

The Pre-Trial Judge



Le Juge de la mise en état

المحكمة الخاصة بلبنان  
SPECIAL TRIBUNAL FOR LEBANON  
TRIBUNAL SPÉCIAL POUR LE LIBAN

**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: **5 April 2012**  
Original language: **English**  
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**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH,  
MUSTAFA AMINE BADREDDINE,  
HUSSEIN HASSAN ONEISSI &  
ASSAD HASSAN SABRA**

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**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**

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## I. Introduction

1. In this Decision, the Pre-Trial Judge decides two separate but connected matters. First, the Pre-Trial Judge considers whether — at this stage of the proceedings — the Parties are entitled to have access to the applications received from persons seeking the status of victims participating in the proceedings (respectively, the “Applications”, and “VPP” or “VPPs”).

2. Second, the Pre-Trial Judge invites observations from the Parties and the Victims’ Participation Unit (the “VPU”) on the relevant legal issues regarding requests for the status of victims participating in the proceedings, according to Rule 86(C)(i) of the Rules of Procedure and Evidence (the “Rules”). The Pre-Trial Judge extends this invitation in anticipation of the decision on whether the applicants can be granted the status of VPP.

## II. Procedural Background

3. On 9 February 2012, the VPU filed its “Transmission of Applications for the Status of Victim Participating in the Proceedings” (the “Transmission of Applications”) before the Pre-Trial Judge pursuant to Rule 51(B)(iii) of the Rules.<sup>1</sup> The Transmission of Applications included 147 annexes classified as confidential and *ex parte*. The confidential and *ex parte* annexes comprised 73 Applications received by the VPU,<sup>2</sup> an associated application summary prepared by the VPU in respect of the completeness of each Application, and an overview of all the Applications. Furthermore, the VPU overview detailed *inter alia* the number of victims who indicated that they were concerned about the disclosure of their identities either to the public or to the Parties.<sup>3</sup>

4. The VPU filed the Applications as confidential and *ex parte* because “they contain names and other identifying information relating to the Applicants [...] and other persons”.<sup>4</sup> At that time, the VPU noted that the non-disclosure of identities might be ordered pursuant to Rules 50, 115, 116 and 133 of the Rules, and that the provision in public fashion of the

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<sup>1</sup> 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 *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*.

<sup>2</sup> Transmission of Applications, paras 1, 27.

<sup>3</sup> Transmission of Applications, Annex 1 (confidential and *ex parte*), para. 21.

<sup>4</sup> Transmission of Applications, para. 9.

Applications at this stage of proceedings would prejudice any future decision under those Rules. The VPU therefore requested the Pre-Trial Judge to order that the annexes to the Transmission of Applications remain confidential and *ex parte*.<sup>5</sup>

5. On 17 February 2012, Counsel for Mr. Sabra filed their “Motion for an Order to VPU to Re-File its Annexes *inter partes* or to Seek Protective Measures from the Pre-Trial Judge” (the “Sabra Motion”). In that motion, Counsel for Mr. Sabra “object[...] to the course taken by the VPU in denying the Defence access to and knowledge of the content of the applications filed without establishing any basis for” not providing them.<sup>6</sup>

6. Following receipt of the Sabra Motion on 17 February 2012, the Pre-Trial Judge invited Counsel for Mr. Sabra to file supplementary submissions in light of the then-pending entry into force on 29 February 2012 of the amended Rules, and in particular of Rules 86 and 133 of the Rules,<sup>7</sup> which are relevant to determining the status of VPPs and measures to ensure their protection, if any. The Pre-Trial Judge furthermore requested the remaining Parties and the VPU to file any responses to both of the Sabra’s Defence’s submissions by 7 March 2012. These submissions were likewise to take the amended Rules into account.<sup>8</sup>

7. On 29 February 2012, Counsel for Mr. Sabra duly filed these supplementary submissions (the “Supplementary Sabra Motion”).<sup>9</sup> Both the Sabra Motion and the Supplementary Sabra Motion expressed that Defence Counsel for the three other accused in the *Ayyash et al.* case “join and support” the position of the Sabra Defence.<sup>10</sup> No further submissions were received from the Defence; the arguments advanced shall therefore be referred to as those of “Defence Counsel”.<sup>11</sup>

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<sup>5</sup> Transmission of Applications, para. 30.

<sup>6</sup> Sabra Motion, para. 4.

<sup>7</sup> “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.

<sup>8</sup> *Id*

<sup>9</sup> 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.

<sup>10</sup> Sabra Motion, para. 3; Supplementary Sabra Motion, para. 5.

<sup>11</sup> In this regard, the Pre-Trial Judge refers to his decision of 23 March 2012 in the same case, STL, *Prosecutor v. Ayyash et al.*, Case No: STL-11-01-PT/PTJ « *Ordonnance relative à la requête de la défense de M. Sabra aux fins de garantir le respect de l’Ordonnance du Juge de la mise en état du 24 janvier 2012 et portant fixation d’un délai pour faire valoir des Observations à propos de la requête du procureur du 21 décembre 2011* », at para. 10, which reads as follows : « *ATTENDU que, selon le Procureur, la déclaration selon laquelle la Défense de M. Oneissi, la Défense de M. Ayyash et la Défense de M. Badreddine soutiennent la Requête est sans effet dans la mesure où les différents conseils n’ont pas, eux-mêmes, expressément confirmé ce soutien ; que cette pratique est source de confusion et d’incertitudes juridiques* ».

