



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-05**
The Prosecutor v. Salih Mustafa

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 27 November 2020

Language: English

Classification: **Public**

Framework Decision on Victims' Applications

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

Registry
Victims' Participation Office

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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 22(1), 34(6), 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 23(5), 95(2)(i) and 113 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 12 June 2020, the Pre-Trial Judge issued the "Decision on the Confirmation of the Indictment Against Salih Mustafa" ("Confirmation Decision"),² together with, *inter alia*, an arrest warrant and transfer order for Salih Mustafa ("Mr Mustafa" or the "Accused").³
2. On 19 June 2020, the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment.⁴
3. On 24 September 2020, Mr Mustafa was arrested⁵ and transferred to the detention facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.⁶

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was filed on 5 October 2020.

³ KSC-BC-2020-05, F00009/A01, Pre-Trial Judge, *Arrest Warrant for Mr Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*; F00009/A02, Pre-Trial Judge, *Order for Transfer to Detention Facilities of the Specialist Chambers*, strictly confidential and *ex parte*. Public redacted versions of the two documents were filed on 24 September 2020.

⁴ KSC-BC-2020-05, F00011/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Indictment*, 19 June 2020, confidential. A public redacted version of the Confirmed Indictment was filed on 28 September 2020 (KSC-BC-2020-05, F00019/A01, Specialist Prosecutor, *Annex 1 to Submission of Further Redacted Version of Confirmed Indictment*, 28 September 2020, public).

⁵ KSC-BC-2020-05, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 24 September 2020, public.

⁶ KSC-BC-2020-05, F00014, Registrar, *Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, public, with Annex 1, strictly confidential and *ex parte*.

4. On 28 September 2020, Mr Mustafa made his initial appearance.⁷ On 28 October 2020, he pleaded not guilty.⁸

II. APPLICABLE LAW

5. Pursuant to Article 22(1) of the Law and Rule 2 of the Rules, a victim is a natural person who has personally suffered harm, including physical, mental or material harm, as a result of a crime within the jurisdiction of the Specialist Chambers and alleged in an indictment confirmed by the Pre-Trial Judge.

6. Pursuant to Rule 113(1) of the Rules, after the confirmation of an indictment and sufficiently in advance of the opening of the case, a person claiming to be a victim of a crime alleged in the indictment may file an application for admission as a victim participating in the proceedings (“VPP”), specifying how he or she qualifies as a victim and providing the location and date of an alleged crime giving rise to harm.

7. Pursuant to Article 34(6) of the Law and Rule 23(5) of the Rules, the Victims’ Participation Office (“VPO”) administers, *inter alia*, the system of victim participation provided for in Article 22 of the Law and the Rules. The VPO provides assistance and advice to VPPs.

8. Pursuant to Rule 113(2) of the Rules, the VPO registers and assesses the applications and files them before the Pre-Trial Judge together with a recommendation on admissibility and common representation, and a request for protective measures under Rule 80 of the Rules, as applicable.

9. In accordance with Rule 113(1)-(3) of the Rules, the Parties do not have access to the application forms and receive only a confidential report of the VPO submission, on

⁷ KSC-BC-2020-05, Transcript, 28 September 2020, public, p. 11, lines 24-25.

⁸ KSC-BC-2020-05, Transcript, 28 October 2020, public, p. 60, lines 2-17.

the basis of which they can make submissions on legal grounds regarding admissibility and common representation.

10. In accordance with Rule 113(4)-(5) of the Rules, the Pre-Trial Judge shall consider whether the applicant has provided *prima facie* evidence of the harm suffered as a direct result of a crime in the indictment and shall render a reasoned decision granting or denying admission in the proceedings. The Pre-Trial Judge shall also decide on common representation and any requests for protective measures. The decision shall be notified to the applicant, the VPO and the Parties.

