



THE PRE-TRIAL JUDGE

Case No.: STL-11-01/PT/PTJ
The Pre-Trial Judge: Judge Daniel Fransen
The Registrar: Mr. Herman von Hebel
Date: 8 May 2012
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THE PROSECUTOR
v.
**SALIM JAMIL AYYASH,
MUSTAFA AMINE BADREDDINE,
HUSSEIN HASSAN ONEISSI &
ASSAD HASSAN SABRA**

DECISION ON VICTIMS' PARTICIPATION IN THE PROCEEDINGS

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I. Introduction

1. The Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) is in receipt of the “Transmission of Applications for the Status of Victim Participating in Proceedings” (the “Transmission Document” and “Applications”, respectively), filed by the Victims’ Participation Unit of the Tribunal (the “VPU”).¹

2. In the present decision, the Pre-Trial Judge rules on the status of victims participating in the proceedings (“VPP” or “VPPs”) in the *Ayyash et al.* case on the basis of *prima facie* evidence that a natural person has suffered physical, material or mental harm as a direct result of the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons (the “Attack”).² Applicant victims who are granted the status of VPPs are entitled to participate in the Tribunal’s proceedings in a manner consistent with the Tribunal’s Statute (the “Statute”) and Rules of Procedure and Evidence of the Tribunal (the “Rules”).

3. This decision is therefore without prejudice to another Chamber’s determination in a final judgment that an individual who has been granted VPP status by the Pre-Trial Judge on the basis of *prima facie* evidence is or is not a victim of an attack falling within the Tribunal’s jurisdiction.³

4. With regard to the modalities of victims’ participation in the proceedings, they are determined by the appropriate Chamber at different stages of the proceedings, pursuant to Rule 87 of the Rules. In so far as the modalities of victims’ participation in proceedings before the Pre-Trial Judge are concerned, they will form the object of a separate decision.

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Transmission of Applications for the Status of Victim Participating in the Proceedings, filed publicly with confidential and *ex parte* annexes, 9 February 2012. The VPU filed both the “Corrigendum to ‘Transmission of Applications for the Status of Victim Participating in the Proceedings’” and the “Annex - Corrigendum to ‘Overview of Victim Applications’” on 15 February 2012, the latter being filed confidential and *ex parte*.

² Art. 1 STLSt.

³ Art. 25(1) STLSt. provides that “[t]he Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.” Furthermore, Rule 86(G) STL RPE states as follows: “[a]ny person identified in a final judgment as a 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.”



5. In the present decision, the Pre-Trial Judge will first recall the procedural background (Section II) and the applicable law (Section III). Having discussed the criteria to be applied to the assessment of the Applications (Section IV), the Pre-Trial Judge will state his findings in a summary manner (Section V), since each individual Application is analysed in detail in the confidential and *ex parte* annex to this decision. After determining the victims who may participate in the *Ayyash et al.* case, the Pre-Trial Judge will rule on the issues of victims' common legal representation and their possible division into more than one group (Section VI). Finally, he will make some remarks on the confidentiality of the Applications (Section VII).

II. Procedural Background

6. On 9 February 2012, the VPU filed the Transmission Document before the Pre-Trial Judge pursuant to Rule 51(B)(iii) of the Rules.⁴ The Transmission Document included 147 annexes classified as confidential and *ex parte*. The confidential and *ex parte* annexes comprised 73 Applications,⁵ and further documents prepared by the VPU: an associated application summary in respect of the completeness of each Application, and an overview of all the Applications.

7. On 17 February 2012, the Defence of Mr. Sabra filed a "Motion for an Order to VPU to Re-File its Annexes *inter partes* or to Seek Protective Measures from the Pre-Trial Judge" in which they objected to the filing of the Transmission Document in a confidential and *ex parte* manner and denying the Defence access thereto.⁶ Following further submissions from the Defence of Mr. Sabra,⁷ the Prosecution⁸ and the VPU,⁹ the Pre-Trial Judge issued a

⁴ Cf. note 1 above.

⁵ Transmission Document, paras 1, 27.

⁶ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Motion for an Order to VPU to Re-File its Annexes *inter partes* or to Seek Protective Measures from the Pre-Trial Judge, 17 February 2012, (the "Sabra Motion"), para. 4.

⁷ On 24 February 2012, the Pre-Trial Judge invited Counsel for Mr. Sabra to file a supplementary submission in light of the then-pending entry into force on 29 February 2012 of the amended Rules ("CMSS Memorandum regarding Scheduling Directive from the Pre-Trial Judge pursuant to Rule 8 regarding the Motion for an Order to VPU to Re-File its Annexes *Inter Partes* or to Seek Protective Measures from the Pre-Trial Judge, filed by Counsel for Mr. Sabra on 17 February 2012", 24 February 2012).

Counsel for Mr. Sabra duly filed this supplementary submission on 29 February 2012 (STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra Defence Supplementary Filing regarding VPU's Transmission (Amendment of Rule 86(C)), 29 February 2012) (the "Supplementary Sabra Motion"). Both the Sabra Motion and the Supplementary Sabra Motion expressed that Defence Counsel for the three other accused



decision on 5 April 2012 denying the request of the Defence of Mr. Sabra (the “Decision of 5 April 2012”)¹⁰ and inviting the Parties and the VPU to submit their observations in relation to legal issues relevant to the Pre-Trial Judge’s decision on applications for the status of VPP.¹¹

8. On 23 April 2012, the Prosecution and the VPU submitted their respective observations in response to the Pre-Trial Judge’s Decision of 5 April 2012 (the “Prosecution’s Submission”¹² and the “VPU Submission”,¹³ respectively). The arguments of the Prosecution and the VPU on the legal issues put forward by the Pre-Trial Judge will be recalled in the relevant sections below.

9. On 23 April 2012, the Defence of Mr. Sabra and the Defence of Mr. Badreddine (the latter being joined by the Defence of Mr. Oneissi) also notified the Pre-Trial Judge that, without having access to the Applications, they declined at the current stage of proceedings to make submissions on the legal issues raised by the Pre-Trial Judge.¹⁴ The Defence of Mr. Ayyash did not file any submission.

in the *Ayyash et al* case “join and support” the position of the Sabra Defence (Sabra Motion, para. 3; Supplementary Sabra Motion, para. 5).

⁸ On 7 March 2012, the Prosecutor filed its submission (STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission pursuant to the Scheduling Directive dated 24 February 2012, 7 March 2012).

⁹ On 7 March 2012, the VPU filed its response (STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, VPU Response to Sabra Defence Motion and Supplementary Filing concerning Annexes to the VPU Transmission, 7 March 2012).

¹⁰ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, 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, (the “Decision of 5 April 2012”). The Pre-Trial Judge notes that on 19 April 2012, the Prosecution filed the “Prosecution Request for Leave to Seek Reconsideration and Reconsideration of the Pre-Trial Judge’s Decision of 5 April 2012 Concerning Access to Applications for the Status of Victim Participating in the Proceedings, or Alternative Relief.” In the *Décision relative à la requête du Procureur en réexamen de la Décision du 5 avril 2012* of 4 May 2012, the Pre-Trial Judge denied the request.

¹¹ Decision of 5 April 2012, para. 59.

¹² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission in Response to the Pre-Trial Judge’s Order Dated 5 April 2012, 23 April 2012.

¹³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, VPU Submission on Legal Issues pursuant to the Pre-Trial Judge’s Decision of 5 April 2012, 23 April 2012.

¹⁴ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra Notice Regarding Certain Legal Issues Pertaining to Victims’ Participation, 23 April 2012, para. 4; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01-PT/PTJ, *Mémoire de la Défense en réponse aux questions liées à la participation des victimes*, 23 April 2012, para. 3.



10. On 26 April¹⁵ and 3 May 2012,¹⁶ the VPU filed supplementary materials to its Transmission Document as requested by the Pre-Trial Judge on 24 April 2012.¹⁷

11. Upon the Pre-Trial Judge's authorisation,¹⁸ on 27 April 2012, the VPU filed further submissions on the issue of common legal representation of victims authorised to participate in proceedings.¹⁹

III. Applicable Law

12. The provisions relevant to the granting of VPP status are Articles 17 and 25 of the Statute, which are supplemented by Rules 2, 51 and 86 of the Rules.

13. Article 17 of the Statute sets out the general framework for victims' participation in the proceedings. It provides that:

[w]here the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

14. Article 25(1) of the Statute, which deals with compensation to victims, identifies victims as persons "who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal."

15. Rule 2 of the Rules contains definitions of both a "victim" and a "victim participating in the proceedings". The former is defined as "[a] natural person who has suffered physical,

¹⁵ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01-PT/PTJ, Transmission of Consolidated Applications for the Status of Victim Participating in the Proceedings, Including Supplementary Material, 26 April 2012 (the "Transmission of Consolidated Applications"). The VPU re-filed each annex which was subject to the Pre-Trial Judge's request for supplementary materials. In the Annex to this decision, the Pre-Trial Judge refers to these new annexes only to the extent necessary to make reference to the supplementary material.

¹⁶ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Second Transmission of Consolidated Applications for the Status of Victim Participating in the Proceedings, Including Supplementary Material, 3 May 2012 ("Second Transmission of Consolidated Applications").

¹⁷ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Internal Memorandum, *Demande de pièces complémentaires à l'appui des requêtes des personnes souhaitant obtenir la qualité de victime participant à la procédure*, confidential and *ex parte*, 24 April 2012.

¹⁸ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Internal Memorandum, *Requête confidentielle et ex parte du Greffier aux fins d'autoriser la Section de participation des victimes à déposer des écritures conformément à l'article 51 E) du RPP*, confidential and *ex parte*, 27 April 2012.