8. On 7 March 2012, the Prosecutor filed its “Prosecution’s Submission pursuant to the Scheduling Directive dated 24 February 2012” (the “Prosecution Response”).<sup>12</sup>

9. On the same date, the VPU filed its “VPU Response to Sabra Defence Motion and Supplementary Filing Concerning Annexes to the VPU Transmission” (the “VPU Response”).<sup>13</sup>

### III. Submissions of the Parties and the VPU

#### a. Submissions of Defence Counsel

10. Defence Counsel aver that the VPU filed the victims’ applications confidentially and *ex parte* without establishing any basis for doing so,<sup>14</sup> whereas it is essential to the fairness of the inherently adversarial proceedings that the Defence participate in “all relevant phases” and have access to the Applications.<sup>15</sup>

11. Defence Counsel argue that since amended Rule 86(C) of the Rules was not in force at the time, the VPU filed the Transmission of Applications, it is “inapplicable and without effect”<sup>16</sup> and that “amended Rule 86(C) is *ultra vires* of the Statute.”<sup>17</sup> Instead, Defence Counsel submit the Rule applies as it existed prior to the entry into force of the amendment of the Rules on 29 February 2012. This is because amended Rule 86(C) of the Rules “restricts the scope of permissible submissions by the Defence (and Prosecution) to ‘legal issues’ arising from victims’ applications and, thus, (negatively) affects the scope of its right to be heard”.<sup>18</sup> On the contrary, Defence Counsel submit that the pre-existing Rule 86(C) imposed no limitation on Counsel regarding the issues on which they could be heard.<sup>19</sup>

12. Consequently, Defence Counsel argue that they are “entitled [...] to be heard concerning each and every application for victim status”<sup>20</sup> and, relying on the foregoing

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<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> Sabra Motion, para. 7. Defence Counsel correctly identify how Rules 115 and 116 STL RPE are inapplicable *in casu*, but incorrectly aver that Rule 133 STL RPE applies only to proceedings before the Trial Chamber.

<sup>15</sup> Sabra Motion, paras 4-6, 12.

<sup>16</sup> Supplementary Sabra Motion, paras 17-18.

<sup>17</sup> *Id.*, para. 15.

<sup>18</sup> *Id.*, para. 13.

<sup>19</sup> *Id.*, para. 12.

<sup>20</sup> Sabra Motion, para. 12.

arguments, that they “must have access to the applications” and related documents filed confidential and *ex parte* by the VPU.<sup>21</sup>

13. As an alternative argument, Defence Counsel request the Pre-Trial Judge to order the VPU to file a motion for protective measures pursuant to Rule 133 of the Rules, in respect of each applicant for VPP status, containing detailed submissions regarding the risk associated therewith.<sup>22</sup>

**b. Submissions of the Prosecution**

14. The Prosecution submits that since it poses no threat to the applicants for VPP status,<sup>23</sup> it should immediately be provided with the annexes to the Transmission of Applications in unredacted form, and that the Victims’ and Witnesses Unit of the Tribunal (the “VWU”) should be consulted on the transmission of the same to the Defence.<sup>24</sup> Furthermore, the Prosecution suggests that the majority of applicants may already be known to it by virtue of its investigations,<sup>25</sup> and that it may even already have “applied for protection for some of the victims under Rule 115” of the Rules.<sup>26</sup>

15. With respect to the applicable law, the Prosecution supports the application of Rule 86(C) of the Rules as amended, because there is nothing in the Rules to suggest it does not apply retrospectively, and because in any event, the amended Rules “do not prejudice the rights of the Accused under Rule 5(H)” of the Rules.<sup>27</sup>

16. Reading paragraphs (B) and (C) of Rule 86 of the Rules together, the Prosecution argues that it should have access to the applications for VPP status before making submissions pursuant to those provisions. The Prosecution also submits that failure to provide it with the Applications will prejudice it, inasmuch as it needs to know whether the witnesses it plans to call at trial have applied to be VPPs. In this regard, the Prosecution would need,

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<sup>21</sup> Supplementary Sabra Motion, para. 19.

<sup>22</sup> Sabra Motion, para. 15(ii).

<sup>23</sup> Prosecution Response, paras 12, 14.

<sup>24</sup> *Id.*, paras 7, 22, 24. The Prosecution refers to the obligation of the Office of the Prosecutor at the International Criminal Court (the “ICC”) to respect the interests and personal circumstances of the victims, and refers to Rule 55(C) STL RPE, which is the equivalent obligation incumbent upon it before the Tribunal. Rule 55(C) STL RPE provides that “the Prosecutor shall assist the Tribunal in establishing the truth, and protect the interests of victims and witnesses.”

<sup>25</sup> *Id.*, para. 15.

<sup>26</sup> *Id.*, para. 16.

<sup>27</sup> *Id.*, para. 11.

