs 137, 139, 142, 147, 149, 150, 152, 157 and 163 above.”⁵²

23. In accordance with Articles 21(4)(a) and 38(4) of the Law, as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charged crimes, including the modes of liability charged. This ensues directly from the principle that the Accused has to be informed of the nature and cause of the accusation against him or her, as enshrined in Article 30(1) of the Constitution of Kosovo and Article 6(3)(a) of the European Convention on Human Rights. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment, so as to provide notice to the accused and enable him or her to prepare a meaningful defence.⁵³

24. The Panel finds that, until sufficient notice of additional details is given by the prosecution, an accused is entitled to proceed upon the basis that what is provided in a list is exhaustive in nature.⁵⁴ The Panel considers that the reference in the Indictment to “incidents [...] *includ[ing]* those identified in Schedule C”⁵⁵ may lead to prejudice to

⁵¹ Krasniqi Response, para. 23(c), referring to F00221, Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment, 15 March 2021, paras 14, 58-60.

⁵² Emphasis added.

⁵³ See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, paras 35-36 and references cited therein.

⁵⁴ See e.g. ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 43. See also ICTR, *Muvunyi v. Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008, paras 99-100.

⁵⁵ Indictment, para. 171 (emphasis added).

the Accused as it could be seen as an attempt to reserve for the SPO the right to expand the factual basis of the charges through the addition of new material facts after the charges have been confirmed by the Pre-Trial Judge.⁵⁶ Additionally, the Panel notes that in the Confirmation Decision, the Pre-Trial Judge confirmed the count of enforced disappearance of persons only for the series of incidents listed in Schedule C and described further in the Indictment.⁵⁷ Therefore, Schedule C, read in conjunction with the relevant sections of the Indictment,⁵⁸ provides an exhaustive description of the crimes of enforced disappearance with which the Accused are charged.

25. Turning to the Denied Applicants' arguments on their collective suffering and personal interests,⁵⁹ as the Pre-Trial Judge stressed, a victim applicant is admitted to participate in the proceedings if there is *prima facie* evidence that: (a) the applicant is a natural person; (b) the applicant described acts in the application that appear to constitute a crime within the scope of the Indictment; (c) the applicant has personally suffered harm; and (d) the harm was the direct result of a crime in the Indictment.⁶⁰ The Law and Rules of the Specialist Chambers do not require the Pre-Trial Judge to consider other elements, such as the collective suffering of the victims or their personal interests, to rule on the admissibility of victims' applications.

⁵⁶ See e.g. ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Public Redacted version of Decision on the confirmation of charges, 16 December 2011, para. 81. See also ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 99.

⁵⁷ F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020), paras 418-436.

⁵⁸ See Indictment, p. 51, where the SPO indicates that "[a]ll sections of this indictment, including its Schedules, should be read in conjunction with one other." The Panel underlines that Schedules A-C of the Indictment detail, notably, the locations and approximate dates of the crimes alleged in the Indictment.

⁵⁹ Appeal, paras 34-42. The Denied Applicants also submit that the Pre-Trial Judge made a partial reading of the ICC jurisprudence he referred to in the Impugned Decision, regarding the "link" between victims and crimes; see Appeal, para. 40.

⁶⁰ Impugned Decision, para. 42, referring to Framework Decision, para. 28. See also Article 22(1) of the Law, Rules 2, 113(1) and (4) of the Rules.

26. The Denied Applicants further refer to the JEP, the judicial mechanism of Colombia's highly complex transitional justice system (Sistema Integral de Verdad, Justicia, Reparación y No Repetición). The Panel notes that the JEP represents a unique judicial component of a transitional justice system which is both the product of a peace agreement between the Colombian government and the (former) rebel group Fuerzas Armadas Revolucionarias de Colombia-Ejército Popular ("FARC-EP") and is governed by a specific constitutional framework.⁶¹ This model cannot simply be transferred to the Specialist Chambers that are governed by different Law and Rules. The broad recognition of participatory rights of victims, including collective entities, by the JEP,⁶² is a consequence of this unique constitutional framework and peculiar to this transitional justice process. The Panel stresses in this context that the possibility of ensuring minimum standards for real and meaningful victim participation is related to the implementation of sound participation mechanisms in accordance with the legal framework of the respective tribunal. Otherwise, the extensive participation of victims can easily become a mere symbolic act without real impact on the effective realisation of victims' rights to truth and justice.