¹⁹ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Observations de la section de participation des victimes sur la répartition des victimes*, 27 April 2012 (the "VPU Observations").



material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction". The definition of the latter is a "[v]ictim of an attack within the Tribunal's jurisdiction who has been granted leave by the Pre-Trial Judge to present his views and concerns at one or more stages of the proceedings after an indictment has been confirmed."

16. Rule 51(B)(iii) of the Rules recognises the VPU as the appropriate body responsible for the receipt of applications from victims seeking to participate in the proceedings before the Tribunal, the verification of the completeness of these applications and, subsequently, their transmission to the Pre-Trial Judge.

17. Rule 86(B) of the Rules governs the granting of victim participation status to applicant victims by the Pre-Trial Judge. In particular, this Rule requires that, when deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider four criteria:

- (i) whether the applicant has provided prima facie evidence that he is a victim as defined in Rule 2;
- (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.

18. Rule 86(B) of the Rules also permits the Pre-Trial Judge, when deciding whether an applicant victim may participate in the proceedings, to consider the following criteria:

- (v) whether the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness;
- (vi) whether the legitimate personal interests of the applicant at stake in the trial are different from those of other victims participating in the proceedings, if any;
- (vii) whether the proposed participation by the applicant would jeopardise the appearance of integrity, dignity, decorum and objectivity of the proceedings;
- (viii) whether the proposed participation would cause unnecessary delay or inefficiency in the proceedings;
- (ix) whether the proposed participation would impact negatively on the security of the proceedings or of any person involved; and
- (x) whether the proposed participation would otherwise be in the interests of justice.



19. Moreover, Rule 86(C)(i) of the Rules states that “[t]he Pre-Trial Judge shall decide a request for the status of victim participating in the proceedings, after seeking submissions from the Parties and the Victims’ Participation Unit on relevant legal issues.” Subparagraph (ii) further provides that “[a] victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial Judge authorises otherwise.”

20. Finally, Rule 86(D) of the Rules addresses the issue of the grouping of victims for the purpose of their participation in the proceedings through common legal representatives.

IV. The Criteria for Assessing the Applications

21. The Pre-Trial Judge will now discuss the criteria applicable to the assessment of the completeness and validity of the Applications pursuant to Rule 86(B) of the Rules.

22. The VPU argues that the main requirement falling to be demonstrated by a person requesting VPP status is to provide sufficient evidence that the person is a victim according to the definition in Rule 2 of the Rules.²⁰ The VPU thus avers that applicants are not required to demonstrate the factors set out in Rule 86(B)(ii) to (iv), nor those in Rule 86(B)(v) to (x) of the Rules.

23. In interpreting the criteria set out in Rule 86(B) of the Rules, the Pre-Trial Judge will be guided by the spirit of the Statute and the principles of interpretation laid down in customary international law, as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties of 1969.²¹ These principles require that a provision be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.²² In determining the object and purpose of the relevant Rules, the Pre-Trial Judge considers that the jurisprudence of other international criminal tribunals is also of assistance. With regard to the specific issue of victims’ participation, the Pre-Trial Judge considers in particular that the jurisprudence of the International Criminal Court (“ICC”) and the Extraordinary Chambers in the Courts of

²⁰ Transmission Document, para. 12.

²¹ Done at Vienna on 23 May 1969, 27 January 1980, 1155 U.N.T.S. 331.

²² Vienna Convention on the Law of Treaties of 1969, Art. 31(2)-(3). See also STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01-I, 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 & Mr Assad Hassan Sabra, 28 June 2011, paras 19, 21.



Cambodia (“ECCC”) is instructive. Moreover, the Pre-Trial Judge will refer to Lebanese law as appropriate.

24. The Pre-Trial Judge further notes that the language of Rule 86(B) of the Rules — namely, “the Pre-Trial Judge *shall* consider”²³ — suggests that the first four criteria indicated in Rule 86(B)(i) to (iv) are cumulative requirements which an applicant must satisfy in order to be granted VPP status. The six further criteria set out in Rule 86(B)(v) to (x) of the Rules *may* also be considered by the Pre-Trial Judge in deciding whether an applicant victim can participate in the proceedings. As the plain language of this provision suggests, these latter elements are not mandatory requirements. Rather, they are factors that the Pre-Trial Judge may take into account in addition to the mandatory criteria indicated in Rule 86(B)(i) to (iv) of the Rules.

25. With respect to the submissions of the VPU,²⁴ the Pre-Trial Judge considers, however, that it would be unduly burdensome to require applicants to address all the criteria contained in Rule 86(B) of the Rules in their Applications. Persons requesting VPP status are only required to provide *prima facie* evidence that they are victims and to indicate the reasons why they wish to participate in the proceedings. The other factors mentioned in Rule 86(B) of the Rules are matters for judicial interpretation only. Therefore, an Application may be treated as complete regardless of whether it provides evidence directly relevant to those matters, provided that the Pre-Trial Judge can derive sufficient information from the Application to rule on whether it complies with the required criteria.

26. Finally, the Pre-Trial Judge clarifies that the discussion below concerns the general principles relating to the granting of VPP status and is without prejudice to the Pre-Trial Judge’s assessment of each of the Applications on a case by case basis.

²³ Emphasis added. The French version of the Rules provides that: « [L]e Juge de la mise en état examine notamment les éléments suivants »

²⁴ Cf. para. 22 above.

**A. Whether the Applicant Is a Victim within the Meaning of Rule 2 of the Rules²⁵**

27. The first criterion set out in Rule 86(B)(i) of the Rules for consideration by the Pre-Trial Judge is that “the applicant [...] provided prima facie evidence that he is a victim as defined in Rule 2” of the Rules. In other words, in order for an Applicant to be allowed to participate in the proceedings, the Pre-Trial Judge must first be satisfied that this person is *prima facie* a victim within the meaning of Rule 2 of the Rules.

28. In providing a definition of “victim”, Rule 2 of the Rules sets forth three cumulative requirements that an individual must meet in order to qualify as a victim. These are as follows: (1) the applicant must be a natural person; (2) he 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.

29. The Pre-Trial Judge will discuss each of these requirements in turn, starting with the applicant’s status as a natural person. For the sake of clarity, the Pre-Trial Judge will then discuss the requirement of the harm being a direct result of a relevant attack, before addressing in more detail the three forms of harm mentioned in Rule 2 of the Rules.

1. The Applicant Is a Natural Person

30. The first condition for considering that an applicant is a victim is that he demonstrates his status as a natural person. Legal persons are thus excluded from participating in the Tribunal’s proceedings.²⁶

31. The Pre-Trial Judge considers that, to bring an application, a natural person must have legal capacity. As indicated in the application form to participate in proceedings, if the victim

²⁵ The Pre-Trial Judge notes that the using of the word “applicant” may create some confusion in cases where the victim is represented by a person acting on his behalf. To that end, the Pre-Trial Judge clarifies that, unless otherwise specified, the criteria discussed in this section of the decision must be fulfilled by the victim himself, not by the person acting on his behalf. The word “applicant” is therefore used in the same sense as in Rule 86 of the Rules, namely to refer to a person claiming to be a victim of a crime within the Tribunal’s jurisdiction.

²⁶ Rules of Procedure and Evidence, Explanatory Memorandum by the Tribunal’s President, November 2010, para. 19 (“President’s Explanatory Memorandum”).



is a minor within the meaning of Lebanese civil law²⁷ or otherwise lacks legal capacity, the application can be brought by a person acting on the applicant's behalf.²⁸

32. Applicant victims must show *prima facie* proof of their identity. In cases where the victim is represented by a person acting on his behalf, proof of identity is needed for both the victim and his representative, together with proof of the connection between the two.

33. The Pre-Trial Judge considers that the following documents would suffice as proof of the applicant's identity:

- (i) Identification documents, such as, but not limited to, national identity cards, extracts from individual record books,²⁹ passports, special passports,³⁰ residence cards, driving licences;
- (ii) Where the documents under (i) cannot be provided, other reliable documents whose primary purpose is not to be used as identification documents, but which nonetheless contain information identifying the applicant. Examples include, but are not limited to, documents relating to medical treatment, work identification documents, letters from the local authorities and membership cards. The probative value of these other documents will be assessed on a case by case basis.

34. Where the victim is represented by a person acting on his behalf, the link between them can be proved through, *inter alia*, family record books,³¹ identity cards (indicating the name of the spouse and of the parents), guardianship decisions of courts, and statements of credible witnesses.

²⁷ Pursuant to Art. 215 of the Lebanese Code of Obligations and Contract (*Code des obligations et des contrats*), a natural person who is under 18 years of age is a minor (« [t]oute personne parvenue à l'âge de dix-huit ans révolus est capable de s'obliger si elle n'en est pas déclarée incapable par un texte de loi »).

²⁸ STL, Application Form to Participate in Proceedings under the Jurisdiction of the Special Tribunal for Lebanon, at 1. This is consistent with the practice of other international courts. See, e.g., Rule 89(3) ICC RPE and ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, para. 43 ("Ruto Victims' Participation Decision of 5 August 2011").

²⁹ Referred to in Lebanon as *Bayan kayd ifradi* (بيان قيد إفرادي). In the annexes to the Transmission Document, this document's name has been translated as "individual personal status extract".

³⁰ Special passport issued by the Lebanese government to its officials.

³¹ Referred to in Lebanon as *Bayan kayd aa'ili* (بيان قيد عائلي). In the annexes to the Transmission Document, this document's name has been translated as "family personal status extract".



