

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Daryl Mundis, Acting Registrar**

Date: **2 May 2013**

Original language: **English**

Classification: **Public with confidential and *ex parte* annex**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

FOURTH DECISION ON VICTIMS' PARTICIPATION IN THE PROCEEDINGS

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan

Legal Representative of Victims:
Mr. Peter Haynes

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz

Victims' Participation Unit:
Mr. Alain Grellet

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young



I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on applications by four persons each requesting status as a victim participating in the proceeding (“VPP status”). These applications have been transmitted with the assistance of the Tribunal’s Victims’ Participation Unit (“VPU”) pursuant to Rule 51(B)(iii) of the Rules of Procedure and Evidence (“Rules”).

II. PROCEDURAL BACKGROUND

2. On 8 May 2012, the Pre-Trial Judge issued a public decision on VPP status.¹ On 3 September 2012 the Pre-Trial Judge issued the second decision on VPP status.²

3. On 2 November 2012, the VPU filed the “Further Transmission of Applications for the Status of Victim Participating in the Proceedings, Including Retransmitted (*sic*) and New Applications” in relation to the applications of five persons seeking VPP status (“Further Transmission of Applications”).³

4. On 28 November 2012, the Pre-Trial Judge rendered the “Third Decision on Victims’ Participation in the Proceedings” ruling solely on the resubmitted claim of only one applicant.⁴ Consequently, the applications by the remaining four applicants identified as V074, V075, V076 and V077 (collectively, the “Applicants”) are pending and form the subject of this decision.

III. SUBMISSIONS

5. The submissions of the VPU, provided to the Pre-Trial Judge on behalf of the Applicants, are summarised in the confidential and *ex parte* annex to this decision. This

¹ Decision on Victims’ Participation in the Proceedings, 8 May 2012, Public with confidential and *ex parte* annex.

² Second Decision on Victims’ Participation in the Proceedings, 3 September 2012, Public with confidential and *ex parte* annex.

³ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Further Transmission of Applications for the Status of Victim Participating in the Proceedings, Including Retransmitted (*sic*) and New Applications, 2 November 2012, Public with confidential and *ex parte* annexes. The annexes comprise of an overview of the claims prepared by the VPU (Annex 1); the individual applications and supporting documents by the applicants (Annexes 2, 3, 5, 7, and 9 for applicants V029, V074, V075, V076 and V077 respectively); and summaries of each application prepared by the VPU (Annexes 4, 6, 8 and 10 for applicants V074, V075, V076 and V077 respectively). All further references to filings and decisions relate to this case number unless otherwise stated.

⁴ Third Decision on Victims’ Participation in the Proceedings, 28 November 2012, Public with confidential and *ex parte* annex.

decision is classified as “public”, with an examination of the Applicants’ claims detailed in the attached confidential and *ex parte* annex. This approach conforms to the Tribunal’s practice in previous decisions determining VPP status, which aims to strike a balance between ensuring transparency in the proceedings as enshrined in Rule 96 (A),⁵ and ensuring the protection and confidentiality of Applicants and their applications.⁶

6. Consequently, for the sake of the protection of the Applicants, any details of their claims tending to reveal their identities will not be articulated in the body of this decision, but rather in the annex appended to this decision. This includes details of the harm suffered by the Applicants and how this harm is linked to the killing of the Lebanese Prime Minister Rafiq Hariri and others on 14 February 2005.

7. The Pre-Trial Judge is seised of an issue on a point of law which is critical and determinative in resolving the question of whether the Applicants are entitled to VPP status. Notably, the issue arising hinges on the extent to which the Applicants have demonstrated a direct causal nexus between a crime in the indictment on the one hand, and the consequent harm suffered by an applicant for VPP status on the other. This key issue is analysed in the following section of this decision, which is rendered publicly in accordance with Rule 96(A).