⁶¹ See generally on the unique character of the JEP as a transitional justice mechanism, especially vis-à-vis international criminal tribunals, K. Ambos/S. Aboueldahab, *The Colombian Peace Process and the Special Jurisdiction for Peace, Dritto Penale Contemporaneo, Rivista Trimestrale*, 4/2018, pp. 256-258. For a recent comprehensive assessment see J.L. Fabra-Zamora/ A. Molina-Ochoa and N. Doubleday, eds., *The Colombian Peace Agreement. A Multidisciplinary Assessment*, London and N.Y. (Routledge) 2021 (with various references to the importance of victims' rights and participation, already during the peace negotiations, and as reflected in the legal framework; on the JEP see especially the contributions by Gobertus E., Ambos and Rojas Betancourt).

⁶² Colombia, Law 1922 of 2018 Adopting Rules of Procedure for the Special Jurisdiction for Peace (Ley 1922 de 2018, Por medio de la cual se adoptan unas reglas de procedimiento de la Jurisdicción Especial para la Paz), 18 July 2018, Article 2 ("participación colectiva de las víctimas frente a los procesos adelantados ante la jurisdicción especial para la Paz"); Colombia, Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, *AUTO No. 02 de 2020*, Acreditación de víctimas colectivas, 17 January 2020, pp. 11-15, 25-26. See also Appeal, para. 37; Krasniqi Response, para. 26.

27. The Panel further stresses that the recognition of collective suffering of the victims does not necessarily entail participatory rights.⁶³ The existence or lack thereof of such rights needs to be assessed within the strict parameters of the mandate of the Specialist Chambers. The findings on the status of victim(s) are strictly aimed at defining the group of participating victims for the purpose of a specific trial, *in casu*, the trial involving the four Accused in this case. Finally, the Panel stresses that the legal requirements applicable to VPPs are not designed to prevent the participation of persons who may very well be the victims of grievous crimes and suffering. Rather, the requirements for victim participation serve to ensure the integrity of particular criminal proceedings, and that the rights of the accused, together with the celerity of the proceedings, are respected.⁶⁴

28. Ultimately, the Panel agrees with the Denied Applicants that the following reasoning of the ICC Appeals Chamber in the *Lubanga* case is consistent with the legal framework of the Specialist Chambers: “[i]f the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate [...] for his or her views and concerns to be presented”.⁶⁵ However, the Panel cannot discern how any of the Pre-Trial Judge’s findings could be understood as contradicting this jurisprudence.

⁶³ With regard to collective suffering, the Panel notes that the only international judicial authority which the Denied Applicants cite in support of their arguments is from the ECCC. The Panel agrees with Krasniqi’s arguments that the ECCC has different procedural rules for matters related to victims’ reparations where victims can *only* claim and be awarded collective and moral reparations. See ECCC, Internal Rules, Rules 23bis(1)(b), 23quinqies(1); ECCC, *Co-Prosecutors v. Ieng et al.*, 002/19-09-2007-ECCC/OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, para. 70. See also Krasniqi Response, paras 23(a), 26. In addition, the Panel recalls that the test of “personal interests” being affected relates to the determination of the *modalities* of victim participation in the proceedings and not to the admission of victims for participation; see Rule 114(4) of the Rules. In addition, the UN Basic Principles primarily define the content of the rights of victims to a remedy and to reparation. They do not focus on defining what a victim is for the narrow purpose of a specific trial. See UN Basic Principles, paras 8-9.