2. The Harm Suffered Was a Direct Result of an Attack within the Tribunal's Jurisdiction

35. A further condition for considering that an applicant is a victim pursuant to Rule 2 of the Rules is that he suffered harm as a direct result of an attack within the Tribunal's jurisdiction.

a. Prosecution's Submission

36. With respect to this requirement, the Prosecution has made submissions on the concepts of remoteness and causation. It argues that, to the extent that remoteness concerns intervening causes or factors, it is relevant in determining whether the resulting harm was direct.³²

b. VPU Submission

37. The VPU submits that the notion of "direct result" refers to "remoteness rather than causation, with the result that in at least some instances persons suffering harm as an indirect result of an attack within the Tribunal's jurisdiction are to be considered as victims."³³ The VPU further recalls the distinction between direct and indirect victims as spelled out by the ICC Appeals Chamber in the *Lubanga* case³⁴ and argues that both kinds of victims are encompassed in the definition of victim enshrined in Rule 2 of the Rules.³⁵ The requirement of "direct result" in Rule 2 of the Rules, when met, thus establishes that the harm suffered should be sufficiently close or immediate to the cause.³⁶

³² Prosecution's Submission, para. 4.

³³ VPU Submission, para. 4. In VPU's Submission, "remoteness" is defined as "a concept used to limit an injured person's legal entitlements in respect of an injury suffered where there is a 'want of close connection between a wrong and the injury, as cause and effect'" (*id.*, para. 11).

³⁴ The notion of "direct victim", as spelled out by the ICC and upheld by legal scholars and jurisprudence, indicates persons "whose harm is the 'result of the commission of a crime within the jurisdiction of the Court.'" Cf. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Version of "Decision on 'Indirect Victims'", 8 April 2009 ("*Lubanga* Decision on 'Indirect Victims'"), para. 44. Conversely, "indirect victims" are "those who suffer harm as a result of the harm suffered by direct victims" (*ibid.*). See also ECCC, *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012 ("*Duch* Appeal Judgement"), paras 416-417.

³⁵ VPU Submission, para. 17.

³⁶ *Id.*, para. 11.



c. Discussion

38. The Pre-Trial Judge notes at the outset that all applicants claim to have suffered harm ensuing from the Attack. This Attack falls within the Tribunal's jurisdiction pursuant to Article 1 of the Statute.

39. With respect to the requirement that the harm suffered must be a direct result of the Attack, the Pre-Trial Judge points out that the use of the adjective "direct" in Rule 2 of the Rules refers to the requirement of causation ("direct result") and does not refer to the notion of harm itself. Therefore, it cannot be assumed that only victims who have suffered direct harm — who are also referred to as "direct victims" pursuant to the jurisprudence recalled above³⁷ — are admitted to participate in the proceedings, to the exclusion of the so-called "indirect victims" (i.e. victims who have suffered harm as a result of the harm suffered by the direct victim). The reasons are as follows.

40. First, the notion of "direct result" in Rule 2 of the Rules should be interpreted in light of the spirit of the Statute. In that respect, the Pre-Trial Judge recalls that Article 25 of the Statute, in defining victims, only states that "[they] have suffered harm *as a result* of the commission of the crimes by an accused convicted by the Tribunal."³⁸ Thus, Article 25 of the Statute does not set a specific requirement that the harm suffered by a victim be a "direct" result of the commission of crimes by an accused. Likewise, Rule 86(G) of the Rules, which concerns persons identified in a final judgment as victims, defines them as persons "who [have] suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal." Again, there is no requirement that the harm suffered by the victim be a direct result of the commission of crimes. The Pre-Trial Judge therefore considers that the requirement of "direct result" in Rule 2 of the Rules should not be interpreted narrowly so as to exclude from the definition of victim persons having suffered indirect harm (i.e. indirect victims).

41. Second, excluding indirect victims from participating in the proceedings would be contrary to international practice. The Pre-Trial Judge considers that the jurisprudence of the ECCC is particularly instructive in this respect since the requirements for civil party

³⁷ Cf. note 34 above.

³⁸ Emphasis added.



participation before this court are analogous to those for victims' participation before the Tribunal. The Internal Rules of the ECCC require the victim to demonstrate that he suffered injury "as a direct consequence" of a relevant crime.³⁹ Notwithstanding this apparent limitation, the ECCC has allowed indirect victims to participate in the proceedings as civil parties. In a recent judgment, the ECCC Supreme Court Chamber has also authoritatively stated that "the term 'direct victim' [...] is not coterminous with the category of persons who suffered injury as a 'direct consequence' of the crime."⁴⁰ Indeed, indirect victims can also participate as civil parties so long as they "suffered injury as a direct consequence of the crimes committed against the direct victim(s)".⁴¹

42. It is also worth recalling the relevant ICC jurisprudence, even though its definition of a victim differs from that applicable before the Tribunal. In particular, the ICC definition does not require that the harm suffered by the victim be the "direct result" of the commission of a crime.⁴² Interestingly, the ICC Appeals Chamber has held that, as long as an individual suffers harm personally, "it can attach to both direct and indirect victims".⁴³ The Pre-Trial Judge endorses this finding.

43. Third, the above interpretation of the definition of a victim, which encompasses both "direct" and "indirect" victims, is also consistent with international standards on human rights. The Pre-Trial Judge recalls in particular the United Nations Basic Principles 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 of 2005 ("UN Basic Principles").⁴⁴ Although this document is not concerned with victims' participation in criminal proceedings but rather with States' obligation to provide remedies and reparation to

³⁹ Rule 23bis(1)(b) ECCC Internal Rules (formerly Rule 23(2)(b) of the ECCC Internal Rules), which provides as follows: "[i]n order for [a] 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 upon which a claim of collective and moral reparation might be based."

⁴⁰ *Duch Appeal Judgment*, para. 416. See footnote 32.

⁴¹ *Id.*, para. 417.

⁴² Rule 85(a) ICC RPE defines victims as "natural persons who have suffered harm as result of the commission of any crime within the jurisdiction of the Court."

⁴³ Cf., e.g., ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, 11 July 2008, para 1 ("*Lubanga Judgment on Appeals of 11 July 2008*")

⁴⁴ Adopted and proclaimed by United Nations General Assembly Resolution A/RES/60/147 of 16 December 2005.



victims of violations of human rights and humanitarian law, it amounts to a degree of recognition of victim status for indirect victims, in accordance with the domestic law of the State concerned.⁴⁵

44. Finally, the Pre-Trial Judge refers to Article 134 of the Lebanese Code of Obligations and Contract, which provides for the awarding of reparations for indirect harm, provided that it is clearly related to the delict or quasi-delict in question.⁴⁶

45. In light of the above, the Pre-Trial Judge finds that the requirement of harm as a direct result of the Attack does not restrict the recognition of VPPs to direct victims only, but can also include indirect victims who personally suffered harm as a direct result of the Attack.

46. With respect to the meaning of the word “direct” in the context of Rule 2 of the Rules, the Pre-Trial Judge considers that it is a limiting factor that restricts the recognition of victim status only where persons are closely connected to the Attack or the direct victim thereof. The notion of closeness of relationships is context-dependent.⁴⁷ The question that arises is how closely an indirect victim needs to be related to the direct victim, and on what basis, in order for the former to be granted VPP status.

d. The Required Proximity between the Direct and Indirect Victims Claiming VPP Status

i. Prosecution’s Submission

47. With respect to the above question, the Prosecution submits that in addition to immediate family members⁴⁸ of the person killed or injured, persons in relationships of

⁴⁵ “For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” (UN Basic Principles, para. 8).

⁴⁶ Lebanese Code of Obligations and Contract, Art. 134 : « *Les dommages indirects doivent être pris en considération, mais pourvu qu'ils se rattachent clairement au fait délictuel ou quasi-délictuel* ».

⁴⁷ Duch Appeal Judgment, para. 562.

⁴⁸ The Pre-Trial Judge notes that in legal language such immediate family members are “[a] person’s parents, spouse, children and siblings”. Cf. B. A. Garner (ed.), *Black’s Law Dictionary*, 9th edn. (St. Paul: West, 2009), at 679.



similar closeness can also apply for VPP status.⁴⁹ Moreover, in the Prosecution's view, the required closeness of relationship does not differ depending on whether a person was injured or killed in the attack.⁵⁰

ii. VPU Submission

48. The VPU argues that persons beyond immediate family members may be recognised as victims. However, the relevant test for participation varies depending on whether the direct victim was injured or killed. In the event of death of the direct victim, the test is whether the person applying for VPP status is in a close personal relationship with, or has a special bond of affection with or dependence on, the deceased.⁵¹ If the direct victim suffered harm other than death, applications from indirect victims should be assessed on a case by case basis taking into account: (i) the nature of the harm suffered by the direct victim; (ii) the nature and proximity of the relationship between the direct victim and the applicants; and (iii) whether the applicant himself suffered harm.⁵²

iii. Discussion

49. The Pre-Trial Judge notes that other tribunals have consistently granted victim participation or civil party status to persons other than immediate family members.⁵³ However, those tribunals have limited indirect victims' participation to cases where "a close personal relationship"⁵⁴ or "special bonds of affection or dependence" were shown to have existed between the direct and indirect victims.⁵⁵

50. In light of the foregoing, the Pre-Trial Judge finds that, in addition to first degree relatives, persons in relationships of like proximity to the direct victim, and other extended family members having a special bond of affection with or dependence on the direct victim,

⁴⁹ Prosecution's Submission, para. 8.

⁵⁰ *Id.*, para. 7.

⁵¹ VPU Submission, para. 17.

⁵² *Id.*, para. 17(iv).

⁵³ Cf. ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09-255, Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, 19 March 2010, para. 28. The ECCC Supreme Court Chamber has held that "the category of indirect victims is not restricted to any specific class of persons such as family members." Cf. *Duch* Appeal Judgment, para. 418.