11. In accordance with Article 22(4) of the Law, VPPs shall form one group unless a Panel orders that they should be divided into more than one group. Pursuant to Rule 113(8) of the Rules, the Pre-Trial Judge, in consultation with the VPO, shall decide whether to divide VPPs into groups having common representation, and taking into consideration any conflicting interests that may hinder common representation, any similar interests that may facilitate common representation and the rights of the Accused and the interests of a fair and expeditious trial.

12. Pursuant to Rule 113(6) of the Rules, denied applicants may appeal as of right the decision of the Pre-Trial Judge within fourteen days of notification. A Party may seek certification of the same decision, but only on grounds of an error of law.

III. DISCUSSION

A. PRINCIPLES GOVERNING THE VICTIM APPLICATION PROCESS

13. The legal framework of the SC provides for several procedural steps to be taken by the Pre-Trial Judge, the Parties and Victims' Counsel, where applicable, between the initial appearance of the Accused and the transmission of the case file to the Trial Panel, in accordance with Rule 98 of the Rules. One of these steps concerns the

determination of applications for admission as victim participating in the proceedings, as provided by Rule 95(2)(i) of the Rules.

14. The VPO plays a central role in the victims' application process by, *inter alia*, collecting applications and submitting them before the Pre-Trial Judge, making recommendations on admissibility and common representation as well as requesting protective measures for applicants. Other units of the Registry may also be involved in various aspects of the application process. Additionally, the SPO should indicate to the VPO any person who has suffered harm as a result of a crime in the Confirmed Indictment. To ensure the efficiency and expeditiousness of the victims' application process and to assist the VPO and all other stakeholders involved in this process, the Pre-Trial Judge considers it necessary to provide timely and detailed guidance, with clear, streamlined instructions for the application of the relevant provisions.⁹

15. Furthermore, to enable VPO to perform its functions as provided in Article 34(6) of the Law and Rule 113(2) of the Rules, the Pre-Trial Judge finds it appropriate to provide access to the VPO to the un-redacted versions of the Confirmed Indictment and the Confirmation Decision. The Pre-Trial Judge reminds the VPO of the strictly confidential classification of the aforementioned filings and instructs it to refrain from disclosing to any person information subject to redactions contained in the corresponding public versions.

⁹ Similarly, ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, *Decision Establishing Principles on the Victims' Application Process ("Ntaganda Principles Application Process")*, ICC-01/04-02/06-67, 28 May 2013, para. 3; *Prosecutor v. Ongwen*, Pre-Trial Chamber II, *Decision Establishing Principles on the Victims' Applications Process ("Ongwen Principles Application Process")*, ICC-02/04-01/15-205, 4 March 2015, paras 1-2.

B. INFORMATION PROVIDED TO WOULD-BE APPLICANTS

16. Timely and effective outreach action aimed at informing would-be applicants about the SC mandate and its victims' participation regime is critical.¹⁰ In this regard, the Pre-Trial Judge advises that, whenever practicable, the VPO should provide would-be applicants with complete, accurate, concise and accessible information regarding, *inter alia*: (i) the SC mandate; (ii) the material, temporal and geographic parameters of the crimes confirmed in the SC indictment; (iii) the steps in the application process; (iv) the main features of the victims' participation regime; and (v) the SC reparations regime.¹¹

C. COLLECTION OF APPLICATIONS

17. The Pre-Trial Judge emphasises that, whenever practicable, the VPO should assist the applicants in filling out the four-page "Application for Admission as a Victim Participating in Proceedings" form, available on the SC website ("Application Form"). Such assistance, be it in person or remotely, as the case may be, should entail a brief description of the content of the Application Form and the application process and, to the extent necessary, guidance in filling out the individual sections of the Application Form.¹² However, victims are also free to fill in the Application Form on their own or with the assistance of a counsel.

18. In light of the above, the Pre-Trial Judge instructs the VPO to report on the manner in which the applications have been received, the number of applications received and

¹⁰ Similarly, ICC, *Ntaganda* Principles Application Process, para. 12; *Ongwen* Principles Application Process, para. 10.