IV. APPLICABLE LAW

8. The relevant analysis of the law applicable to a determination of VPP status pursuant to Rule 86 has been outlined in previous decisions, in particular, the “Decision on Victims’ Participation in the Proceedings” of 8 May 2012 (the “First Decision”).⁷ The crux of the issue to be examined in this decision is the requirement imposed on VPP status applicants to demonstrate that an “attack within the Tribunal’s jurisdiction” has directly caused resulting physical, mental or material harm. This causal requirement arises through the operative provisions of Rules 2 and 86(B), in particular, Rule 86(B)(i).

9. Rule 86(B) enumerates several mandatory and discretionary criteria to be satisfied by an applicant seeking VPP status. Relevantly, the first of four mandatory criteria that an

⁵ Rule 96(A) STL RPE provides that “[s]ubject to sub-paragraph (B), pre-trial filings, proceedings and orders shall be public, unless otherwise provided by the Rules or decided by the Pre-Trial Judge at the request of a Party.”

⁶ Decision on Defence Motion of 17 February 2012 for an Order to the Victims’ Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, 5 April 2012.

⁷ Decision on Victims’ Participation in the Proceedings, 8 May 2012, Public with confidential and *ex parte* annex, Sections III and IV.

applicant seeking VPP status must demonstrate is stipulated in Rule 86(B)(i), which requires that the applicant provide “prima facie evidence that he is a victim as defined by Rule 2”.⁸

10. “Victim”, as defined in Rule 2, establishes three cumulative elements: (1) the applicant must be a natural person; (2) the applicant must have suffered physical, material or mental harm; and (3) such harm must have been a direct result of an attack within the Tribunal’s jurisdiction. Critically, the third element establishes a test of causation.

11. Further, therefore, to the analysis in the First Decision, the Pre-Trial Judge clarifies in this decision the meaning of what constitutes a “Victim” as defined in Rule 2 for the purposes of determining whether to grant VPP status to an applicant in accordance with criteria enumerated in Rule 86(B), and Rule 86(B)(i) in particular.

12. By its reference to “an attack within the Tribunal’s jurisdiction”, Rule 2 is potentially open to interpretation. The exercise of interpreting Rules 2 and 86(B)(i), as mandated by Rule 3, must be conducted in a manner consonant with the spirit of the Tribunal’s Statute. In the event of any remaining ambiguity, additional sources that inform the interpretive exercise include Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”)⁹ which codifies customary international law on the subject. These principles require, *inter alia*, that a provision be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context and in the light of its object and purpose of the Statute as a whole.¹⁰ Other sources to be taken into consideration include, in order of precedence, international standards on human rights, general principles of international criminal law and procedure and, where appropriate, the Lebanese Code of Criminal Procedure.¹¹

13. For the reasons which follow, the Pre-Trial Judge construes Rules 2 and 86(B)(i) to the effect that the causation test requires VPP status applicants to demonstrate on a *prima facie* basis that the harm claimed is caused by a specific crime charged in the indictment.

⁸ The further three mandatory criteria provided in Rule 86(B) are: (ii) whether the applicant’s personal interests are affected; (iii) whether the applicant’s proposed participation is intended to express his views and concerns; and (iv) whether the applicant’s proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

⁹ Vienna Convention on the Law of Treaties, Adopted 23 May 1969, 1155 U.N.T.S. 331 (“Vienna Convention”).

¹⁰ Vienna Convention, Art 31(2)-(3). *See also*, First Decision, para. 23 citing STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr Assad Hassan Sabra, 28 June 2011, paras 19 and 21.

¹¹ Rule 3, STL RPE.