*inter alia*, to fully inform persons acting with the “dual-status” of witnesses and VPPs of the effect of the applicable Rule.<sup>28</sup>

**c. Submissions of the VPU**

17. In its response to the Sabra Motion and Supplementary Sabra Motion, the VPU submits that the Parties have no entitlement — either under the Rules or pursuant to the principles of a fair trial — to receive the Applications, and that the Pre-Trial Judge should withhold the Applications from the Parties at this stage of proceedings.<sup>29</sup> The VPU points out how it is commonplace for certain filings to be made *ex parte*, in particular when such filings are not related to the charges against the accused and do not occasion a right for the Defence to be heard.<sup>30</sup>

18. With respect to the transmission of the Applications to the Pre-Trial Judge, the VPU maintains that the procedure set out in Rule 86(C) of the Rules clearly does not envisage the provision of the same to the Parties.<sup>31</sup> Neither the version of Rule 86(C) of the Rules preceding the rule amendment, nor the amended version of that Rule, provide the Parties with an entitlement to receive applications at this stage of proceedings.<sup>32</sup> Moreover, the VPU submits that the applicability of Rule 86(C) of the Rules as amended is consistent with the Statute and does not prejudice the rights of the accused.<sup>33</sup> For the VPU, the Parties’ access to the identities of the applicants wishing to participate in the proceedings as victims, and their Applications, is more appropriately determined only after the Pre-Trial Judge has decided on their status as participating victims.<sup>34</sup>

**IV. Applicable Law**

19. Before considering each of the issues raised by the Parties and the VPU, the Pre-Trial Judge will recall the applicable law.

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<sup>28</sup> *Id.*, para. 18. The applicable Rule is Rule 150(D) STL RPE, which 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.”

<sup>29</sup> VPU Response, paras 9, 20 *et seq.* The VPU submits further that should the Pre-Trial Judge find that the Parties should receive the Applications, blanket-type protective measures should be sought.

<sup>30</sup> *Id.*, para. 14. The VPU also points out how the jurisprudence of the European Court of Human Rights cited by Defence Counsel is concerned with an accused person’s entitlement to receive the evidence and submissions in support of the charges against him, and as such is distinguished from the procedure in which a victim’s right to participate in proceedings is determined (VPU Response, para. 20).

<sup>31</sup> *Id.*, paras 16-18.

<sup>32</sup> *Id.*, para. 17.

<sup>33</sup> *Id.*, paras 41-47.

<sup>34</sup> *Id.*, para. 25.

20. Article 17 of the Statute of the Tribunal provides as follows:

Where 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.

21. The Rules supplement this statutory provision further. Rule 2 of the Rules defines a “Victim” as “[a] natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction.”

22. Furthermore, Rule 2 of the Rules defines a “Victim Participating in the Proceedings” as a:

Victim 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.

23. Rule 86(A) of the Rules provides that a person claiming to be a victim of a crime within the Tribunal’s jurisdiction may request the Pre-Trial Judge to be granted VPP status. Rule 51(B)(iii) of the Rules mandates the VPU to receive applications from victims seeking to participate in the proceedings, verify that these applications are complete and, once this has been done, transmit them to the Pre-Trial Judge. The Transmission of Applications has been filed on the basis of this mandate.

24. Having received the Applications from the VPU, the Pre-Trial Judge is now required to consider certain criteria when deciding whether an applicant may participate in proceedings. Those criteria, reflecting Article 17 of the Statute, are elaborated in Rule 86(B)(i)-(iv) of the Rules. The Pre-Trial Judge may furthermore consider the criteria expressed in Rule 86(B)(v)-(x) of the Rules.

25. Rule 86(B) provides as follows:

In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider in particular:

- (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.

The Pre-Trial Judge may also consider:

(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.

## V. Discussion

26. After a preliminary observation in part (a) of this section, the Pre-Trial Judge will in part (b) consider whether applying Rule 86(C) of the Rules, as amended, operates to prejudice the rights of the accused, as argued by Defence Counsel. The Pre-Trial Judge will then address four further issues relevant to determining whether the Applications should remain confidential at this stage of proceedings, namely: (c) Protecting the interests of applicants whose applications may be denied; (d) The importance of the appointment of Victims' Legal Representatives; (e) The role of the Victims' and Witnesses Unit and its mandate to undertake risk assessments; and (f) Distinguishing a VPP's status from the modes of a VPP's participation.

### a. Preliminary Observation

27. The Pre-Trial Judge observes that the question of whether an applicant victim is entitled to VPP status is not a matter that falls to be litigated by the Parties. Pursuant to the Rules, it must be determined solely by the Pre-Trial Judge. This position is consistent with victims' participation schemes in civil law jurisdictions including Lebanon, which recognise the status of *parties civiles* (civil parties). Reference cannot be had to common law systems, which generally do not provide for the participation of civil parties or victims in criminal proceedings.