¹¹ Similarly, ICC, *Ntaganda* Principles Application Process, para. 13; *Ongwen* Principles Application Process, para. 12; *Prosecutor v. Yekatom and Ngaïssona*, Pre-Trial Chamber II, *Decision Establishing the Principles Applicable to Victims' Application for Participation* ("*Yekatom and Ngaïssona* Principles Application Process"), ICC-01/14-01/18-141, 5 March 2019, para. 12.

¹² Similarly, ICC, *Ntaganda* Principles Application Process, para. 26; *Ongwen* Principles Application Process, para. 23.

the time period in which such applications were received, as provided in paragraph 24.

D. SUBMISSION OF APPLICATIONS

19. Applications may be submitted to the Pre-Trial Judge until the submission of the Defence filing pursuant to Rule 95(5) of the Rules, which is the final deadline for applications submitted during the pre-trial phase. After that date, the VPO may submit the applications to the Trial Panel, as determined by that Panel.

20. Pursuant to Rule 113(2) of the Rules, before submitting the applications to the Pre-Trial Judge, the VPO must register and assess the received applications. This entails a process in which the VPO (i) registers the received applications and assigns a pseudonym to each applicant; (ii) reviews the content of the received applications in order to identify any missing, incomplete and/or inaccurate information; (iii) where necessary, reverts to the applicants to request additional information or material to render the application complete; and (iv) prepares the applications for submission, as provided below.

21. As regards pseudonyms, the Pre-Trial Judge instructs the VPO to assign each applicant a number, irrespective of whether the applicants have requested protective measures or not. The pseudonym so assigned should be used as the sole identifier of the victim in public and (strictly) confidential filings, unless otherwise ordered by the competent Panel.

22. To render an application complete, the Pre-Trial Judge considers that at least the following requirements must be met: (i) there is sufficient proof of identity and, where relevant, kinship and/or legal guardianship; (ii) personal details are complete; (iii) all relevant sections of the Application Form are filled in; (iv) the date/period and location of the crimes as well as the harm suffered are sufficiently clearly indicated;

(v) relevant and sufficient documentation has been submitted, to the extent possible; and (vi) the application is signed by the applicant or his/her legal guardian.

23. The VPO should endeavour to submit only complete applications to the Pre-Trial Judge. To this effect, the VPO should expeditiously screen the applications and, if necessary, revert to the applicants to request additional information or material to make the applications complete. Where, despite the VPO's best efforts, an application cannot be completed, the VPO should nevertheless submit it before the Pre-Trial Judge, indicating the measures taken to complete the application and the reasons for their failure. Ultimately, all applications, whether complete or not, should be submitted to the Pre-Trial Judge, unless they are withdrawn by the applicants.

24. As regards the preparation of the applications for submission, the Pre-Trial Judge considers that, in accordance with Rule 113(2) of the Rules, the VPO should submit a consolidated filing ("Report to the PTJ"), including in particular the following:

(a) a report indicating:

- (i) the manner in which the applications have been received, the number of applications received and the time period in which such applications were received;
- (ii) the main steps of the assessment conducted by the VPO to ascertain the completeness of applications;
- (iii) the number, as the case may be, of: (i) submitted complete applications and (ii) submitted incomplete applications and a summary of the reasons why the VPO nevertheless elected to submit them. In its last Report to the PTJ, before the final deadline provided in paragraph 19, the VPO should also indicate the number of any incomplete applications not submitted and whether the VPO envisages any further steps to be taken to ensure their completeness;