14. The causal link requirement stipulated by the third element in Rule 2 with reference to an “attack within the Tribunal’s jurisdiction” adopts the language of Rule 1 which determines the jurisdiction of the Tribunal.¹² This raises a potential ambiguity which merits further clarification. An “attack”, even one limited to being “within the Tribunal’s jurisdiction”, lacks sufficient precision. The term “attack” is nowhere defined in the Rules or the Statute. Conceptually, the term is factual in nature. As the VPU observes, the term “attack” by its very vagueness is capable of being interpreted either narrowly (e.g. limited to the detonation of 14 February 2005 resulting in the killing of Rafiq Hariri and others) or broadly (e.g. encompassing all manner of preparatory or ancillary acts prior to the detonation).¹³

15. Focussing on whether a broad or narrow reading should be taken of any particular “attack” mischaracterises the issue. The Pre-Trial Judge considers 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. This reading confers a legal character to the parameters of the causation elements, thereby providing greater certainty and rigour to the process of VPP status assessments. The reasons supporting this interpretation are as follows.

16. First, Rules 2 and 86(B)(i) must be read consonantly with the spirit of the Statute;¹⁴ put another way, they must be read in good faith, in the context, and in light of the object and purpose of the Statute as a whole.¹⁵ Such a reading dictates that harm claimed by an applicant seeking VPP status must be causally linked to a crime charged in the Indictment against the accused. In this regard, the Pre-Trial Judge notes that Article 25 of the Statute, like Rule 2, establishes a causation test in permitting the Tribunal to “identify victims who have suffered harm as a result of the commission of *crimes* by an accused convicted by the Tribunal”.¹⁶ It is also the case that Article 25 is contained in a section of the Statute governing compensation, which is generally considered at the conclusion of proceedings in the event of a finding of guilt of an accused. If an overly liberal view of “attack” in Rule 2 was to be adopted for the purposes of Rule 86(B)(i), this could potentially lead to the incongruous, indeed illogical, outcome that a wider class of victims would be admitted as VPPs only to be denied

¹² STL Statute, Art. 1 provides more precisely: “The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death and injury of other persons [..]”.

¹³ Further Transmission of Applications, Annex 1, paras 15 and 23.

¹⁴ Rule 3, STL RPE.

¹⁵ Vienna Convention, Art. 31(1).

¹⁶ Art. 25(1), STLSt, emphasis added.

compensation at the conclusion of proceedings based on the narrower ground of Article 25. The admission of victims as VPPs and their participation at all stages of the proceedings should be consistent throughout the proceedings.

17. Furthermore, the wording “attack within the jurisdiction of the Tribunal” in Rule 2 is closely related to Article 1 of the Statute which circumscribes the Tribunal’s jurisdiction while also adopting the language of “attack”. Of particular relevance to the current proceedings, Article 1 describes the scope of the Tribunal’s jurisdiction as the “attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death and injury of other persons”. While Article 1 does not explicitly make reference to “crimes” *per se*, Article 2, which provides for the applicable law in proceedings before the Tribunal, refers to “the prosecution and punishment of the *crimes* referred to in article 1” before enumerating the relevant criminal offences.¹⁷ Seen in this light, for an application for VPP status to succeed, a causal link between the harm suffered and a crime within the Tribunal’s jurisdiction must be established *prima facie*.

18. Second, the criterion expressed in Rule 86(B)(i), and by reference Rule 2, must be read in good faith, in context and in light of the object and purpose of other provisions of the Rules. This includes, first and foremost, Rule 86 (entitled “Granting the Status of Victim Participating in the Proceedings”) contained in Part 5, Section 3 of the Rules. In particular, Rule 86(A) provides the overarching general principle that:

*If the Pre-Trial Judge has confirmed the indictment under Rule 68, a person claiming to be a victim of a crime within the Tribunal’s jurisdiction may request the Pre-Trial Judge to be granted the status of victim participating in the proceedings pursuant to Article 17 of the Statute.*¹⁸

The nexus between VPP status and a “crime” in Rule 86(A), in contrast to the more factually based reference to an “attack”, is reinforced further by the condition that an indictment containing specific charges by the Prosecution must have first been confirmed by the Pre-Trial Judge. Such a condition thereby confers a strictly legal character on the exercise of assessing requests for VPP status.

