



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: **18 May 2012**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON THE VPU'S ACCESS TO MATERIALS AND THE MODALITIES OF VICTIMS' PARTICIPATION IN PROCEEDINGS BEFORE THE PRE-TRIAL JUDGE

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I. Introduction

1. In the present decision, the Pre-Trial Judge rules on the modalities of victims' participation in the proceedings before him in the *Ayyash et al.* case. In so doing, he also addresses the Registrar's "Submission on Receipt of Confidential Documents by Victims' Legal Representatives and the Victims' Participation Unit" of 1 March 2012 (the "Registrar's Submission"),¹ and related subsequent filings.²

2. This Decision applies to those individuals who are granted the status of victims participating in the proceedings ("VPP" or "VPPs").

3. Moreover, the scope of this decision is limited to victims' participation during proceedings before the Pre-Trial Judge. For the purposes of the present decision, the expression "pre-trial phase of proceedings" is the phase of proceedings following the confirmation of an indictment³ and preceding the transmission of the case-file to the Trial Chamber pursuant to Rule 95 of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

4. This decision is therefore without prejudice to another Chamber's determination of the modalities of victims' participation at subsequent stages of the proceedings, as appropriate.

5. In this decision, the Pre-Trial Judge will first recall the procedural background (Section II) and the applicable law (Section III). He will then address the modalities of victims' participation in pre-trial proceedings (Section IV) before determining the documents to which the Tribunal's Victims' Participation Unit (the "VPU") should have access in order effectively to exercise its mandate (Section V).

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Submission on Receipt of Confidential Documents by Victims' Legal Representatives and the Victims' Participation Unit, 1 March 2012.

² See Section II, Procedural Background, below.

³ Pursuant to Rule 2 of the Rules, victims participating in the proceedings may only do so after the confirmation of an indictment.



II. Procedural Background

6. On 1 March 2012, the Pre-Trial Judge received the Registrar's Submission filed pursuant to Rule 48(C) of the Rules,⁴ in which the Registrar sought clarifications on the distribution of documents classified as "confidential" to the VPU and the legal representative.⁵

7. On 2 March 2012, the Pre-Trial Judge invited the Parties to file their responses to the Registrar's Submission by 9 March 2012.⁶

8. On 9 March 2012, the Prosecution filed its response (the "Prosecution's Response").⁷

9. Also on 9 March 2012, Defence Counsel for Mr. Ayyash, joined and supported by Defence Counsel for Mr. Badreddine, Mr. Oneissi, and Mr. Sabra, filed their response (the "Defence Response").⁸

10. On 28 March 2012,⁹ the Pre-Trial Judge invited the Parties to file any additional submissions with respect to access to disclosure material by the Victims' Representatives and the VPU by 4 April 2012.

11. On 4 April 2012, the Defence Counsel jointly filed its submission on access to disclosure materials (the "Defence Submission");¹⁰ and the Prosecution filed an additional

⁴ Registrar's Submission.

⁵ Registrar's Submission, para. 1.

⁶ CMSS Memorandum entitled "Filing Instructions from the Pre-Trial Judge pursuant to Rule 8 regarding the Submission on Receipt of Confidential Documents by Victims' Legal Representatives and the Victims' Participation Unit, filed by the Registry on 1 March 2012", 2 March 2012, R117857.

⁷ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution's Response to the Registry's Submission on Receipt of Confidential Documents by Victims' Legal Representatives and the Victims' Participation Unit, 9 March 2012.

⁸ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PTJ/PT (*sic*), Defence Response to the Registrar's "Submission on Receipt of Confidential Documents by Victims' Legal Representatives and the Victims' Participation Unit", 9 March 2012.

⁹ CMSS Memorandum entitled "Scheduling Directive from the Pre-Trial Judge", 28 March 2012, R119413-R119414.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Defence Submission regarding Access to Disclosure Material by The Victims' Legal Representatives and The Victims' Participation Unit, 4 April 2012.



submission on access to disclosure material (the “Prosecution’s Submission”).¹¹ The VPU filed a submission on the same issue (the “VPU Submission”) on the same date.¹²

12. On 8 May 2012, the Pre-Trial Judge ruled on victims’ applications to participate in proceedings, granting the status of victim participating in the proceedings to 58 applicants.¹³

13. On 16 May 2012, the Registrar designated the legal representative of the VPPs, together with two co-legal representatives, pursuant to Rule 50(G)(i) of the Rules (the “Legal Representative”).¹⁴

III. Applicable Law

14. The statutory provision relevant to victims’ participation in proceedings before the Pre-Trial Judge is Article 17 of the Statute, supplemented by several provisions in the Rules.

15. Article 17 of the Statute provides that:

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.

16. Several other provisions in the Rules grant victims participating in the proceedings more specific procedural entitlements at various phases of the proceedings. The Pre-Trial judge will recall those provisions in the Rules within the context of the different sections of the present decision. The Pre-Trial Judge will also take into account the relevant Practice Directions.

¹¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Additional Submissions pursuant to the Pre-Trial Judge’s Scheduling Directive Dated 28 March 2012, 4 April 2012, para. 4. The Prosecution sought leave to make submissions “out of time” to the extent that its Submission raised matters it ought to have addressed in its response; *Ibid.*

¹² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, VPU Submission pursuant to the Pre-Trial Judge’s Scheduling Directive of 28 March 2012, 4 April 2012.