- (b) a summary of the recommendations on admissibility of the applications, taking into account the criteria provided in paragraphs 27-39;
- (c) a summary of the recommendations on grouping for the purpose of common representation, taking into account the criteria provided in paragraphs 41-43;
- (d) a summary of the requested protective measures, taking in consideration the criteria provided in paragraphs 44-47;
- (e) annexes, as follows:
 - a. an annex with confidential and *ex parte* tables indicating, as the case may be, the number and details of applicants recommended for admission – Group A, not recommended for admission – Group B or in relation to whom the VPO makes no recommendation – Group C;
 - b. confidential and *ex parte* annexes, per each submitted application, consisting of a concise “Application Summary” prepared by the VPO together with the related Application Form and supporting material.¹³ The “Application Summary” must indicate the following information, taking in consideration the criteria provided in paragraphs 27-47:
 - (i) the assigned pseudonym of the applicant;
 - (ii) personal details of the applicant, including family name, first name, date and place of birth, citizenship, language(s) spoken, and whether the applicant is a direct or indirect victim;
 - (iii) a detailed but concise description of the incident(s), including geographical and temporal parameters, pertaining to the crime(s) in

¹³ Application Forms under Group A and C should be submitted with a revised translation. Application Forms under Group B should be submitted with a draft translation. The supporting material does not require translation.

the indictment, and the alleged perpetrator(s) or group(s) held responsible, if known;

- (iv) the harm suffered, including a summary of the documentation submitted to demonstrate the harm suffered, to the extent available, and the causality between the incident(s) and the suffered harm;
- (v) the VPO recommendation as to admissibility;
- (vi) where relevant, the applicant's request for protective measures and the VPO's assessment and recommendation in that regard; and
- (vii) the VPO recommendation as to grouping, indicating the applicant's background, language, geographical location, potential conflict of interest; any preferences/opinions stated by the applicant regarding legal representation.

25. The Pre-Trial Judge further considers that such Reports to the PTJ should be submitted by the VPO periodically, pursuant to the timeline provided in paragraph 55.

E. ASSESSMENT OF APPLICATIONS

26. The VPO is instructed to conduct the preliminary assessment of the admissibility of applications, the determination of the grouping of applicants and the decision on the requested protective measures.

1. Admissibility of Applications

27. In accordance with Article 22(1) of the Law and Rules 2, 113(1) and (4) of the Rules, a victim applicant is admitted to participate in the proceedings if there is *prima facie* evidence that:

- (a) the applicant is a natural person;

- (b) the applicant described acts in the application that appear to constitute a crime within the scope of the Confirmed Indictment;
- (c) the applicant has personally suffered harm; and
- (d) the harm was the direct result of a crime in the Confirmed Indictment.

(a) Standard of proof: *prima facie* evidence

28. Pursuant to Rule 113(4) of the Rules, the Pre-Trial Judge assesses the submitted information and supporting material on a *prima facie* basis.¹⁴ Accordingly, the Pre-Trial Judge reviews the submitted information and supporting material on a case-by-case basis,¹⁵ taking into account: (i) all relevant circumstances as apparent at first sight;¹⁶ and (ii) the intrinsic coherence of the application.¹⁷

(b) Natural person

29. Pursuant to Article 22(1) of the Law and Rule 2 of the Rules, only natural persons are permitted to participate as VPPs in SC proceedings. Legal persons are thus excluded from participation. In order to submit a valid application, a natural person must have legal capacity.¹⁸ As indicated in the Application Form, if the applicant is

¹⁴ The term *prima facie* means “at first sight; on the face of it; as it appears at first without investigation”. See OED Online. Oxford University Press, September 2020. Web. 26 November 2020, <https://www.oed.com/view/Entry/151264?redirectedFrom=prima+facie#eid>

¹⁵ Similarly, STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, *Decision on Victims’ Participation in the Proceedings* (“*Ayyash et al. Decision on Victim Participation*”), 8 May 2012, para. 62.

¹⁶ Similarly, ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, *Decision on Victim’s Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings*, ICC-02/11-01/11-138, 4 June 2012, para. 21.

¹⁷ Similarly, ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, *Fourth Decision on Victims’ Participation* (“*Bemba 4th Decision on Victim Participation*”), ICC-01/05-01/08-320, 12 December 2008, para. 31; *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, *Decision on Victim’s Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings*, ICC-02/11-01/11-138, 4 June 2012, para. 21.