¹⁷ Emphasis added. Those crimes include (a) “provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit association and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.

¹⁸ Emphasis added.

19. Similarly, Rule 86(G), which like Article 25 of the Statute deals with compensation, requires a putative victim to have “suffered harm as a result of the commission of crimes by an accused”.¹⁹ Therefore, Rule 86(B)(i) must be read in a manner which preserves the internal consistency of Rule 86 as a whole.

20. Third, in considering the context of the relevant provisions, the Pre-Trial Judge gives due regard to relevant international law.²⁰ It is noteworthy that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by resolution of the United Nations General Assembly, also defines a victim by reference to a criminal offence. In relevant part, victims are defined as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are *in violation of criminal laws*”.²¹ It follows that, in the context of criminal proceedings, victims seeking to participate must necessarily be able to demonstrate a nexus not only with any criminal offence, but rather, with the specific offences charged in the indictment.

21. Fourth, in the event of any remaining doubt, recourse to supplementary means of interpretation can be helpful.²² Guidance with respect to the interpretation of Rule 2 in the context of Rule 86(B)(i) is provided by the Explanatory Memorandum on the Rules which emphasises that “the notion of ‘victim’ must be defined rather narrowly”.²³ The object and purpose of this imperative was to limit the volume of victims granted VPP status, in order to prevent the process from becoming cumbersome and slow.²⁴

22. Fifth, the various different language versions of Rule 2 are themselves not entirely consistent on this point, and they are open to interpretation when read together. While the English and French versions employ the term “attack”, the use of the term “جريمة” in the Arabic version translates as “crime”, “felony” or “offence” in English or *crime, délit*,

¹⁹ Rule 86(G), STL RPE provides: “Any person identified in a final judgment as a victim, or otherwise considering himself or herself victim, who has suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal may request from the Registrar a certified copy of the judgment for the purpose of exercising his or her rights under national or other relevant law, as provided by Article 25 of the Statute”.

²⁰ Vienna Convention, Art. 31(3).

²¹ A/RES/40/34 (1985), Annex, at para. 1. Emphasis added.

²² Vienna Convention, Art. 32.

²³ Rules of Procedure and Evidence Explanatory Memorandum, 25 November 2010 (“Explanatory Memorandum”), para. 19.

²⁴ Explanatory Memorandum, para. 18.

forfaiture or *infraction majeure* in French.²⁵ In accordance with Article 33 of the Vienna Convention, where the relevant text has been authenticated in two or more languages, each linguistic version is equally authoritative and the terms must be presumed to be consistent in their meaning. In the event of any remaining ambiguity, this inconsistency can be reconciled by settling on a single meaning having regard to the object and purpose of the Statute and the Rules. On balance, and consistent with the foregoing analysis, the better view is that the Arabic version of the text is to be preferred, having regard to the object and purpose of the Statute and Rule 86.

23. Sixth, jurisprudence emanating from international criminal courts and tribunals on equivalent provisions from their respective Rules of Procedure and Evidence can be of assistance. This jurisprudence is consistent in requiring a causal nexus between harm suffered by an applicant and a relevant crime charged in the Indictment. In this regard, the jurisprudence of the International Criminal Court (“ICC”) and the Extraordinary Chambers in the Court of Cambodia (“ECCC”) on the equivalent provisions to those currently under consideration is relevant.

24. The ECCC Pre-Trial Chamber, on appeal from decisions of the Co-Investigating Judges, has found that the Court’s Internal Rules make express reference to a causal link between harm suffered by victim applicants and an alleged “crime”.²⁶ That Chamber has held that victims – known in that jurisdiction as *parties civiles* – wishing to participate in proceedings must demonstrate that the harm suffered is not merely linked to any crime within the jurisdiction of the ECCC, but more specifically, “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)”.²⁷

25. Rule 85(a) of the ICC Rules of Evidence and Procedure (“ICC Rules”) likewise defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court”. Pre-Trial Chamber I of the ICC has held that

²⁵ Mona Joreige, *Glossary of Legal Terms* (Librarie du Liban Publishers, 2007) p. 231.