⁵⁴ *Lubanga* Judgment on Appeals of 11 July 2008, para. 32. See footnote 41.

⁵⁵ *Duch* Appeal Judgment, para. 562.



can also be considered to have suffered harm as a direct result of the Attack. Moreover, the closeness of the relationship required for the granting of VPP status does not differ depending on whether the direct victim was injured or killed. However, different requirements apply to proving the harm suffered by the indirect victims depending on the harm suffered by the direct victims and on the closeness of the relationship between the two.⁵⁶

e. Proof of Direct Result

51. In order to establish whether the harm suffered by an applicant who claims to be a direct victim was a direct result of the Attack, the Pre-Trial Judge will assess whether the particular circumstances of the harm suffered — that is, where and when it occurred — correspond *prima facie* to those of the Attack.

52. What evidence (be it documentary or otherwise) is sufficient to satisfy this requirement should be assessed on a case by case basis and taking into account all relevant circumstances.⁵⁷ Ordinarily, applicants claiming to have suffered physical or mental harm as direct victims need to show at a minimum that they were present at the scene of the Attack at the relevant time. If all reasonable steps to provide official documents or a written statement to that effect have been taken, but yielded no results, applicants must notify the Pre-Trial Judge of the impossibility of producing the required documents and the reasons therefor. To that end, applicants can avail themselves of VPU's assistance.

53. Similarly, indirect victims whose harm results from the physical or mental harm suffered by the direct victim need to show the direct victim's presence at the scene of the Attack as indicated above. In addition, they need to show their kinship, close personal relationship or bond of special affection with, or dependence on, the direct victim, as appropriate.

⁵⁶ These evidentiary requirements will be discussed in the relevant sections pertaining to each type of harm below.

⁵⁷ ICC, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05-371, Judgment on the Appeals of the Defence against the Decisions Entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, Appeals Chamber, 23 February 2009, para. 36 ("Kony Judgment on Appeals of 23 February 2009").



54. The same requirements apply *mutatis mutandis* to applicants claiming to have suffered material harm as a direct result of the Attack with respect to showing at a minimum that the asset(s) that have been damaged or destroyed were located in proximity of the scene of the Attack.

3. The Applicant Has Suffered Physical, Material or Mental Harm

55. The remaining requirement set forth by the definition of victim in Rule 2 of the Rules is that the applicant suffered physical, material or mental harm.

56. The Pre-Trial Judge notes that neither the Statute nor the Rules define physical, material or mental harm. The Pre-Trial Judge will therefore interpret those notions consistently with the spirit of the Statute and the principles of interpretation laid down in the Vienna Convention on the Law of Treaties of 1969, as referred to above.⁵⁸ More particularly, the Pre-Trial Judge will draw on the jurisprudence of other criminal tribunals that have ruled on similar issues.

57. The Pre-Trial Judge further notes that the three forms of harm mentioned in Rule 2 of the Rules — namely, physical, material and mental — are listed in the alternative. Hence, he considers that *prima facie* evidence of one form of harm suffices for the granting of VPP status, if the other conditions set forth in Rule 86(B) are met.⁵⁹

58. In light of the foregoing, where an applicant alleges multiple forms of harm, the Pre-Trial Judge will only make a finding in relation to one of those if satisfied that it has been proven *prima facie*. This does not amount to a finding that the other form(s) of harm have not been made out *prima facie*. The Pre-Trial Judge's findings on matters concerning the harm suffered therefore cannot be relied upon elsewhere to deny reparation to victims on the basis that they have only suffered the form of harm expressly recognised by the Pre-Trial Judge in the present decision.

59. Finally, the Pre-Trial Judge considers that a common requirement applying to all three forms of harm is that they must be *personal* to the individual (i.e. the harm alleged must have been personally suffered by the applicant), consistent with the jurisprudence of other

⁵⁸ Cf. para. 23 above.

⁵⁹ See sections IV.B., C., D. and E. below.



tribunals.⁶⁰ In cases where the victim is represented by a person acting on his behalf, the relevant harm must have been suffered by the victim, not by the applicant.

60. The Pre-Trial Judge will now address the standard of proof applicable to the three forms of harm, and how such standard can be met (Section (a)). Subsequently, he will discuss each form of harm in turn (Sections (b), (c) and (d)).

a. Standard of Proof

61. In assessing whether applicant victims have suffered harm, the Pre-Trial Judge is required to apply a *prima facie* standard of proof.⁶¹ Consequently, he will assess whether there are sufficient *prima facie* credible grounds that an applicant has suffered harm.

62. As a general principle, applicants are required to produce, where possible, documentary evidence of the harm sustained to substantiate their Application. The probative value of the relevant documentary evidence will be assessed on a case by case basis. As a general rule, only documents of an official nature⁶² will be accepted as sufficient *prima facie* evidence. The Pre-Trial Judge considers that documentary materials which are not of an official nature, such as newspaper articles, may provide useful elements of information. However, on their own, they ordinarily do not meet the standard of proof required for proving *prima facie* the harm sustained by an applicant in and of themselves.

b. The Notion of Harm

63. The Pre-Trial Judge notes that for the analyses of the specific forms of harm that follow, it is useful first to define the meaning of “harm” generally. In this regard, the Pre-Trial Judge considers that the ordinary meaning of “harm” as a legal concept is applicable. For the purpose of this decision, “harm” in Rule 2 of the Rules can be understood as “injury, loss, damage; material or tangible detriment.”⁶³

⁶⁰ *Lubanga Judgment on Appeals of 11 July 2008*, paras 1, 38-39.

⁶¹ Rule 86(B)(i), STL RPE.

⁶² By “documents of an official nature” the Pre-Trial Judge means documents issued by a competent authority or person that can be independently verified in general, and does not mean to limit the category to documents bearing notarised authority or similar formal authentication.

⁶³ B. A. Garner (ed.), *Black's Law Dictionary*, note 48 above, at 784.



c. Physical Harm

i. The Notion of Physical Harm

64. The word “physical” pertains to something “bodily rather than mental; involving the body; carnal”.⁶⁴ Therefore, the Pre-Trial Judge considers that “physical harm” in Rule 2 of the Rules should be interpreted as “bodily injury”. This is also the interpretation that the ICC and ECCC have given to the notion of “harm” in their Rules of Procedure and Evidence.⁶⁵

65. The Pre-Trial Judge further notes that Rule 2 of the Rules does not set any explicit threshold of seriousness for the physical harm alleged. According to national legislation and case law that has elaborated on the notion of bodily harm, physical harm that is legally relevant does not have to be life-threatening or permanent.⁶⁶ However, it must be of such nature and gravity as to interfere with the health, well-being or comfort of the victim.⁶⁷ In light of the above, the Pre-Trial Judge considers that transient or trifling harm does not constitute physical harm for the purpose of Rule 2 of the Rules. This is also consistent with the spirit of that Rule, which is to define victims rather narrowly so as to “prevent [them] from being too numerous”, thereby making the proceedings “cumbersome and slow”.⁶⁸

66. In conclusion, the Pre-Trial Judge considers that “physical harm” encompasses substantial bodily injuries, ordinarily requiring a degree of medical treatment for the victim.

⁶⁴ *Shorter Oxford English Dictionary*, 6th edn. (New York: Oxford University Press, 2007), Vol. 2, at 2194

⁶⁵ Although the Rome Statute does not refer to “physical harm” (see note 42 above), ICC Pre-Trial Chambers have held that “harm” within the meaning of Rule 85(a) of the Rules includes physical injury, emotional suffering and economic loss. Cf., e.g., *Ruto Victims’ Participation Decision* of 5 August 2011, para. 50; *Situation in the Democratic Republic of the Congo*, Public Redacted Version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006 (“DRC Decision on Participation”), para. 172 (containing further references to the jurisprudence of the Inter-American and the European Courts of Human Rights). According to the ECCC Supreme Court Chamber, the injury suffered by an applicant must be “[p]hysical, material or psychological” and “physical injury denotes biological damage, anatomical or functional. It may be described as a wound, mutilation, disfigurement, disease, loss or dysfunction of organs, or death.” Cf. *Duch Appeal Judgment*, para. 415. See note 34 above.

⁶⁶ Cf., e.g., *R v. Bollom* [2004] 2 Cr App R 50, para. 53.

⁶⁷ Cf., e.g., *R v. Donovan* [1934] 2 KB 498, at 509. In the Canadian Criminal Code, “bodily harm” is defined as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature” (sect. 2).

⁶⁸ President’s Explanatory Memorandum, paras 18-19.



ii. Proof of Physical Harm

67. The Pre-Trial Judge recalls his finding in paragraph 52 above regarding the necessary evidence to meet the standard of proof for the requirement of “direct result” and deems that it also applies to proof of physical harm. Applicants are required to produce, where possible, medical records of the harm sustained, such as medical reports from a doctor, hospital or health centre, X-rays and scan results and prescriptions for medication where applicable. Furthermore, *prima facie* proof that the physical harm was caused by the Attack is required.

d. Material Harm

i. The Notion of Material Harm

68. In interpreting the notion of “material harm” in Rule 2 of the Rules, the Pre-Trial Judge refers to the discussion of “harm” in paragraph 63 above. As regards the word “material”, its ordinary meaning in legal language is “of or relating to [...] material goods”.⁶⁹

69. A question that arises is whether the notion of material harm encompasses an applicant’s loss of employment and the associated income. The Prosecution argues that “generally, material harm would only occur as a direct result of a qualifying attack,” and thus indicates “damage to property, vehicles or buildings owned by the applicant.”⁷⁰ However, the Prosecution also contends that there may be cases where loss of employment and associated income could constitute material harm, provided that they are a direct result of a qualifying attack.⁷¹

70. The VPU claims that “material harm should be understood to encompass loss of employment and associated income.”⁷² Moreover, VPU argues that the direct victim’s dependants (i.e. those who depend financially on the person who lost his income as a direct result of a qualifying attack) may also claim to have suffered material harm as a result of the attack.⁷³

⁶⁹ B. A. Garner (ed.), *Black’s Law Dictionary*, note 48 above, at 1066.