¹⁸ See Law No. 2004/32 on Family Law providing in Article 15(2)-(3) that legal capacity is obtained upon the completion of the eighteenth year of age.

under 18 years of age or an adult declared as lacking legal capacity, he or she must be represented by a parent or a legal guardian.¹⁹

30. Applicants may submit as proof of identity: (i) identification documents, such as national identity cards, passports, residence cards, driving licences; and (ii) where identification documents are not available, any other reliable document(s) which contain information identifying the applicant, such as medical certificates, work identification documents, records issued by local authorities. Where the applicant is represented by a parent or a legal guardian, the following documents may be submitted as proof of legal guardianship: birth certificates, identity cards indicating parentage or legal guardianship, court decisions regarding guardianship, other records issued by local or national authorities.²⁰

(c) Alleged crime(s)

31. Pursuant to Article 22(1) of the Law and Rule 113(4) of the Rules, an applicant must aver to have been victim of one or more crimes in the indictment. In this context, “crime” pertains to any of the crimes reflected in the Confirmed Indictment. The Applicant must describe, as specifically as possible, the place and time of the event and, if possible, any alleged perpetrator present at the scene or involved in the event.

(d) Personally suffered harm

32. Pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, an applicant must have personally suffered harm, including physical, mental or material harm, as a result of a crime in the indictment.

¹⁹ Application Form, Section 4.

²⁰ *Similarly, STL, Ayyash et al.* Decision on Victim Participation, para. 33.

33. In relation to the harm having been suffered *personally* by the victim, this denotes a requirement that the harm is suffered *by* the applicant, *i.e.* his or her physical or psychological well-being or economic situation is affected. This may include harm suffered by victims subjected to the acts of the perpetrator(s) (“direct victims”)²¹ or suffered by individuals in a close personal relationship with the direct victim killed or injured by the perpetrator(s) (“indirect victims”).²²

34. As regards physical harm, applicants must provide a description of the specific bodily injury, detailing, to the extent possible, the type, gravity, body region and number of injuries as well as their effects on the victim’s health, ability to work and well-being.²³ As proof of the physical harm, applicants may submit, to the extent available, medical certificates (hospital records, radiography or other medical scan results, physician’s reports, etc.), medication prescriptions, photographs or any other records attesting the bodily injury suffered.²⁴

35. As regards mental harm, applicants must provide a description of the specific psychological suffering, detailing, to the extent possible, its nature, gravity and manifestations as well as its effects on the victim’s health, ability to work and well-

²¹ Similarly, ICC, *Prosecutor v. Lubanga*, Appeals Chamber, *Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008* (“Lubanga Appeal Decision on Victim Participation”), ICC-01/04-01/06-1432, 11 July 2008, para. 32; *Prosecutor v. Lubanga*, Trial Chamber I, *Redacted Version of “Decision on ‘Indirect Victims’”* (Lubanga Decision on Indirect Victims), ICC-01/04-01/06-1813, 8 April 2009, para. 44; ECCC, *Co-Prosecutors v. Kaing*, Appeals Chambers, *Appeal Judgment (“Duch Appeal Judgment”)*, 3 February 2012, para. 416; STL, *Ayyash et al.* Decision on Victim Participation, para. 39.

²² Similarly, ICC, *Lubanga Appeal Decision on Victim Participation*, paras 1, 32; *Lubanga Decision on Indirect Victims*, paras 44, 50; ECCC, *Duch Appeal Judgment*, para. 417; STL, *Ayyash et al.* Decision on Victim Participation, para. 39; ICC, *Prosecutor v. Abdallah Banda*, Trial Chamber IV, *Decision on 19 Applications to Participate in the Proceedings*, ICC-02/05-03/09-528, 12 December 2013, para. 26; STL, *Ayyash et al.* Decision on Victim Participation, para. 67; STL, *Prosecutor v. Ayyash*, Pre-Trial Judge, *Decision Relating to Victims’ Participation in the Proceedings and Their Legal Representation* (“2020 Ayyash Decision on Victim Participation”), 17 April 2020, para. 25.

²³ Application Form, Section 2.3.