28. For instance, in Lebanese law, any aggrieved person may assume the status of a civil party before the competent jurisdiction depending on the nature of the offence.<sup>35</sup> This status can be achieved in two ways. First, in cases where the Public Prosecutor brings criminal charges against the suspect, victims may file civil charges with the investigating judge.<sup>36</sup> Alternatively, aggrieved persons may also bring an action themselves if the Public Prosecutor has not done so.<sup>37</sup> In such a case, the complaint filed by a person who acquires the status of civil party automatically initiates a public prosecution.<sup>38</sup>

29. The victims' participation scheme under Lebanese law is itself inspired by the French system. In French law, victims who wish to be granted the status of *parties civiles* in the course of criminal proceedings already initiated by the Public Prosecutor (known as a *plainte par voie d'intervention*) can make a declaration before the investigating judge (*juge d'instruction*)<sup>39</sup> or the competent court.<sup>40</sup> Alternatively, if the Public Prosecutor has not initiated criminal proceedings against the suspect, victims themselves can initiate an action by lodging a civil complaint which automatically triggers criminal proceedings (known as a *plainte par voie d'action*). In this case, a victim must file his complaint (*constitution de partie civile*) before the ranking member (*doyen*) of the competent investigating judges, stating the facts in support of his application. The investigating judge may hear the victim to seek clarification of the facts alleged in the application; he then informs the Public Prosecutor accordingly. The investigating judge rules on the admissibility of the application; in so doing, he is not bound by any response of the Public Prosecutor. The application is only admissible if the victim shows that the Public Prosecutor does not wish to pursue the suspect, or if he did not reply to the application within three months of the lodging of the complaint.<sup>41</sup>

30. In Italian law, persons wishing to be granted the status of civil parties in an ongoing criminal case (*parti civili*) have to submit a declaration to the chancellery of the competent tribunal, or make such declaration during a hearing.<sup>42</sup> The parties are not heard. Such a

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<sup>35</sup> Art. 7 of the Lebanese Code of Criminal Procedure.

<sup>36</sup> Art. 67 of the Lebanese Code of Criminal Procedure.

<sup>37</sup> Arts 7 and 68 of the Lebanese Code of Criminal Procedure.

<sup>38</sup> Art. 68 of the Lebanese Code of Criminal Procedure.

<sup>39</sup> Art. 87 of the French Code of Criminal Procedure.

<sup>40</sup> Arts 418 *et seq.* of the French Code of Criminal Procedure.

<sup>41</sup> Art. 85 of the French Code of Criminal Procedure.

<sup>42</sup> Art. 78 of the Italian Code of Criminal Procedure,

declaration is considered admissible only if it complies with certain procedural requirements.<sup>43</sup>

31. Under German law, a victim of a criminal offence may apply for the ‘adhesive procedure’ (*Adhäsionsverfahren*).<sup>44</sup> The competent judge will decide on the matter, taking into account the evidence for, and foundation of, the civil claim and whether the nature of the claim is suitable for criminal proceedings.<sup>45</sup> In ruling on victims’ application, the competent judge does not hear the parties.

32. Generally then, in civil law systems, victims wishing to be granted the status of *parties civiles* file their requests to the competent jurisdiction, which then rules on their status and participation, without hearing the parties. The prosecution and the defence thereafter have the right to seek the exclusion of the *parties civiles* with good cause during the course of the trial.<sup>46</sup> However, the parties are not entitled to receive the requests, or the information contained therein, beforehand.

33. While victims participating in proceedings before the Tribunal are not *parties civiles* in the sense of civil law, among the many similarities between the two concepts is the exclusive mandate of the competent Judge to decide the status of VPPs in non-contentious proceedings in the absence of the Parties, and with reference to the *prima facie* evidence in support thereof. Among the differences is the entitlement of the Parties before the Tribunal to be heard on legal issues pursuant to Rule 86(C), an entitlement not recognised in civil law. The Parties nevertheless remain entitled to raise issues related to a VPP’s status before the Trial Chamber.

#### **b. Protecting the Rights of the Accused**

34. Article 17 of the Statute requires the Tribunal to permit the victims’ views and concerns to be presented in a manner that is not prejudicial to or inconsistent with the rights

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<sup>43</sup> Those requirements are specified in art. 78 of the Italian Code of Criminal Procedure.

<sup>44</sup> §§ 403 *et seq.* of the German Code of Criminal Procedure (*Strafprozessordnung*, “StPO”).

<sup>45</sup> § 406 StPO.

<sup>46</sup> Under Lebanese law, in case the charges are brought directly by the victim of an offence, the Public Prosecutor may challenge the status of the civil party before carrying out the investigation. The defendant or his counsel may raise this plea prior to the questioning of the defendant. The investigating judge informs the civil party of the plea and gives him a right to reply, then rules on the matter (Art. 70 Lebanese Code of Criminal Procedure).

Pursuant to art. 80 of the Italian Code of Criminal Procedure, the prosecution and the defence can seek the exclusion of the civil parties during the course of the trial.

of the accused and a fair and impartial trial. It is thus a victim's participation in proceedings which must be consistent with the rights of the accused. Determining an applicant's status as VPP is a different question, requiring the Pre-Trial Judge to apply Rule 86(B) of the Rules, having first heard the submissions on legal issues pursuant to Rule 86(C) of the Rules.