⁷⁰ Prosecution’s Submission, para. 10.

⁷¹ *Id.*, para. 11.

⁷² VPU Submission, para. 18.

⁷³ *Id.*, para. 20.



71. In the jurisprudence of the ICC, harm within the meaning of Rule 85(a) of the ICC Rules of Procedure and Evidence has been interpreted, *inter alia*, as economic loss.⁷⁴ Such economic loss can be claimed both by direct and indirect victims.⁷⁵ Likewise, in the practice of the ECCC, the notion of material injury refers to “a material object’s loss of value, such as complete or partial destruction of personal property, or loss of income.”⁷⁶

72. The Pre-Trial Judge considers therefore that “material harm” in Rule 2 of the Rules denotes damage to, or destruction or deterioration of property, loss of income or of means of subsistence and other forms of financial loss.

ii. Proof of Material Harm

73. Where an applicant claims loss or material damage to his property, *prima facie* proof of title over the property in question is required, as well as *prima facie* proof of the destruction or damage caused to it by the Attack.

74. The Pre-Trial Judge recalls his finding in paragraph 52 above regarding the sufficient evidence to meet the standard of proof and deems that it also applies to proof of material harm. In order to prove title over property, documents such as title deeds, registration papers or equivalent documents establishing ownership in Lebanon, as well as invoices, insurance certificates and similar materials are relevant. In addition to the foregoing, the material harm suffered can be shown by insurance claim documents and other documentary evidence (for example, photographs or audio-visual footage of the damaged property). In exceptional cases, the Pre-Trial Judge may consider other documents in proof of material harm, such as a witness statements attesting to the material damage suffered by an applicant.

75. Applicants claiming to have suffered material harm in the form of lost income must provide *prima facie* evidence of their prior income in the form of, *inter alia*, employment contracts, payslips and tax returns, as well as of their inability to work either temporarily or permanently. This can be done by submitting documentary evidence of, *inter alia*: (i) a destroyed workplace; (ii) a disability; or (iii) receipt of unemployment benefits.

⁷⁴ *Ruto Victims’ Participation Decision* of 5 August 2011, para. 50. See also note 65 above.

⁷⁵ See e.g., ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Public Redacted Version of “Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case”, 9 October 2009, paras 93-96; *Lubanga Decision on ‘Indirect Victims’*, paras 49-50.

⁷⁶ *Duch Appeal Judgment*, para. 415.



e. Mental Harm

i. The Notion of Mental Harm

76. In interpreting the notion of “mental harm” in Rule 2 of the Rules, the Pre-Trial Judge refers to the discussion of “harm” in paragraph 63 above. As regards the word “mental”, its ordinary meaning is “[o]f or pertaining to the mind.”⁷⁷

77. In the jurisprudence of the ECCC, the injury suffered by a victim “may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.”⁷⁸ Moreover, “[i]n grave or prolonged cases, psychological injury may lead to physical injury by causing various ailments.”⁷⁹ At the ICC, as has already been mentioned, “harm” has been interpreted as comprising “emotional suffering”.⁸⁰ The Pre-Trial Judge recalls that these courts have granted victim status to the family members of, or other persons in a close personal relationship with, a deceased or injured person on the basis of the emotional suffering occasioned by such death or injury.⁸¹

78. In light of the foregoing, the Pre-Trial Judge concludes that the notion of mental harm in Rule 2 of the Rules encompasses harm of emotional, psychological or psychiatric nature. The Pre-Trial Judge furthermore considers that, to be characterised as “harm” for the purpose of granting VPP status to applicants, emotional distress must be serious. Indeed, the law is only concerned with emotional distress that “is so severe that no reasonable man could be expected to endure it.”⁸² This is to the exclusion of transient and trivial emotional distress. The jurisprudence of the ECCC has adopted a similar approach. For instance, the co-investigating judges have held that:

psychological harm has a dimension and character distinct from the emotional distress that may be regarded as inevitably caused to witnesses of crimes of this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature.⁸³

⁷⁷ *Oxford English Dictionary*, note 64 above, Vol. 1, at 1752.

⁷⁸ *Duch Appeal Judgment*, para. 415.

⁷⁹ *Id.*, para. 417.

⁸⁰ Cf. note 65 above.

⁸¹ See, e.g., *Lubanga Decision on ‘Indirect Victims’*, para. 50; *Duch Appeal Judgment*, para. 417.

⁸² B. A. Garner (ed.), *Black’s Law Dictionary*, note 48 above, at 601.

⁸³ ECCC, *Nuon Chea*, Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Kratie Province, Office of the Co-Investigating Judges, 9 September 2010, para. 15(d).



ii. Proof of Mental Harm

79. The Pre-Trial Judge recalls his finding in paragraph 52 above regarding the sufficient evidence required to meet the standard of proof and deems that it also applies to proof of mental harm. Applicants claiming to have suffered mental harm ordinarily must submit documentary evidence of the harm suffered in the form of an attestation by a qualified medical practitioner, psychologist, psychiatrist or counsellor.

80. With regard to the mental harm occasioned by the loss or injury of a family member, the Prosecution avers that the requirement to show *prima facie* the harm suffered by the indirect victims also applies to these applicants.⁸⁴ In other words, in the Prosecution's view, such harm should not be presumed, notwithstanding the jurisprudence of the ICC and the ECCC supporting the exercise of such a presumption.⁸⁵

81. The VPU argues that when the direct victim was killed in an attack, the existence of a close personal relationship or bond of affection and dependence between the deceased and his immediate family members should be presumed.⁸⁶ Conversely, it appears from the VPU Submission that such relationship or bond should be proven for other persons beyond immediate family members of a direct victim killed in an attack. The same close personal relationship or bond of affection should also be proven in cases where the direct victim suffered harm other than death.⁸⁷

82. The Pre-Trial Judge recalls that, as a general principle, applicants who are indirect victims have to show, to the extent possible, the mental harm they have suffered.⁸⁸ Moreover, they have to provide evidence of (i) the harm suffered by the direct victim; and (ii) their kinship or otherwise close personal relationship with the direct victim (for instance, through family record book or, in the lack thereof, the statement of credible witnesses).

⁸⁴ Prosecution's Submission, para. 7.

⁸⁵ *Id.*, para. 9.

⁸⁶ According to VPU, immediate family members comprise first degree relatives and persons assimilated into such roles. Cf. VPU Submission, para. 17(iii).

⁸⁷ *Id.*, para. 17(iv).

⁸⁸ Cf. para. 62 above.



83. The Pre-Trial Judge furthermore notes that the burden of proving the mental harm suffered by indirect victims is contingent on the gravity of the harm suffered by the direct victim and on the closeness of the relationship between the two. As far as the first aspect is concerned, if the direct victim sustained only minor injuries, the emotional distress suffered by his family members would not ordinarily rise to the level of harm required for the granting of VPP status, unless shown otherwise.

84. With regard to the closeness of the relationship between the direct and indirect victims, first-degree relatives are presumed to have a special bond of affection with the direct victim. Therefore, the harm suffered by these immediate family members can be presumed in case of death of the direct victim, consistent with the jurisprudence of other international courts.⁸⁹ The presumption also applies to persons in a relationship of similar closeness to the deceased (for example, persons assimilated into the role of first-degree relatives), provided that they satisfy the Pre-Trial Judge of the existence *prima facie* of their relationship with the direct victim. The harm alleged by extended family members may, in exceptional circumstances, amount to a direct result of the Attack if the applicant can establish a sufficiently close personal relationship with the direct victim.⁹⁰

B. Whether the Applicant's Personal Interests Are Affected

85. The second criterion for the granting of VPP status enshrined in Rule 86(B) of the Rules is that the applicant's personal interests are affected.

1. Prosecution's Submission

86. In the Prosecution's view, the expressions "personal interests" and "legitimate personal interests" in the Statute and Rules have the same meaning.⁹¹ The question whether an applicant's personal interests are affected is a question of fact.⁹² Applicants' legitimate interests include, but are not limited to, seeking reparation, pursuing the truth and wishing to

⁸⁹ Cf., e.g., *Duch* Appeal Judgment, para. 562; *Kony* Judgment on Appeals of 23 February 2009, para. 36.

⁹⁰ ECCC, *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Case No. 001/18-07-2007/ECCC/TC, Judgement, Trial Chamber, 26 July 2010, para. 643 ("*Duch* Trial Judgment").

⁹¹ Prosecution's Submission, para. 16.

⁹² *Id.*, para. 12.



see those responsible tried.⁹³ In addition, the Prosecution argues that it cannot be presumed that an applicant who has suffered harm has *ipso facto* had his personal interests affected.⁹⁴

2. VPU Submission

87. The VPU submits that the presumption that a victim's interests are affected by the Tribunal's criminal proceedings should hold, and that victims' interests should also be presumed to be "legitimate" unless it is shown that they are otherwise.⁹⁵ Moreover, the VPU argues that the concept of "personal interests" as set out in Article 17 of the Statute will prove of most relevance when determining the permissibility of a particular modality of participation sought to be exercised by victims granted the status of victim participating in the proceedings.⁹⁶

3. Discussion

88. The Pre-Trial Judge notes that the concept of "personal interests" appears in both Article 17 of the Statute and Rule 86(B)(ii) of the Rules. Furthermore, it is also referred to in Article 68(3) of the Rome Statute of the ICC. Moreover, Rule 86(B)(vi) refers to "the legitimate personal interests of the applicant at stake in the trial." Notwithstanding these provisions, the term itself remains undefined. The Pre-Trial Judge will therefore interpret it consistently with the principles of interpretation outlined in paragraph 23 above.