²⁶ Internal Rule 23*bis*(1)(b), adopted on 9 February 2010, entered into force on 19 February 2010, provides that in order for a Civil Party action to be admissible, “the Civil Party applicant shall 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 [...] injury”.

²⁷ Extraordinary Chambers in the Court of Cambodia (“ECCC”), *Prosecutor v. Thirith Ieng, Ieng Sary, Khieu Samphan and Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC47 & 48), 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 (in relation to Internal Rule 23(1)(a)). See also, para. 29 in relation to Internal Rules 23(2) and 23*bis*(1)(b).

the events described in an application for participation must first constitute crime(s) within the jurisdiction of the court and, furthermore, the harm suffered by the applicant must appear to have arisen “as a result” of the crime charged.²⁸

26. In applying the causation test in the *Banda and Jerbo* proceedings, Pre-Trial Chamber I of the ICC concluded that “the events as a result of which [the applicant] allegedly suffered harm are not the incidents which form the basis of the crimes with which the suspects are charged”, and was not satisfied that the harm alleged was caused by crimes of which the suspects were accused.²⁹

27. As this example demonstrates, a nexus must be clearly demonstrated between the harm suffered and a charge in the indictment.

28. It should be noted that this legal requirement is 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.

V. FINDINGS

29. The Pre-Trial Judge finds that the Applicants have failed to satisfy the first mandatory criterion in Rule 86(B)(i) requiring them to provide *prima facie* evidence that they are Victims as defined in Rule 2. More detailed reasons are outlined in the confidential and *ex parte* annex to this decision. For this public decision, it suffices to say that the Applicants have not demonstrated the required nexus between the harm they each claim to have suffered, and a crime pleaded within the indictment against the accused.

²⁸ International Criminal Court (“ICC”), *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges, 29 October 2010 (“*Banda and Jerbo*”), para. 2. See also, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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, paras 58-65; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Fourth Decision on Victims’ Participation, 12 December 2008, paras 62-63.

²⁹ *Banda and Jerbo*, para. 22.

30. As the four mandatory criteria set out in Rule 86(B) are cumulative, the Pre-Trial Judge considers it unnecessary to evaluate the remaining three criteria in Rule 86(B)(ii)-(iv).³⁰

31. The Pre-Trial Judge recalls Rule 51(B)(v), which requires the VPU to inform the Applicants of this decision “in a timely manner”, and considers that notification should be effected within four weeks of the Arabic translation of this decision.

VI. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Articles 17 and 25 of the Statute and Rules 2, 51(B)(v), 86 and 133 of the Rules:

DENIES VPP status to the Applicants (V074, V075, V076 and V077);

ORDERS the VPU to notify the applicants of the present decision within four weeks of the finalisation of its Arabic translation;


ORDERS that the Annexes to the “Further Transmission of Applications for the Status of Victim Participating in the Proceedings, Including Retransmitted (*sic*) and New Applications”, filed by the VPU on 2 November 2012, remain confidential and *ex parte* until further order; and


ORDERS that the Annex to this decision remain confidential and *ex parte* until further order.

Done in Arabic, English and French, the English version being authoritative.

Leidschendam, 2 May 2013




Daniel Fransen
Pre-Trial Judge



³⁰ Nor, needless to say, the discretionary criteria in Rule 86(B)(v)-(x).

30. As the four mandatory criteria set out in Rule 86(B) are cumulative, the Pre-Trial Judge considers it unnecessary to evaluate the remaining three criteria in Rule 86(B)(ii)-(iv).³⁰

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Daniel Fransen
Pre-Trial Judge



³⁰ Nor, needless to say, the discretionary criteria in Rule 86(B)(v)-(x).