35. Neither the Statute nor the Rules determine whether, and, if so, at what stage of proceedings and subject to what modalities, the Parties ought to have access to the applications for victims' participation received from the VPU.<sup>47</sup> This is the case, regardless of whether one applies the current or previous (that is, pre-amendment) versions of Rule 86(C) of the Rules.

36. Prior to its amendment, Rule 86(C) of the Rules provided that the Pre-Trial Judge would make a ruling regarding a VPP's legal representation after hearing the Prosecutor and the Defence. Rule 86(C) of the Rules was otherwise silent on the determination of victim participation, and accordingly recognised no entitlement to the Parties to be heard on that issue.

37. Since its entry into force on 29 February 2012, the current Rule 86(C) of the Rules recognises that the Pre-Trial Judge shall decide a request for the status of VPP "after seeking submissions from the Parties and the Victims' Participation Unit on relevant legal issues." Rule 86(C) of the Rules in fact recognises a new entitlement for the Parties — along with the VPU — to be heard on the legal issues associated with determining victim participation status.<sup>48</sup>

38. Furthermore, since Rule 86(C) of the Rules is a procedural rule, any amendment thereto applies to current proceedings before the Pre-Trial Judge, provided that it does not operate to prejudice the rights of an accused, pursuant to Rule 5(H) of the Rules.<sup>49</sup>

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<sup>47</sup> Rule 89(1) of the Rules of Procedure and Evidence of the ICC specifically provides that the Registrar of the ICC shall provide a copy of applications for victim participation to the Prosecutor and the defence, subject to the provisions of the Statute. It is noteworthy that the Tribunal's Statute and Rules do not do the same.

<sup>48</sup> Rule 86(C) STL RPE also now recognises that a VPP may only participate through a legal representative unless the Pre-Trial Judge authorises otherwise.

<sup>49</sup> This position is consistent with the jurisprudence of the European Court of Human Rights ("ECHR") on the non-retroactivity of criminal law. The ECHR has consistently endorsed the practice of domestic courts that have applied the *tempus regit actum* principle with regard to procedural rules. See: ECHR, *Scoppola v. Italy*, Judgment (Grand Chamber), 17 September 2009, para. 110; *Coëme and Others v. Belgium*, Judgment, 22 June 2000, ECHR 2000-VII, paras 147-149 (on the immediate application to pending proceedings of laws amending the rules on limitation); *Martelli v. Italy*, Decision, 12 April 2007 (concerning implementation of a law

39. Rule 86(C) of the Rules is clear in at least one further notable aspect: it is the Pre-Trial Judge alone who must decide a request for the status of victim participating in the proceedings.<sup>50</sup> The Pre-Trial Judge makes this decision on the basis of the *prima facie* evidence accompanying the applications for participations. As such, the Pre-Trial Judge's present decision is without prejudice to any future decision which the Trial or Appeals Chambers might make — after hearing the Parties — identifying victims in a final judgment, pursuant to Rule 86(G) of the Rules. Therefore the application of Rule 86(C) of the Rules to the decision pending before the Pre-Trial Judge does not serve to deprive either of the Parties of a right.

40. The Pre-Trial Judge is therefore not persuaded by the submissions of Defence Counsel that the amendment of Rule 86(C) of the Rules amounts to an infringement of the rights of the accused or prejudices the fairness of the proceedings in that it deprives Defence Counsel of the right to receive the Applications.<sup>51</sup> The Parties are entitled to be heard on legal issues only. No entitlement to receive the Applications is or was recognised, and no prejudice is occasioned thereby.

41. The Pre-Trial Judge therefore concludes that the application of amended Rule 86(C) of the Rules does not prejudice the rights of the accused. It follows that the Defence Counsel motion must be denied. There are, however, four further considerations which the Pre-Trial Judge considers it appropriate to address, and which support the same conclusion.

### **c. Protecting the Interests of Victims Whose Applications May Be Denied**

42. Pending the Pre-Trial Judge's decision on the Applications, there are no VPPs yet, only victims in the sense of Rule 2 of the Rules. The determination of which applicant victims are entitled to VPP status is a preliminary assessment to be based on the merits of the Applications.<sup>52</sup>

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containing new rules on the assessment of evidence); *Mione v Italy*, Decision, 12 February 2004, and *Rasnik v. Italy*, Decision, 10 July 2007 (with reference to new regulations on time-limits for appeals).

<sup>50</sup> The Pre-Trial Judge notes that this decision is subject to the rights of appeal provided by Rule 86(C) STL RPE.

<sup>51</sup> Supplementary Sabra Motion, para. 14.

<sup>52</sup> Cf in this regard ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07,

43. Not all of the Applications will necessarily be accepted as valid. Indeed, the VPU's Transmission of Applications suggests that some may well be incomplete.<sup>53</sup> There may also be other reasons for denying an Application.

44. Where applicants are denied the status of VPP, a degree of anonymity is required in order to ensure that their personal information is protected and not disclosed to the Parties, since they would not be participating in the proceedings at any stage. Having been deprived of the entitlements and protections that the Tribunal has made available to ensure the security of VPPs, these applicants would have no remedy should their interests be prejudiced. The Pre-Trial Judge therefore considers that all of the Applications should remain confidential and *ex parte* for the time being.