89. According to relevant jurisprudence, the notion of "personal interest" is understood to mean the legitimate interest which a VPP must demonstrate in order to justify participating in the proceedings in a specific manner, for example, by calling witnesses or tendering evidence.⁹⁷ Indeed, since they are not Parties within the meaning of Rule 2 of the Rules —

⁹³ *Id.*, para. 13.

⁹⁴ *Id.*, para. 14.

⁹⁵ VPU Submission, para. 30,

⁹⁶ *Id.*, para. 32.

⁹⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims' Participation", 18 January 2008, paras 96-97 ("*Lubanga* Decision on Victims' Participation").

See also: *Lubanga* Judgment on Appeals of 11 July 2008, para. 99; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010 ("*Katanga* Decision on Modalities"), paras 58, 62.

For an example of an instance in which victims were refused permission to file submissions because they had not demonstrated how their personal interests were affected by the question before the Court, see: *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the



inasmuch as the Prosecutor and the Defence are Parties — but only participants, VPPs cannot intervene in the proceedings as of right. They must show that their personal interests are affected.

90. In light of this, the Pre-Trial Judge considers that, when determining whether or not a person is a victim in the sense of Rule 2 of the Rules, the notion of “personal interests” is of limited relevance. Indeed, its existence can be presumed once it is established that the person concerned has “suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction”.⁹⁸ As stated above, the notion of “personal interests” will assume additional importance when deciding on specific the modalities for the VPPs proposed participation.

91. After having conducted an individual assessment of the Applications, the Pre-Trial Judge finds that the personal interests of all of the applicants who — pursuant to his findings — have *prima facie* suffered harm as a direct result of the Attack, are affected.

C. Whether the Applicant’s Proposed Participation is Intended to Express His Views and Concerns

92. The third criterion in Rule 86(B) of the Rules for the granting of VPP status is that the applicant’s proposed participation is intended to express his views and concerns.

Appeals Chamber” of 2 February 2007, Appeals Chamber, 13 June 2007 (“*Lubanga Appeals Chamber Decision on Joint Application*”), paras 23-24, 26-28.

⁹⁸ Rule 2 of the Rules. The VPU made the following observation: “A number of ICC Chambers have applied the requirement in determining whether to grant the status of participating victim to applicants at a certain phase of proceedings. When doing so, they have tended to conclude that by virtue of the harm suffered by them, victims in general have a broad interest in the outcome of the proceedings at a given stage (for example at the stage of proceedings for the confirmation of charges or at trial), thus granting the status to all persons meeting the definition of “victim.” VPU Submission, para. 28. See ICC, *Prosecutor v. Joseph Kony, Vincent Oti, Okot Odhiambo, Dominic Ongwen*, Case No. ICC-02/04-01/05-252, Public Redacted Version, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, 10 August 2007, paras 9-10.

See also DRC Decision on Participation, para. 63; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-579, Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, Pre-Trial Chamber I (Single Judge), 10 June 2008, paras 24, 25; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Fourth Decision on Victims’ Participation, Pre-Trial Chamber III (Single Judge), 12 December 2008, para. 91.



1. Prosecution's Submission

93. The Prosecution submits that the views and concerns of the victims should relate to criminal proceedings against persons accused of being responsible for attacks within the Tribunal's jurisdiction.⁹⁹ This is because the object and purpose of Article 17 of the Statute, to be considered when interpreting this requirement, is to govern criminal trials conducted before the Tribunal.¹⁰⁰

2. VPU Submission

94. The VPU provides an analysis of the history of the term "views and concerns" in Article 17 of the Statute and refers to the jurisprudence of the ICC on the nature and extent of a VPP's participation in proceedings.¹⁰¹ The VPU submits that the term "views and concerns of the victims" should be read as encompassing any intervention in the proceedings which victims are permitted to undertake.¹⁰²

3. Discussion

95. The Pre-Trial Judge notes that the concept of "views and concerns" appears in both Article 17 of the Statute and Rule 86(B)(iii) of the Rules. Inspired by Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985,¹⁰³ this notion is also expressed in Article 68(3) of the Rome Statute of the ICC. As is the case for the notion of "personal interests", however, these texts do not define the concept of "views and concerns".

96. According to relevant jurisprudence, this criterion refers to the general motivation of persons seeking to participate in the proceedings as victims, as well as to the modalities of their participation at specific stages thereof. With respect to the former element, it requires that applicants be driven to contribute to the pursuit of justice, for example by seeking to

⁹⁹ Prosecution's Submission, para. 17.

¹⁰⁰ *Id*

¹⁰¹ VPU Submission, para. 34. The VPU submits that Art. 17 STLSt is based on Art. 68(3) of the Rome Statute of the ICC, itself based on the United Nations General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, para. 6(b).

¹⁰² VPU Submission, para. 36.

¹⁰³ A/RES/40/34 (1985), Annex at para. 6(b).



establish the truth or to obtain recognition of the harm they have allegedly suffered.¹⁰⁴ Their objective, therefore, cannot be to undermine the integrity or the fair and efficient conduct of the proceedings. With respect to the latter aspect, it implies that VPPs are constrained to express their views and concerns in accordance with the specific modalities prescribed by the Rules.¹⁰⁵

97. In the light of this, the Pre-Trial Judge considers that, at this stage of the proceedings, only the first aspect of the requirement is relevant. In other words, the Pre-Trial Judge must ascertain whether persons who seek to participate in the proceedings are motivated by a legitimate objective. The second aspect of the notion only becomes relevant when deciding on specific modalities of VPPs' proposed participation at the appropriate stage of proceedings.

98. After having conducted an individual assessment of the Applications, the Pre-Trial Judge finds that the applicants who meet the other criteria in Rule 86(B) of the Rules intend to express their views and concerns. Where an applicant has not stated any specific reason for participating in the Tribunal's proceedings, the Pre-Trial Judge has considered whether, taking into account the entirety of his application, his willingness to do so was demonstrated.

D. Whether the Applicant's Proposed Participation Would Be Prejudicial to or Inconsistent with the Rights of the Accused

99. The fourth mandatory criterion that the Pre-Trial Judge has to take into account pursuant to Rule 86(B) of the Rules is whether the applicant's proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

¹⁰⁴ *Lubanga* Decision on Victims' Participation, paras 97-98; *Katanga* Decision on Modalities, para. 59 (relevant finding undisturbed by the Appeals Chamber in ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010).

See also Separate Opinion of Judge Pikis in the *Lubanga* Appeals Chamber Decision on Joint Application.

¹⁰⁵ See, for example *Lubanga* Decision on Victims' Participation, para. 98, *Katanga* Decision on Modalities, paras 58, 62, and generally 68-85; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-807, *Corrigendum* to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 12 July 2010, paras 27 *et seq*; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, Trial Chamber I, 26 June 2009.



100. The Pre-Trial Judge considers that this requirement can be met in at least three ways. First, it is necessary to ensure that the persons who are granted VPP status, and therefore participate in the proceedings, are legitimately concerned thereby by virtue of the criteria discussed above, namely: (1) they are victims as defined by Rule 2 of the Rules; (2) their personal interests are affected; and (3) their views and concerns relate to legitimate objectives. Second, VPPs will ordinarily be represented by common legal representatives who — by virtue of their professional experience and ethical obligations — are required to ensure the integrity and expeditiousness of the proceedings. Third, with respect to the preparation of the *Ayyash et al* case for trial, concrete measures will be taken, if necessary, to ensure that victims' participation in the proceedings does not prejudice the rights of the accused.

101. After having conducted an individual assessment of the Applications, the Pre-Trial Judge finds that, in respect of those applications that meet the other criteria in Rule 86(B) of the Rules, there are no reasons to conclude, at this stage, that the applicants' participation in the proceedings would be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.

E. Other Criteria

102. In addition to these criteria that have already been examined, the Pre-Trial Judge may also take other elements into account. In this regard:

- i) With respect to Rule 86(B)(v) of the Rules on whether an applicant is likely to be a witness, this determination will be made at the appropriate time pursuant to Rule 150(D) of the Rules.¹⁰⁶ The fact that a person may act in the capacity of a witness during trial shall not, however, serve to deprive that person of his rights to participate in proceedings as a victim.
- ii) With respect to Rule 86(B)(vi) of the Rules on whether the legitimate personal interests of the applicant at stake in the trial are different from those of other victims participating in the proceedings, the Pre-Trial Judge considers that the relevance of this provision is twofold. First, applicants who meet the requirements of Rule 86(B)

¹⁰⁶ Rule 150(D) STL RPE provides that: "A victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require."



of the Rules and have different personal interests should be allowed to participate to express their views and concerns. Conversely, in other circumstances the Pre-Trial Judge may limit an applicant's participation in the proceedings if his legitimate personal interests at stake are not different from those of other VPPs and are thus already represented. On the basis of the information available to him, the Pre-Trial Judge finds that at present this situation does not arise. Second, a determination on whether the applicant's personal interests are different from those of other VPPs is to be made at the time, if any, that VPPs are divided into groups having common legal representation pursuant to Rule 86(D) of the Rules. The fact that a person may have interests that diverge from the interests of others shall not, however, serve to deprive that person of his rights to participate in proceedings as a victim.