²⁴ Similarly, STL, *Ayyash et al.* Decision on Victim Participation, para. 67; 2020 *Ayyash* Decision on Victim Participation, para. 36.

being.²⁵ As proof of the mental harm, applicants may submit, to the extent available, attestations issued by qualified professionals, such as doctors, psychologists, psychiatrists or counsellors or any other records attesting the psychological suffering.²⁶

36. As regards material harm, applicants must provide a description of the specific property or pecuniary damage or loss, detailing, to the extent possible, the number and category/type of damaged, destroyed or lost goods, the type and proportion of the suffered damage or loss as well as the impact on the victim's livelihood.²⁷ As proof of the material harm, applicants may submit, to the extent available, records attesting personal property and/or prior income together with documentation demonstrating the material harm suffered, such as insurance claims, estimates or receipts for repairs, photographs, receipts of unemployment benefits and other relevant documents.²⁸

(e) Direct result of a crime in the indictment

37. Pursuant to Article 22(1) of the Law and Rules 2 and 113(4) of the Rules, the harm suffered must be the direct result of a crime in the indictment.

38. The harm is the direct result of the crime where, in the circumstances prevailing at the relevant place and time and taking in consideration the personal situation of the victim, the acts or omissions of the perpetrator(s) would most likely bring about that harm, as viewed by an objective observer.²⁹ Applicants must indicate the causal link between the harm and the crime in the indictment by providing a description of the events, detailing, to the extent possible, the acts or omissions that caused the harm,

²⁵ Application Form, Section 2.3.

²⁶ *Similarly, STL, Ayyash et al.* Decision on Victim Participation, para. 79; 2020 *Ayyash* Decision on Victim Participation, para. 43.

²⁷ Application Form, Section 2.3.

²⁸ *Similarly, STL, Ayyash et al.* Decision on Victim Participation, paras 74-75; 2020 *Ayyash* Decision on Victim Participation, paras 38-40.

²⁹ *Similarly, albeit in the Rome Statute context: ICC, Bemba 4th Decision on Victim Participation, para. 77.*

the place, time, unfolding and duration of the events as well as any other relevant circumstances.³⁰

(f) VPO recommendation

39. The VPO shall submit all applications, regardless of whether, in its view, they are admissible (Group A) or not (Group B), or whether they are to be deferred to the determination of the Pre-Trial Judge (Group C). Before submitting the applications, however, the VPO may advise the applicants of the criteria under Article 22(1) of the Law and may give applicants the opportunity to supplement or withdraw such applications, if they so wish.

40. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on admissibility taking in consideration the aforementioned criteria.

2. Grouping of Applicants

41. In accordance with Article 22(4) of the Law and Rule 113(2) and (8) of the Rules, the VPO shall make a recommendation on common representation. It may propose that applicants, recommended to be admitted (Group A) or in relation to whom the VPO has deferred to the determination of the Pre-Trial Judge (Group C), form one group, represented by a common Victims' Counsel, or several groups, each commonly represented. To this effect, it may consider the criteria set out in Rule 113(8) of the Rules.

42. A need to divide applicants into more than one group arises when the situation or the specificity of the victims is so different that their interests are irreconcilable,³¹

³⁰ Application Form, Section 2.2.

³¹ Similarly, ICC, *Prosecutor v. Abdallah Banda and Jerbo*, Trial Chamber IV, Decision on Common Legal Representation ("*Banda and Jerbo Decision*"), ICC-02/05-03/09-337, 25 May 2012, para. 42.

making their common representation impracticable. That being said, mere dissimilarity between the personal situations of the victims does not suffice to create more than one group. Accordingly, the fact that victims suffered different forms of harm, were subjected to different crimes, have different ethnicities, reside in different areas, originate from different countries, speak different languages, have different political views, or have an additional interest or view, which is not shared but not disputed by other victims, may not automatically warrant separate representation.³² Conversely, where several of the aforementioned considerations overlap, namely, that the victims suffered harm as a result of distinct crimes, which took place in different circumstances, on different dates and in different locations, using distinct *modi operandi* and targeting different individuals, the division of victims in more than one group may be warranted.³³ The same applies where one fundamental consideration makes their interests irreconcilable, such as some of the victims having caused harm to other victims.³⁴

43. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on grouping for the purpose of common representation taking in consideration the aforementioned criteria.