45. Notwithstanding this finding, the Pre-Trial Judge notes that in its Transmission of Applications, the VPU did provide a degree of information which serves to contextualise the Applications. This information is relevant to the Parties in the preparation of their responses to the questions posed in section VI below, and is summarised therein.

#### **d. Victims' Legal Representatives**

46. Once the Pre-Trial Judge's decision on the Applications has been made, and VPP status is accorded to the successful applicants, they will be represented through a legal representative unless the Pre-Trial Judge authorises otherwise.<sup>54</sup> The Registrar shall then — after consulting the VPU — designate counsel to represent the VPPs (the "Legal Representatives") pursuant to Rule 51(G)(i) of the Rules.

47. At that stage of proceedings, VPP's will be effectively represented by informed and "highly qualified" counsel.<sup>55</sup> To date, it has not been established that all applicants have received legal advice in the preparation of their applications. The Legal Representatives will be in a position to advise the VPP's on the consequences of applying for or declining anonymity or such other protective measures as may be available to them, after which the Pre-Trial Judge can assume they have been effectively informed in order to make a choice.

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a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, 6 May 2008 (the "6 May 2008 *Lubanga* Decision"), para. 24.

<sup>53</sup> Transmission of Applications, para. 28: "Of the [73] Applications transmitted, [62] appear to be complete, whereas [11] appear to be incomplete."

<sup>54</sup> Rule 86(C)(ii) STL RPE.

<sup>55</sup> Rule 51(C)(i) STL RPE.

**e. The Protection of Victims by the Victims and Witnesses Unit**

48. Pursuant to Rule 50(A) of the Rules, the Registrar has set up the Victims' and Witnesses Unit (the "VWU"), a unit responsible for protecting *inter alia* victims who participate in the proceedings. The VWU is expressly mandated to protect VPPs. As a result, no VWU assessment has yet been either requested or undertaken, since in the absence of an identifiable group of VPPs it is not possible to assess the threats to which putative VPPs will be subject.

49. With respect to the protection of victims' interests, the Pre-Trial Judge acknowledges the professional and ethical obligations to which both Parties have referred,<sup>56</sup> and which the VPU recognises and respects.<sup>57</sup> The Pre-Trial Judge agrees with the VPU, however, that it cannot readily be concluded at this stage that there would be no potential risk to the VPPs occasioned by sharing the Applications with the Parties. The Parties may legitimately decide or be required to act on information contained in the Applications which could effectively prejudice the interests of the applicants.<sup>58</sup> Furthermore and in any event, the VWU has not yet had the opportunity to assess the risks which the eventual VPPs might face.

50. In addition to it being consistent with the applicable Rules, there is a practical reason for the Pre-Trial Judge not to order a VWU assessment at the present time. Where some applications for VPP status are denied, VWU will not have had to assess applicants who will not become VPPs and hence will not require protective measures.

51. The withholding of the Applications from the Parties is also consistent with the practice of other international criminal tribunals. The VPU refers to a decision by Trial Chamber I of the ICC in this regard, which is instructive. That Trial Chamber was called

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<sup>56</sup> Sabra Motion, para. 6; Sabra Supplementary Motion, para. 22: "counsel for the Defence were made to swear an oath to the Tribunal ... [and] are bound to perform their duties in accordance with the Code of [Professional Conduct for Counsel]." Prosecution Response, para. 12: "The Prosecution has a duty to protect victims, in accordance with Rule 55(C)."

<sup>57</sup> VPU Response, para. 35.

<sup>58</sup> The Parties' obligation to safeguard confidentiality does not override their professional obligations *inter alia* to defend their clients' interests, as can be observed from experience at the ICC. See e.g., ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims' Participation, 18 January 2008 (*Lubanga Decision of 18 January 2008*), where access to victims' applications was granted to the Prosecutor, who was subsequently obliged to disclose them to the Defence. See also: ICC, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04 OA4 OA5 OA6, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007, Appeals Chamber, 30 June 2008, para. 89, where the Appeals Chamber confirmed the *Lubanga Decision of 18 January 2008*.

upon to balance the right of the parties in ICC proceedings to receive copies of victim participation applications with Article 68(1) of the Rome Statute, which mandates the ICC to take appropriate measures to protect victims. It recognised that, in order to make an informed decision, it would need the assistance of the ICC's equivalent of the Tribunal's VWU to assess the applicants' security risks.<sup>59</sup> It found that — notwithstanding a clear provision to the contrary — the non-disclosure of the applicant victims' identities was necessary, and that this would in any event:

not restrict the rights of the accused at this moment, or create an irreversible situation that cannot be corrected in due course, given that the Trial Chamber will make any necessary judgements as to these redactions at the time any of the applicants are granted status as victims, in order to guarantee the fairness of proceedings.<sup>60</sup>

52. The Pre-Trial Judge finds this reasoning instructive. It is appropriate to allow the VWU to make a risk assessment of the VPPs, pending which assessment, the Applications should be withheld from the Parties.

