



THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**
The Pre-Trial Judge: **Mr Daniel Fransen**
The Registrar: **Mr Herman von Hebel**
Date: **4 May 2012**
Original: **French**
Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION RELATING TO THE PROSECUTION REQUEST FOR RECONSIDERATION
OF THE DECISION OF 5 APRIL 2012**

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

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

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaél Mettraux





I. The subject of the decision

1. The present decision deals with the Prosecution request of 19 April 2012 for reconsideration of the Pre-Trial Judge's decision of 5 April 2012¹ concerning access to applications for the status of victim participating in the proceedings (the "Request" and the "Decision of 5 April 2012").²

II. Procedural background

2. On 5 April 2012, the Pre-Trial Judge invited the Parties, as well as the Victims' Participation Unit (the "VPU"), to file submissions in respect of various legal issues identified in the Decision of 5 April 2012 concerning the applications of victims to participate in the proceedings.³ He did not however grant them access to those applications for the reasons stated in the same decision.⁴

3. On 19 April 2012, the Prosecution filed the Request and the Pre-Trial Judge invited counsel for the Defence of Messrs. Ayyash, Badreddine, Oneissi and Sabra ("Counsel for the Defence") and the VPU to respond to the Request by 25 April 2012 at the latest.⁵

4. Neither Counsel for the Defence nor the VPU have replied to the Request.

III. The submissions of the Prosecution

5. On the basis of Rule 140 of the Rules of Procedure and Evidence (the "Rules"), the Prosecution requests that the Pre-Trial Judge: (i) grant it leave to file a request for

¹ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, 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, 19 April 2012.

² STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on Defense 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.

³ Decision of 5 April 2012, Disposition

⁴ *Id.*, paras 27-55.

⁵ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Scheduling Directive from the Pre-Trial Judge, 19 April 2012.



reconsideration of the Decision of 5 April 2012; and (ii) reconsider the Decision of 5 April 2012⁶ for the primary reasons that:

- the Decision of 5 April 2012 might constitute an injustice insofar as the Prosecution is not able to draw up a list of witnesses that it intends calling during the proceedings as long as it has not been made aware of the identity of the persons who will have the status of victims participating in the proceedings;⁷
- if the identity of those victims is only disclosed to the Prosecution after the issue of their status has been determined or when the Trial Chamber is seized of the case, the Prosecution would not be able to prepare its case in due time and the course of the proceedings would be delayed;⁸
- the Pre-Trial Judge misconstrued several provisions of national codes of criminal procedure cited in support of the reasons behind the Decision of 5 April 2012;⁹ and
- with regard to the need to ensure the protection of the persons applying for the status of victim participating in the proceedings, the Decision of 5 April 2012 fails to take into account the fact that the issue of disclosing their identity to the Prosecution does not have the same implication as with respect to Counsel for the Defence.¹⁰ On the one hand, unlike the latter, the Prosecution has a “particular interest” in determining the identities of the victims insofar as they might also be witnesses;¹¹ on the other hand, the Prosecutor has an obligation incumbent upon him personally to ensure the protection of witnesses, in accordance with Rule 55 (C) of the Rules.¹²

6. Consequently, the Prosecution requests that the Pre-Trial Judge give it access to the victims’ participation applications or order the VPU to provide it with the victims’ identities

⁶ Request, para. 20.

⁷ *Id.*, para. 5.

⁸ *Ibid.*

⁹ Request, paras 6-11.

¹⁰ *Id.*, paras 12-17

¹¹ *Id.*, para. 12.

¹² *Ibid.*



(and their application to participate) before the time-limit set out in Rule 91 (G) of the Rules has expired.¹³

IV. Statement of reasons

7. After having recalled in brief the applicable law (A), the Pre-Trial Judge will apply that law to the Request (B).

A. Applicable law

8. Rule 140 of the Rules provides that:

A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice.

9. Pursuant to Rule 97 of the Rules, that provision is applied *mutatis mutandis* in proceedings before the Pre-Trial Judge.

10. It results from Rules 97 and 140 mentioned above that a request to reconsider a decision must first be authorised by the Pre-Trial Judge before consideration of the merits.

11. In this respect, as mentioned in the Pre-Trial Judge's decision of 29 March 2012 (the "Decision of 29 March 2012"), for a request for reconsideration to be granted, it should not be "manifestly unfounded". The Request must therefore: (i) be duly reasoned; and (ii) show, *prima facie*, that failure to reconsider the impugned decision would result in an injustice.¹⁴

12. With regard to the grounds for reconsideration, Rule 140 of the Rules sets out that they must prove to be "necessary to avoid injustice". That injustice may be based, *inter alia*, on an error of reasoning contained in the decision undertaken or circumstances or newly discovered facts that justify reconsideration.¹⁵

¹³ *Id.*, para. 20.

¹⁴ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, para. 30.

¹⁵ *Id.*, para. 30.



B. Application of the law to the Request

13. The Pre-Trial Judge wishes first of all to point out that, as confirmed by the Criminal Tribunals for the former Yugoslavia (“ICTY”) and for Rwanda (“ICTR”), requests for reconsideration of a decision must remain the exception.¹⁶ With this in mind, the Prosecution should have opted for ordinary means of obtaining redress rather than the exceptional measure of the reconsideration of the Decision of 5 April 2012.

14. Furthermore, the Pre-Trial Judge considers that the Prosecution has not shown *prima facie* that the Decision of 5 April 2012 might have caused an injustice that would justify its reconsideration, as required by the aforementioned case law.¹⁷

15. Indeed, as the Pre-Trial Judge pointed out in the Decision of 5 April 2012, the question raised at this stage of the proceedings was that of deciding who, amongst those persons claiming to be victims and applying to participate in the proceedings, may be granted the status of “victim participating in the proceedings”, within the meaning of Rule 86 of the Rules. In this respect, the Pre-Trial Judge decided that, before ruling, he should consult the Parties on certain relevant legal issues, in accordance with Rule 86 (C) (i) of the Rules. He considered moreover that in order to be able to submit observations on these issues, the Parties did not need to receive personal information originating from persons who claim to be victims.¹⁸

16. Although in his Decision of 5 April 2012, the Pre-Trial Judge found that the identity of persons seeking to obtain the status of victim participating in the proceedings must not be disclosed to the Parties before they obtain that status, he has not ruled however on that issue once that status has been granted to them. Likewise, the Decision of 5 April 2012 does not

¹⁶ Decision of 29 March 2012, para. 23. See also ICTR, *The Prosecutor v Ntirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber’s Rule 92 bis Decision of 22 September 2011, 25 November 2011, para. 13; ICTR, *The Prosecutor v Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Second Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List pursuant to Rule 73 bis (E)”, 14 July 2004, para. 7; ICTY, *The Prosecutor v Prlić et al.*, Case No. IT-04-74-Ar73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision On Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 6.

¹⁷ Decision of 29 March 2012, para. 30.

¹⁸ Decision of 5 April 2012, para. 54.



deal with or determine in advance other issues relating to the victims participating in the proceedings such as that of being heard as witnesses.¹⁹ On the contrary, in the Decision of 5 April 2012, the Pre-Trial Judge explicitly stated that that matter would be considered at the appropriate time.²⁰

V. The disposition

FOR THESE REASONS,

Pursuant to Rules 97 and 140 of the Rules,

THE PRE-TRIAL JUDGE,

STATES that it is not appropriate to grant the Prosecution leave to file a request for reconsideration of the Decision of 5 April 2012.

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

Leidschendam, 4 May 2012

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

¹⁹ *Id.*, para. 55.

²⁰ *Ibid.*