⁶⁴ Similarly, *Ayyash et al.* Fourth Decision on Victims’ Participation, para. 28.

⁶⁵ *Lubanga* Appeal Decision, para. 64; Appeal, paras 40-41.

29. Accordingly, the Panel dismisses the Denied Applicants' grounds (a)-(c).

B. THE PRE-TRIAL JUDGE'S ASSESSMENT OF THE DENIED APPLICANTS' APPLICATIONS
(GROUNDS (D)-(E))

1. Submissions

30. The Denied Applicants argue that the Impugned Decision failed to properly consider the crime of enforced disappearance. Reference is made to the "specific and extreme seriousness" of this crime.⁶⁶ It is submitted that "considering the nature of enforced disappearances and giving effect to the victim's right, [a] broad link [between the crime and the Indictment] must suffice".⁶⁷ It is further argued that, when the whereabouts of the disappeared person are unknown and when victims do not know the specific detention site at which the person was held because they were denied any information about this, the *prima facie* standard can hardly be met.⁶⁸ In addition, regarding the temporal link with the crimes alleged in the Indictment, the Denied Applicants submit that the crime of enforced disappearance is a crime that continues as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.⁶⁹

31. The Denied Applicants further provide explanations regarding the individual applications they filed and argue that they demonstrated, on a *prima facie* basis, a sufficient link between the harm they suffered and the crimes in the Indictment.⁷⁰

32. Krasniqi responds that the "extreme seriousness" of the crime of enforced disappearance was not relevant to the Impugned Decision; the continuing nature of this crime was also irrelevant unless the evidence shows that, at some stage, the

⁶⁶ Appeal, para. 43.

⁶⁷ Appeal, para. 47, referring to Victim 08/06. See also Appeal, para. 49, referring to Victim 13/06.

⁶⁸ Appeal, para. 44. See also Appeal, para. 47, referring to Victim 08/06. See also Appeal, para. 49, referring to Victim 13/06.

⁶⁹ Appeal, para. 45. See also Appeal, para. 46.

⁷⁰ Appeal, paras 47-50.

continuing crime fell within the crimes alleged in the Indictment; and to meet the *prima facie* threshold, a victim must know when and where the relevant individuals were detained.⁷¹ In addition, he argues that the applications filed by the Denied Applicants fall outside of the scope of the charges in this case and were rightly rejected.⁷²

2. Assessment

33. The Panel interprets the Denied Applicants' arguments on the "necessary human rights protection in cases of enforced disappearances" and on the "specific and extreme" seriousness of the crime of enforced disappearance,⁷³ as referring to the crime of enforced disappearance of person as part of Crimes against Humanity pursuant to Article 13(1)(i) of the Law. Thus, it is not required to deal with the question of the existence of enforced disappearance as an individual crime (as part of customary international law) within the legal framework of the Specialist Chambers.

34. Although the Denied Applicants seem to argue that the Impugned Decision failed to grasp the "specific and extreme seriousness of the crime of enforced disappearance",⁷⁴ the Panel finds that they fail to identify the findings they intend to challenge in this regard and further that they fail to articulate any error arising from the Impugned Decision. Accordingly, the Panel summarily dismisses these submissions.⁷⁵

35. The Panel further notes that the Denied Applicants appear to suggest that the lack of precision in some of the denied applications with regard to the location of the crime of enforced disappearance is caused by the applicant's difficulties in obtaining specific information but that, nonetheless the information that has been provided

⁷¹ Krasniqi Response, para. 29.

⁷² Krasniqi Response, paras 30-31.

⁷³ Appeal, para. 43. See also Appeal, fn. 51.

⁷⁴ Appeal, para. 43.

⁷⁵ See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.