- iii) With respect to Rules 86(B)(vii) and (viii) of the Rules, the impact that the participation of victims could have on the "integrity, dignity, decorum and objectivity of the proceedings" and on the duration of or efficiency in the proceedings, respectively, the Pre-Trial Judge notes that, as has already been mentioned above,¹⁰⁷ VPPs will ordinarily be allowed to participate in the proceedings, not on their own account, but through common legal representatives. The professional experience and ethical obligations of such representatives will ensure the integrity, dignity, decorum and objectivity of the proceedings, as well as their efficiency. Moreover, these concerns will be addressed by the appropriate Chamber when the modalities of victims' participation are determined. In this regard, the Pre-Trial Judge considers that at this stage of proceedings, the applicants meet these criteria.
- iv) With respect to Rule 86(B)(ix) of the Rules, on the impact the participation of victims could have on the security of the proceedings or of any person involved therein, the Pre-Trial Judge finds that, on the basis of the information available to him, the granting of VPP status to the relevant applicants does not impact negatively on the security of the proceedings or of any person involved. If and when the question arises in the future, it can be remedied by the application of the necessary protective measures.

¹⁰⁷ Cf. para. 100 above. For a more detailed discussion of victims' common legal representation cf. section VI below.



- v) With respect to Rule 86(B)(x) of the Rules, whether the proposed participation of victims would otherwise be in the interests of justice is a matter to be determined at the time it arises, if at all. It suffices to observe that the interests of justice and the interests of victims would usually be complementary. Victims are likely to have an interest in seeing that crimes are effectively investigated and — where appropriate — prosecuted. In the instant decision, the Pre-Trial Judge is satisfied that the participation of the VPPs recognised in this decision is consistent with the interests of justice, and defers consideration of this element to such time as it becomes an issue, if ever.

V. Conclusions on the Assessment of Applications

A. Successful Applications

103. In its Transmission Document, the VPU considers that 62 Applications out of the total 73 submitted to the Pre-Trial Judge are complete.¹⁰⁸

104. However, after having conducted an individual assessment of all the Applications, following VPU's transmission of supplementary material,¹⁰⁹ the Pre-Trial Judge is satisfied that 58 Applications fulfil the requirements set forth in the Statute and the Rules, as discussed in section IV above. Therefore, the relevant applicants are granted the status of victims participating in the proceedings.¹¹⁰

B. Incomplete Applications

105. At the time of the transmission of Applications, VPU submitted that 11 Applications were possibly incomplete in that they perhaps did not provide sufficient evidence to support a *prima facie* determination by the Pre-Trial Judge in relation to each element of the definition of "victim" in Rule 2 of the Rules.¹¹¹

¹⁰⁸ Transmission Document, para. 28.

¹⁰⁹ Cf. para. 10 above.

¹¹⁰ Reference is made to the following applicants: V001, V002, V003, V004, V005, V007, V009, V010, V016, V020, V021, V022, V023, V024, V025, V026, V027, V028, V030, V031, V035, V036, V037, V038, V040, V041, V042, V043, V044, V045, V046, V047, V048, V049, V050, V051, V052, V053, V054, V055, V056, V057, V058, V059, V060, V061, V062, V063, V064, V065, V066, V067, V068, V069, V070, V071, V072, V073.

¹¹¹ Transmission Document, paras 24 and 28.



106. However, after having conducted an individual assessment of the Applications following VPU's Transmission of Consolidated Applications and VPU's Second Transmission of Consolidated Applications,¹¹² the Pre-Trial Judge considers that 15 Applications are incomplete; the related applicants cannot therefore be granted VPP status at this stage.¹¹³

107. A finding that an Application is incomplete is related to the supporting materials which accompanied those applications, and is not equivalent to a finding that an applicant should be denied VPP status. The Pre-Trial Judge states that applicants whose applications have been found to be incomplete may resubmit their applications for VPP status, with the assistance of the VPU, and with the the supplementary materials required.

VI. The Common Legal Representation and Grouping of Victims

A. The Common Legal Representation of VPPs

108. According to Rule 86(C)(ii) of the Rules, victims shall participate in the proceedings through legal representatives, unless otherwise authorised by the Pre-Trial Judge.

109. The Pre-Trial Judge notes that no applicant has applied to represent himself. Furthermore, the VPU has not filed any submission with respect to the common legal representation of VPPs.

110. The Pre-Trial Judge notes that the question of common legal representation has been considered in other jurisdictions, most notably at the ICC. In the recent *Lubanga* Trial Judgment, Trial Chamber I of the ICC held that "[v]ictims' views and concerns may be presented by a common legal representative in order to provide for the fairness and expeditiousness of the trial."¹¹⁴ This statement followed that Trial Chamber's elaboration of its reasoning for common legal representation in a preceding decision, which reasoning was the following:

¹¹² Cf. para. 10 above.

¹¹³ Reference is made to the following applicants: V006, V008, V011, V012, V013, V014, V015, V017, V018, V019, V029, V032, V033, V034, V039

¹¹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 14(ix). See also *Ruto* Victims' Participation Decision of 5 August 2011, para. 65.



The Chamber is aware [...] that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims' common views and concerns may sometimes be better presented by a common legal representative [...]¹¹⁵

111. The reasoning of these decisions is informative when considering how to apply the Tribunal's victims' participation regime, which is established by its own Statute and Rules. The Pre-Trial Judge is required to ensure that the proceedings are not unduly delayed, and to take any measures necessary to prepare the case for a fair and expeditious trial.¹¹⁶ Furthermore, the participation of victims in the proceedings must be conducted in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹¹⁷

112. In light of the foregoing, the Pre-Trial Judge considers that the victims authorised to participate in proceedings pursuant to this decision may only do so through a legal representative.

B. Whether to Divide VPPs into Groups Having Common Legal Representation

113. Rule 86(D) of the Rules further requires the Pre-Trial Judge to determine common legal representation, and provides as follows:

The Pre-Trial Judge shall also decide whether to divide victims participating in the proceedings into groups having common legal representation, considering:

- (i) any conflicting interests that may hinder common representation;
- (ii) any shared or similar interests that may facilitate common representation; and
- (iii) the rights of the accused and the interests of a fair and expeditious trial.

This decision may not be appealed.

¹¹⁵ *Lubanga* Decision on Victims' Participation, para. 116.

¹¹⁶ Rule 89(B) STL RPE.

¹¹⁷ Art. 17 STLSt; see also Rule 86(B)(iv).



1. VPU's Observations

114. In its Observations,¹¹⁸ the VPU advocates the creation of two groups in order to reflect the different interests it perceives between the persons applying for the status of VPPs.¹¹⁹

115. For the VPU, one group is composed of 23 victims who maintained close personal, political or contractual ties with the person whose family¹²⁰ was the principal target of the Attack.¹²¹ Members of this first group have already identified their legal counsel and do not plan to seek assistance from the Tribunal's legal aid for victims' participation.¹²² The legal counsel has furthermore indicated that, together with his co-counsel,¹²³ he expressly excludes the possibility of being designated to represent other victims who are considered indigent.¹²⁴

116. The other alleged "heterogeneous non-group"¹²⁵ is composed of the remaining victims, the "immense majority" of whom was not directly targeted in the Attack and had no connection with its principal target,¹²⁶ but instead were merely passers-by¹²⁷ and as such have shared or similar interests.¹²⁸ All members of this alleged "non-group" plan to seek assistance from the Tribunal's legal aid for victims' participation,¹²⁹ even though some of them are also already represented by legal counsel.¹³⁰

117. The VPU submits furthermore that the interests that each group has in participating are distinct. The interest of members of the first group allegedly lies in trying to understand why the principal objective of the Attack was targeted, since their fate as victims is

¹¹⁸ Cf. note 19 above.

¹¹⁹ VPU Observations, para. III.1.

¹²⁰ *Id.*, paras II.5-6.

¹²¹ *Id.*, para. II.8.

¹²² *Id.*, paras II.4, 7, 10, 12.

¹²³ *Id.*, para. II.10.

¹²⁴ *Id.*, para. II.11.

¹²⁵ The VPU refers to this other group as a « *'non groupe' hétéroclite* », *Id.*, para. II.13.

¹²⁶ *Id.*, para. II.14. The VPU specifies that only eight of forty-two members of this "non-group" could claim any kind of connection with the family of the principal target (*Id.*, para. II.15), that all eight have expressed a willingness to be included in the first group of victims and therefore could do so (*Id.*, para. II.22, 27), and that the putative representative of this group has confirmed to the VPU that these eight victims could readily be assimilated into the first group without objection (*Id.*, para. II.26).

¹²⁷ *Id.*, paras II.16-17.

¹²⁸ *Id.*, para. II.17.

¹²⁹ *Id.*, para. II.14.

¹³⁰ *Id.*, para. II.13.



inextricably linked to his own.¹³¹ The interest of members of the “non-group” allegedly lies in trying to understand why, and by whom, an attack against them was planned and executed.¹³²

118. The VPU argues that the representation of all victims by a single common legal representative would be inappropriate. It avers that a single common legal representative would not be able adequately to represent the different views and concerns of all victims, only some of whom were targeted by the Attack.¹³³ It submits furthermore that it would in any event generate an imbalance within the group due to the weight and influence of the group of victims associated with the family of the principal target of the Attack.¹³⁴ Some members of the “non-group”, on the other hand, have allegedly expressed their desire not to be associated in any way with the political affiliations of certain victims.¹³⁵

2. Discussion

119. The Pre-Trial Judge notes that a plain reading of Rule 86(C) of the Rules reveals that, since he must decide whether to divide VPPs into groups for this purpose, the Rule suggests that the VPPs are presumed to be treated as a single group, unless valid reasons according to Rule 86(D)(i)-(iii) of the Rules justifies not doing so.