#### **f. VPP Status and Modes of Participation**

53. The Pre-Trial Judge emphasises that withholding the Applications from the Parties at this stage of proceedings (namely the determination of VPP status) does not amount to barring the Parties *ad infinitum* from accessing information related to VPPs. Rule 87 of the Rules recognises that a degree of such access is in fact anticipated in the interests of transparency, in a manner consistent with the rights of the accused, the VPPs, and the Rules. The effect of the decision not to order the VPU to re-file its Transmission of Application to include the Parties as recipients is therefore limited to the determination of VPP status. It is without prejudice to any future determination on whether or not the Parties should have access to the Applications or the information contained therein, and if so, to what extent and subject to which modalities. It is also without prejudice to such decisions as the Trial or Appeals Chambers may make in the future regarding the modes of participation of victims in the proceedings, which are the subject of Rule 87 of the Rules.

#### **g. Conclusion**

54. In light of the foregoing, the Pre-Trial Judge dismisses the Sabra Motion and the Supplementary Sabra Motion. The Parties are not entitled to receive the Applications, or the

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<sup>59</sup> 6 May 2008 *Lubanga* Decision, paras 19-24.

<sup>60</sup> *Id.*, para. 26(i).

information contained therein, at this stage of proceedings. It is the exclusive mandate of the Pre-Trial Judge to decide the status of VPPs in non-contentious proceedings without hearing the Parties, and with reference to the *prima facie* evidence in support thereof.

55. Furthermore, the Pre-Trial Judge dismisses the Prosecution's submission that it will be prejudiced if it is not provided with the Applications at this stage, since the only question that is before the Pre-Trial Judge at this stage of proceedings is the granting of VPP status, and not whether the Prosecution intends to call VPPs as witnesses during trial. This latter issue will be dealt with at the appropriate stage.<sup>61</sup>

#### **VI. Scheduling Order Regarding Legal Issues Related to a Decision on Victims Participation in the Proceedings**

56. The Pre-Trial Judge now turns to address the second issue with which this Decision is concerned, namely to identify the legal issues arising from the receipt of the Applications on which the submissions of the parties and the VPU are invited.

57. Rule 86(C) of the Rules provides that the 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. Notwithstanding the finding made in Section III.b above, the Pre-Trial Judge nevertheless considers that it is opportune to invite the Parties to submit their observations in relation to the legal criteria the Pre-Trial Judge shall or may consider when deciding on applications for VPP status.

58. As mentioned above, the Pre-Trial Judge notes that in its Transmission of Applications, the VPU provided a degree of information which contextualises the Applications. This information is relevant to the Parties in the preparation of their responses to the questions elaborated in this Section, and is summarised below. Further details are contained in the Transmission of Applications.

- a. The VPU has to date received 73 applications from persons wishing to participate as victims in the proceedings.

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<sup>61</sup> The Pre-Trial Judge notes Rule 86(B)(v) STL RPE, which permits the Pre-Trial Judge to consider whether the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness. It is for the Prosecution to provide to the Pre-Trial Judge the information required in order to make a decision on this provision.



- b. Each Application contains information and documents provided by the person submitting the request for the status of VPP, including the applicant's description of the alleged events and harm suffered.
- c. The VPU has focused its review of completeness on assessing whether the applicants have discharged the evidential burden in Rule 86(B)(i) sufficiently so as to allow the Pre-Trial Judge to make a decision regarding victim status. As concerns the considerations listed in Rule 86(B)(ii) to (x), the VPU has not treated these as issues needing to be addressed in order for an application to be considered complete.
- d. The VPU has considered that 13 of the 73 Applications received at the time of its filing are incomplete as they had not been sufficiently substantiated with evidence at the time of their transmission to the Pre-Trial Judge.
- e. Where various forms of harm are identified in the information provided by an applicant, the VPU has treated the Application as complete so long as there is evidence provided in support of at least one form of harm, since this appears to be a sufficient basis on which the Pre-Trial Judge may determine whether the person is a "victim" within the meaning of Rule 2 of the Rules.
- f. The VPU notes that Rule 51(B)(iii) does not clarify the VPU's obligations in circumstances where efforts to complete an incomplete application are fruitless, or where the completeness of an application is unclear due to unresolved legal issues. Applications received which fall into this category are included in the Transmission of Applications.
- g. The VPU has reviewed and assessed the element of when harm can be said to be the "direct result" of an attack. It has averred that the following categories of harm are comprised within that notion: (i) physical injuries sustained by an applicant as a result of being in the vicinity of the explosion (physical harm); (ii) damage to or destruction of real or personal property owned by an applicant which was located at the site of the attack (material harm); (iii) psychological trauma experienced by an applicant as a result of being present at the attack site and experiencing the attack (mental harm); and (iv) the mental and material harm suffered by an applicant who is an

immediate family member of a person killed in the attack where such harm can be attributed to the death itself.

- h. With respect to the required proximity of family members to injured or deceased persons, the VPU has considered as falling within this category the first degree relatives of the deceased (spouses, parents, children and siblings of deceased persons) or persons who have been assimilated into such a role (for example recognised guardians). The VPU proposes that applications from persons further removed in their relationship from the deceased person should be considered on a case-by-case basis taking into account the closeness of the relationship which is proven.