“should suffice for the necessary link” between the crime(s) alleged by the Denied Applicants and the crime(s) charged in the Indictment.⁷⁶ The Panel recalls first 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 Indictment.⁷⁷ The evidence provided by an applicant in that regard must be sufficient to meet the *prima facie* standard. The Panel notes the Denied Applicants’ argument that the *prima facie* standard is more difficult to meet for victims of enforced disappearances. However, recalling that the Pre-Trial Judge shall not engage in a substantive assessment of the credibility or reliability of the submitted information – as correctly underlined in the Impugned Decision,⁷⁸ the Panel is not persuaded that it would be unreasonably burdensome for applicants to meet the *prima facie* threshold, even when accounting for any additional difficulties which may be presented by the nature of the crime of enforced disappearance.

36. Regarding the arguments on the continuing nature of the crime of enforced disappearance and the uncertainty regarding the end date of this offence, an applicant must at least be able to demonstrate that the start date of the alleged crime falls within the temporal scope of the charges. The continuous nature of the crime does not impact the fact that, to be a VPP, an applicant needs to describe acts in his application that appear to constitute a crime within the scope of the Indictment and that the harm allegedly suffered by the applicant must be the direct result of a crime in the Indictment.⁷⁹ Accordingly, the Panel dismisses the Denied Applicants’ ground of appeal (d).

37. Notwithstanding the important general principles governing the status of VPP before the Specialist Chambers recalled throughout this Decision, the Panel notes that,

⁷⁶ See Appeal, paras 47, 49.

⁷⁷ See above para. 16.

⁷⁸ Impugned Decision, para. 43, fns 44-45, and the jurisprudence cited therein.

⁷⁹ Article 22(1) of the Law; Rules 2(1), 113(1) and (4) of the Rules.

in ground of appeal (e) the Denied Applicants allege that the Pre-Trial Judge erred in the individual assessment of their applications. They further provide explanations regarding the individual applications they filed and argue that they demonstrated, on a *prima facie* basis, a sufficient link between the harm they suffered and the crimes in the Indictment.⁸⁰ At this stage, the Panel finds that it is not able to fully address this ground of appeal.

38. This is because the Impugned Decision does not provide any individual assessment of denied victims' applications. In that regard, the Panel recalls that paragraph 48 of the Impugned Decision rejecting the denied applications is extremely brief and only addresses the case of the Denied Applicants in general terms. It reads in relevant part as follows:

As regards the [Denied Applicants], the Pre-Trial Judge finds that the crimes they claim to have been victims of do not fall under the temporal, geographical and material scope of the charges, as specified in the Confirmed Indictment, and therefore fall outside the scope of Rules 2 and 113(1) of the Rules. [...].

39. The Panel is of the view that the Denied Applicants deserve, like all of the applicants, an individual assessment of their applications. The Impugned Decision does not provide any explanation or detailed reasoning from the Pre-Trial Judge in order for the Denied Applicants to fully understand why their applications were rejected so that they have the means to understand and accept the decision or, if they do not accept it, they have the means to challenge it. The wording of paragraph 48 of the Impugned Decision suggests that this assessment was conducted by the Pre-Trial Judge. However, it is not reflected in the Impugned Decision and therefore not available to the Denied Applicants or to the Panel. In these circumstances, the Panel cannot assess the Denied Applicants' ground of appeal (e).

⁸⁰ Appeal, paras 47-50.

40. Therefore, the Panel defers its determination on ground of appeal (e) of the Denied Applicants to a later stage and instructs the Pre-Trial Judge to revert to the Court of Appeals Panel as soon as possible with an individual assessment of the applications filed by the Denied Applicants as well as the reasons underpinning the Pre-Trial Judge's finding that the Denied Applicants are not admitted to the proceedings as participating victims.

IV. DISPOSITION

41. For these reasons, the Court of Appeals Panel:

DENIES grounds (a) to (d) of the Appeal;

DEFERS determination on ground (e) of the Appeal; and

REMANDS the matter to the Pre-Trial Judge for further consideration consistent with paragraph 40 of this Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 16 July 2021

At The Hague, the Netherlands