120. Moreover, VPPs’ participation must be effected with due regard not only to the interests of the VPPs, but also to the broader interests which the Pre-Trial Judge is charged to ensure, notably the rights of the accused and a fair and expeditious trial. The Pre-Trial Judge therefore considers that the Tribunal’s victims’ participation regime does presume the common legal representation of victims, grouped into one group, unless at least one of the criteria in Rule 86(D)(i)-(iii) is met. It remains to be determined whether there are reasons to rebut this presumption in the case of the instant Applications.

¹³¹ *Id.*, para. II.9 : « Leur participation devrait consister notamment à tenter de comprendre pourquoi et par qui Rafic Hariri était ciblé par une attaque, leur sort de victime étant irrémédiablement et immanquablement associé au sien »

¹³² *Id.*, para. II.17 : « Leur participation devrait consister notamment à tenter de comprendre pourquoi et par qui une attaque contre leur personne était planifiée et exécutée. »

¹³³ *Id.*, paras II.18, 20.

¹³⁴ *Id.*, paras II.18-19.

¹³⁵ *Id.*, para. II.21.



121. The Pre-Trial Judge considers that all of the applicants are affected by the same alleged facts and criminal conduct. The Pre-Trial Judge is not persuaded that at present there is either a conflict of interest that hinders common representation of a single group, or shared or similar interests which require the division of a single group of VPPs.

122. Furthermore, the Pre-Trial Judge does not consider that the alleged interests of each of the two proposed groups advanced by the VPU can be differentiated. Trying to understand why, and by whom, an attack against some of the victims was planned and executed is, to all intents and purposes, the same as trying to understand why and by whom the principal objective was targeted by the Attack. There are therefore no distinct interests between the two proposed groups of VPPs.

123. Neither does the Pre-Trial Judge consider that the weight and influence of certain victims is a factor that justifies dividing a group of victims. Indeed, the notion of equal treatment should inform the participation of VPPs¹³⁶ such that no victim should be placed at a disadvantage with respect to another when participating in the proceedings.¹³⁷ What permits VPPs to present their views and concerns during the proceedings is not their importance relative to other victims, but the fact that their personal interests have been affected, and that they have suffered some form of harm.¹³⁸ To make a contrary finding could undermine the interests of the 'other' less well-endowed victims. It could furthermore introduce into criminal proceedings extraneous considerations that may be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, in violation of Article 17 of the Statute.

124. The Pre-Trial Judge notes that according to the VPU's observations, some victims have allegedly expressed their desire not to be associated with the political interests of certain other victims.¹³⁹ In this regard, the Pre-Trial Judge considers that such interests, if any,

¹³⁶ This is notwithstanding the fact that VPPs are not Parties *per se*, and as such they cannot be said to benefit from the same rights to equal treatment as do the accused (cf. Art. 16(1), (4) STLSt).

¹³⁷ For example, Art. 3(c) of the UN Basic Principles provides that "[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to ... [p]rovide those who claim to be victims of a human rights or humanitarian law violation with *equal and effective access to justice*, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation" (emphasis added).

¹³⁸ Art. 17 STLSt., Rule 2 STL RPE. Cf. also Sections IV.A.3, IV.B, and IV.C above.

¹³⁹ The VPU Observations refer to « dimension politique », VPU Observation, para. II.21.



should not influence the decision on whether the VPPs should be divided into groups. Such decision will be based exclusively on the legal criteria prescribed by Rule 86(D) of the Rules.

125. The Pre-Trial Judge also takes note of the VPU's submission that a lawyer has already been appointed to represent the first group, and that this lawyer and his co-counsel have expressly refused to represent indigent VPPs. The Pre-Trial Judge refers to Rule 51(C)(i) of the Rules, which requires the VPU, "under the authority of the Registrar", to:

draw up and maintain a list of highly qualified counsel who meet the criteria set forth in Rule 59(B)(i), (ii), (iii) and (C) concerning the qualifications of defence counsel, and who have indicated their availability and willingness to represent victims participating in the proceedings [...]

126. If an individual counsel expresses his unwillingness to represent VPPs, it is for the VPU, under the authority of the Registrar, to resolve the issue accordingly.

127. Having reviewed the Applications of the VPPs, and having considered the VPU's submissions, the Pre-Trial Judge finds that there are no valid reasons to justify dividing the VPPs into more than one group. Furthermore, following the review of the Applications, the Pre-Trial Judge considers that there are no conflicting interests that may hinder common representation. Neither are the rights of the accused, nor the interests of a fair and expeditious trial, prejudiced by grouping the VPPs into one group; indeed, the trial would arguably be rendered more expeditious doing so.

128. The Pre-Trial Judge notes that it is incumbent upon the Registrar — pursuant to Rule 51(G) of the Rules — first to consult the VPU and then to designate counsel and co-counsel as appropriate to represent victims participating in the proceedings, in accordance with the applicable Rules and Directive on Victims' Legal Representation¹⁴⁰, and with this decision. In any event, this decision does not fetter the Registrar's discretion to designate as many co-counsel to the legal representative as he considers is necessary to represent effectively the VPPs for the proper functioning of the proceedings.

VII. Confidentiality

129. The present decision is classified as "public" although it refers to documents in the Applications which are classified as confidential and *ex parte*. The reasons for maintaining

¹⁴⁰ STL/BD/2012/04, adopted 4 May 2012.



the confidential and *ex parte* nature of the Applications at this stage of the proceedings have already been stated by the Pre-Trial Judge in the Decision of 5 April 2012.¹⁴¹ For the same reasons, the individual assessment of each Application transmitted to the Pre-Trial Judge is contained in the confidential and *ex parte* annex attached to the present decision.¹⁴² The Pre-Trial Judge recalls, however, the principle of publicity of pre-trial proceedings enshrined in Rule 96 of the Rules.¹⁴³ He considers that it is in the interest of the transparency of proceedings to render this decision publicly. Moreover, the references in this decision to confidential and *ex parte* documents — which are necessary to provide a reasoned opinion — are sufficiently abstract and general in nature that they do not in any way compromise the anonymity of the applicants or the confidentiality of their Applications, or prejudice their interests.

130. Finally, the Pre-Trial Judge reminds the Parties that, as already stated in the Decision of 5 April 2012, the withholding of the identities of the applicants, and their Applications, is justified in order to protect their interests at this stage of proceedings. Nevertheless, subject to the authorisation of a Chamber, the Parties may either be provided with the identities of some or all of the VPPs, or be granted access to some or all of their Applications. At this stage of proceedings, however, withholding of the identity of the applicants and their Applications does not prejudice the rights of the Accused or the interests of the Prosecution.

131. If persons who have been granted VPP status wish to remain anonymous or seek other protective measures, a request to that end should be submitted to the Pre-Trial Judge as soon as possible, pursuant to Rule 133(A) of the Rules.¹⁴⁴ In order to expedite that process, and in keeping with the Tribunal's jurisprudence, the Pre-Trial Judge invites VPU or the victims' legal representative, as appropriate, to submit any such requests to the Pre-Trial Judge after

¹⁴¹ Decision of 5 April 2012, paras 26-55.

¹⁴² The Annex to this decision must be made accessible to the VPU, and the VPU must notify each applicant of the present decision, but only insofar as it relates to his Application.

¹⁴³ 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."

¹⁴⁴ "The Trial Chamber may, *proprio motu* or at the request of a Party, the victim or witness concerned, the Victims' Participation Unit or the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."



having conducted a risk assessment for the relevant applicant(s) with the assistance of the Victims and Witnesses Unit of the Tribunal (the “VWU”).¹⁴⁵

¹⁴⁵ In keeping with the spirit of the Order of the Appeals Chamber of 7 October 2011, it is appropriate that the VWU also examines the risk to the above mentioned persons. Cf. STL, *In the matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor against the Pre-Trial Judge’s Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011, para. 34; *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Provisional Order on the Prosecution’s Application of 21 December 2011 Filed pursuant to Rules 115, 116 and 133 of the Rules of Procedure and Evidence, 24 January 2012, para. 5.

**VIII. Disposition**

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 2, 51, 86 and 133 of the Rules,

GRANTS the status of victims participating in the proceedings to the following persons as referred to in the Annex: V001, V002, V003, V004, V005, V007, V009, V010, V016, V020, V021, V022, V023, V024, V025, V026, V027, V028, V030, V031, V035, V036, V037, V038, V040, V041, V042, V043, V044, V045, V046, V047, V048, V049, V050, V051, V052, V053, V054, V055, V056, V057, V058, V059, V060, V061, V062, V063, V064, V065, V066, V067, V068, V069, V070, V071, V072, V073;

REJECTS as incomplete all other Applications;

ORDERS the VPU to notify each applicant of the present decision only insofar as it relates to his Application;

DECIDES that victims admitted to participate in the proceedings shall do so in a single group having common legal representation;

ORDERS the Registrar to designate a legal representative and as many co-counsel as necessary to represent the persons granted the status of victims participating in the proceedings;

RECALLS the Decision of 5 April 2012 ordering that the annexes to the Transmission Document remain confidential and *ex parte* until further order;



DECLARES that the Annex remains confidential until further order; and

INVITES the VPU or the victims' legal representative to submit any request for appropriate measures to ensure the privacy and protection of victims participating in the proceedings to the Pre-Trial Judge, after having conducted a risk assessment for the relevant VPPs with the assistance of the VWU.

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

Leidschendam, 8 May 2012.



Daniel Fransen
Pre-Trial Judge