³² Similarly, ICC, *Banda and Jerbo* Decision, para. 42; STL, *Ayyash et al.* Decision on Victim Participation, para. 124. See also ICC, *Prosecutor v. Kosgey and Sang*, Registry, Summary of Information Relevant to the Grouping of Victims, ICC-01/09-01/11-243-Anx2, 1 August 2011, paras 2-3, 7-11; *Prosecutor v. Muthaura et al.*, Registry, Summary of Information Relevant to the Grouping of Victims, ICC-01/09-02/11-214-Anx2, 5 August 2011, paras 2-3, 8-12; *Prosecutor v. Abdallah Banda and Jerbo*, Registry, Summary of Information Relevant to the Grouping of Victims, ICC-02/05-03/09-203-Anx2-Red, 25 August 2011, para 5.

³³ STL, 2020 *Ayyash* Decision on Victim Participation, para. 66.

³⁴ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-1328, 22 July 2009, para. 12(c); *Prosecutor v. Ntaganda*, Pre-Trial Chamber I, Decision Concerning the Organisation of Common Legal Representation of Victims, ICC-01/04-02/06-160, 2 December 2013, paras 10, 23.

3. Protective Measures

44. In accordance with Rules 80 and 113(2) and (5) of the Rules, the VPO shall make recommendations as to the applicants' requests for protective measures if necessary for their protection, safety, physical and psychological well-being, dignity and privacy. These recommendations shall pertain to all applicants, namely: (i) applicants recommended to be admitted (Group A) and those in relation to whom the VPO has deferred to the determination of the Pre-Trial Judge (Group C); and (ii) by virtue of the confidentiality of the application process, any rejected applicants (Group B).

45. Pursuant to Rule 80(4)(a), (d) and (e) of the Rules, the measures relevant at this stage of proceedings are the following: the redaction of names and identifying information from the SC public records (Rule 80(4)(a)(i)); non-disclosure to the public of any records identifying the applicant (Rule 80(4)(a)(ii)); the assignment of a pseudonym (Rule 80(4)(a)(vi)); non-disclosure to the Accused or Specialist Counsel of any material or information that may lead to the disclosure of the identity of the applicant (Rule 80(4)(d)); or, in exceptional circumstances, and subject to any necessary safeguards, the non-disclosure to the Parties of any aforementioned material (Rule 80(4)(e)).

46. The Pre-Trial Judge recalls the legal test for determining if certain information may be withheld from the receiving Party,³⁵ which entails an assessment of whether:

- (i) the disclosure of the information in question poses an objectively justifiable risk to the protected person or interest;
- (ii) the protective measure is strictly necessary.³⁶ Thus, if less restrictive protective measures are both sufficient and feasible, such protective measures must be chosen; and

³⁵ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, para. 76.

³⁶ Article 21(6) of the Law.

- (iii) the protective measure is proportionate in view of the prejudice caused to the Accused and a fair trial.³⁷

47. In case an applicant has not requested any Rule 80 protective measures, the VPO is instructed to make recommendations as to whether and which specific protective measures the Pre-Trial Judge shall adopt on his own motion, considering the stage of the proceedings and other relevant considerations.

48. In light of the above, the Pre-Trial Judge instructs the VPO to submit recommendations on protective measures, as provided in paragraph 45, taking in consideration the aforementioned legal test.