59. Pursuant to Rule 86(B)(i) of the Rules, the Pre-Trial Judge — before deciding the requests received from the VPU for the status of victim participating in the proceedings — hereby invites the submissions of the Parties and the VPU on the following relevant legal issues. The Pre-Trial Judge reminds the Parties and the VPU of the need to file submissions which shall not exceed 20 pages or 6,000 words pursuant to Article 5 of the Practice Direction on Filing of Documents before the Tribunal.

**a. Harm as a 'Direct Result' of an Attack**

60. Rule 2 of the Rules requires that victim have suffered harm “as a direct result” of an attack within the Tribunal’s jurisdiction. In this regard:

1. Are the concepts of remoteness or causation relevant to an interpretation of the requirement of *direct* result?
2. How closely does an applicant applying for status as a VPP have to be related to an injured or deceased person who was injured or killed as a result of an attack?
3. Is the same closeness of relationship applicable for persons related to those killed in an attack as opposed to those who were injured in the same attack?

**b. 'Harm' Suffered as a Direct Result of an Attack**

61. Rule 2 of the Rules defines as a victim “a natural person who has suffered physical, material, or mental harm”.

4. Regarding mental harm, can it be presumed to have been established when a person to whom a victim was close has been killed or injured as a result of a criminal act within the Tribunal's jurisdiction?
5. Regarding material harm, does the term include an applicant's loss of employment and the associated income?

**c. The 'Personal Interests' of the Victims**

62. Article 17 of the Statute envisages the participation of victims in proceedings "[w]here the personal interests of the victims are affected." Rule 86(B)(ii) of the Rules requires the Pre-Trial Judge to consider "whether the applicant's personal interests are affected". Rule 86(B)(vi) of the Rules permits the Pre-Trial Judge to consider "whether the legitimate personal interests of the applicant at stake in the trial are different from those of other victims participating in the proceedings." It appears from the foregoing that the meaning of "personal interests" should be clarified.

6. What are the "personal interests" referred to in Article 17 of the Statute and Rule 86(B)(ii) of the Rules which might be affected?
7. Since Rule 2 of the Rules defines a victim as a natural person who has suffered harm, can it be presumed that a natural person who has suffered harm has *ipso facto* had his personal interests affected? If not, what is the difference between harm suffered and a personal interest affected?
8. Do "personal interests" in Article 17 of the Statute and Rule 86(B)(ii) of the Rules differ from the "legitimate personal interests" of a victim that may be at stake in Rule 86(B)(vi) of the Rules, and if so, how?

**d. The Meaning of 'Whether the Applicant's Proposed Participation is Intended to Express His Views and Concerns' in Rule 86(B)(iii)**

63. Article 17 of the Statute provides that the Tribunal shall permit the views and concerns of victims to be presented. Rule 86(B)(iii) of the Rules requires the Pre-Trial Judge, when deciding whether a victim may participate in the proceedings, to consider whether the applicant's proposed participation is intended to express his views and concerns.

Furthermore, Rule 2 of the Rules defines a VPP as a victim who has been granted leave to present his views and concerns in the proceedings.

9. What meaning is to be ascribed to the expression “views and concerns of victims” in Article 17 of the Statute and Rules 2 and 86(B)(iii) of the Rules?

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Article 17 of the Statute and Rule 86(C) of the Rules;

**DISMISSES** the Sabra Motion;

**DISMISSES** the Prosecution's request to receive the Applications;

**ORDERS** that the annexes to the Transmission of Applications remain confidential and *ex parte* until further notice; and

**INVITES** the Parties and the VPU to file their submissions in response to the following legal issues by 23 April 2012:

1. Are the concepts of remoteness or causation relevant to an interpretation of the requirement of *direct* result?
2. How closely does an applicant applying for status of a VPP have to be related to an injured or deceased person who was injured or killed as a result of an attack?
3. Is the same closeness of relationship applicable for persons related to those killed in an attack as opposed to those who were injured in the same attack?
4. Regarding mental harm, can it be presumed to have been established when a person to whom a victim was close has been killed or injured as a result of a criminal act within the Tribunal's jurisdiction?
5. Regarding material harm, does the term include an applicant's loss of employment and the associated income?
6. What are the personal interests referred to in Article 17 of the Statute and Rule 86(B)(ii) of the Rules which might be affected?
7. Since Rule 2 of the Rules defines a victim as a natural person who has suffered harm, can it be presumed that a natural person who has suffered harm has *ipso facto* had his personal interests affected? If not, what is the difference between harm suffered and a personal interest affected?

- 8. Do “personal interests” in Article 17 of the Statute and Rule 86(B)(ii) of the Rules differ from the “legitimate personal interests” of a victim that may be at stake in Rule 86(B)(vi) of the Rules, , and if so, how?
- 9. What meaning is to be ascribed to the meaning of “views and concerns of victims” in Article 17 of the Statue and Rules 2 and 86(B)(iii) of the Rules?

Done in Arabic, English and French, the English version being authoritative.  
Leidschendam, 5 April 2012.



Daniel Fransen  
Pre-Trial Judge