F. ROLE OF THE PARTIES IN THE APPLICATION PROCESS

49. The Pre-Trial Judge recalls that, pursuant to Rule 113(1) of the Rules, Application Forms are not disclosed to the Parties. The VPO is required, however, as provided in Rule 113(2) of the Rules, to submit to the Parties a confidential summary of its Report to the PTJ ("Report to the Parties"). This report shall be filed concurrently with the Report to the PTJ; alternatively, the VPO may indicate whether the Report to the PTJ can be re-classified so that it be shared with the Parties, provided it does not contain confidential information warranting redactions. The Report to the Parties should include the following information, without providing identifying information on the applicants:

- (a) a summary of the collection process of applications;
- (b) the total number of applications received and the number of applications submitted to the Pre-Trial Judge;
- (c) the alleged crimes or crime sites as well as the alleged perpetrator(s);

³⁷ Rule 80(1) of the Rules.

- (d) the number of direct and indirect victims whose applications have been submitted, and the type of documentation accepted to prove identity, kinship, guardianship;
- (e) the types of harm alleged and the type of documentation accepted to prove such harm;
- (f) a summary of the VPO recommendation on admissibility, indicating the number of applications proposed to be admitted (Group A), rejected (Group B) or deferred to the determination of the Pre-Trial Judge (Group C), with a general description of the reasons for each group;
- (g) a summary of the VPO recommendation on grouping for the purpose of common representation, with a general description of the reasons thereof; and
- (h) a summary of the protective measures requested and the VPO recommendations thereon.

50. On the basis of the Report to the Parties and in accordance with Rule 113(3) of the Rules, Parties may make submissions on legal grounds regarding admissibility and common representation, namely on the application and interpretation of the criteria provided in paragraphs 27-43.

51. Bearing in mind that the withholding of information from the Parties must be consistent with the rights of the Accused and the fairness of proceedings, the Pre-Trial Judge considers that Rule 113(3) of the Rules does not preclude the Parties from making submissions on the interpretation and application of the criteria provided in paragraphs 44-47 in relation to any requests for protective measures under Rule 80(4)(d) or (e) of the Rules.

52. In light of the above, the Pre-Trial Judge orders the Parties to file their submissions on admissibility, common representation and protective measures within ten (10) days of the Report to the Parties.

53. The Pre-Trial Judge further recalls that, pursuant to Rule 113(6) of the Rules, Parties may seek certification to appeal the decision on victims' participation, but only on grounds of an error of law.

G. REMEDY FOR DENIED APPLICANTS


54. Pursuant to Rule 113(6) of the Rules, applicants may appeal as of right a decision of the Pre-Trial Judge denying their applications. Such appeals must be submitted before the Court of Appeals Panel within 14 days of the decision denying the application. The Pre-Trial Judge recalls in this regard that, pursuant to Rules 9(2) and 113(5) of the Rules, the aforementioned time limit runs from the first working day after the notification to the applicant of the decision denying admission.

IV. DISPOSITION

55. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **DIRECTS** the Registrar to make available the un-redacted versions of the Confirmed Indictment and the Confirmation Decision to the VPO;
- b. **ORDERS** the VPO to refrain from disclosing to any person information subject to redactions in the public versions of the Confirmed Indictment and the Confirmation Decision;
- c. **ORDERS** the VPO to file its Report to the PTJ following the instructions and guidelines as set out in this decision, by 10 December 2020;
- d. **ORDERS** the VPO to file its Report to the Parties concurrently with the Report to the PTJ; or, alternatively, to indicate whether the Report to the PTJ can be re-classified so that it be shared with the Parties;

- e. **ORDERS** the VPO to file further Reports to the PTJ, if any, on a regular basis, and the latest by the submission of the Defence filing pursuant to Rule 95(5) of the Rules;
- f. **ORDERS** the VPO to file its further Reports to the Parties, corresponding to its further Reports to the PTJ, as indicated in paragraph 55.b; and
- g. **ORDERS** the Specialist Prosecutor and the Defence for Mr Mustafa to file submissions pursuant to Rule 113(3) of the Rules, if any, within ten (10) days of the notification of each Report to the Parties or, as the case may be, the reclassified version of each Report to the PTJ.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 27 November 2020
At The Hague, the Netherlands.