¹³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on Victims’ Participation in the Proceedings, public with confidential and *ex parte* annex, 8 May 2012 (the “Decision on Victims’ Participation”).

¹⁴ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Designation of Victims’ Legal Representatives, 16 May 2012.



IV. The Modalities of Victim's Participation before the Pre-Trial Judge

17. The modalities of victims' participation in the proceedings are generally regulated by specific provisions in the Rules. Before addressing them in turn, four preliminary considerations are in order.

18. First, the Pre-Trial Judge recalls that VPPs are not parties to the proceedings in the sense of Rule 2 of the Rules, which defines only the Prosecution and the Defence as Parties. The VPPs' participation is limited to expressing their views and concerns on matters that affect their personal interests.¹⁵ Therefore, to participate in proceedings before the Pre-Trial Judge in relation to a specific issue, a VPP's personal interests must be affected by the particular issue under consideration.¹⁶ Where the VPPs' personal interests are not affected by the particular issue at a specific stage in the proceedings in which they seek to intervene, their participation will either be limited or prevented accordingly.¹⁷

19. Second, a VPP's proposed participation cannot be inconsistent with the rights of the accused and a fair and impartial trial.¹⁸ In addition to this being a criterion for the determination of VPP status, it is also a factor for the Pre-Trial Judge to consider throughout proceedings when assessing whether or not a VPP can intervene, and if so, the manner in which he may do so.

¹⁵ The Pre-Trial Judge recalls that this is also a criterion for the granting of VPP status, as stated in the Decision on Victims' Participation (Section IV. B. and C.)

¹⁶ This is consistent with the practice of other international courts. See e.g., International Criminal Court ("ICC"), *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ("*Ruto* Victims' Participation Decision of 5 August 2011"), para. 84: "In particular, in order for the Chamber to grant them rights under the said legal basis, victims must justify that their personal interests are affected by the specific issue(s) under consideration."

¹⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Victims' Participation, 18 January 2008, paras 96-97 ("*Lubanga* Decision on Victims' Participation"), para. 96: "Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient." See also ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012 ("*Lubanga* Trial Judgment"), para. 14(v).

¹⁸ Art. 17 STLSt.



20. Third, the Pre-Trial Judge recalls that, pursuant to the Decision on Victims' Participation and in application of Rule 86(C)(ii) and (D) of the Rules, VPPs are only permitted to participate in proceedings related to the *Ayyash et al.* case as part of a group having common legal representation.¹⁹ No VPPs have been authorised to represent themselves. Therefore, in this Decision, when referring to VPPs, the Pre-Trial Judge means their Legal Representative unless the context indicates otherwise.

21. Fourth, this Decision provides a framework for victims' participation in the proceedings on the basis of the applicable Rules. Where the Rules are clear, and do not lead to conflicting interpretations, the Pre-Trial Judge has not sought the observations of the Parties and the participants. The Pre-Trial Judge has however invited the submissions of the Parties and the VPU in respect of the access of VPPs to confidential filings and disclosure materials, since in this respect the Rules are unclear. These observations are summarised in the relevant sections below.

22. The Pre-Trial Judge will now elucidate victims' participatory entitlements — which they will exercise through their Legal Representative — at the pre-trial phase of the proceedings before him. This is without prejudice to any other entitlement that the Pre-Trial Judge may grant the VPPs in the course of the pre-trial proceedings either *proprio motu* or at the request of the Legal Representative.

A. Participation at Meetings, Status Conferences and Hearings

23. Rule 89(C) of the Rules provides that:

In order to perform his functions and when necessary in the interests of justice, the Pre-Trial Judge may, *proprio motu* where appropriate, hear the Parties, without the accused or the victims participating in the proceedings being present. The Pre-Trial Judge may hear the Parties and the victims participating in the proceedings in chambers, in which case minutes of the meeting shall be taken by a representative of the Registry.

24. Rule 91(D) and (E) provide that:

The Pre-Trial Judge shall order the Parties to meet to discuss issues related to the preparation of the case. He may invite victims participating in the proceedings to attend.

Such meetings shall be held *inter partes* or, if the Pre-Trial Judge so decides at the request of a Party, *ex parte*.

¹⁹ Decision on Victims' Participation, paras 112, 127-128.



25. Pursuant to Rule 94(A) of the Rules, the Pre-Trial Judge shall:

convene a status conference within a reasonable period after the initial appearance of the accused and not more than eight weeks after it and, thereafter, within eight weeks from the previous one unless otherwise ordered to:

- (i) organise exchanges between the Parties so as to ensure expeditious preparation for trial; and
- (ii) review the status of the case and allow the Parties the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused

26. In light of these provisions, and taking into account the principles recalled in paragraph 19 above, the Pre-Trial Judge considers that, as a general rule, the Legal Representative may attend and participate in meetings, status conferences and hearings, where a VPP's personal interests are affected by an issue which will be considered at the event concerned. Indeed, to hold otherwise would seriously impede the Legal Representative's ability to exercise his mandate. This general rule is subject to the following two limitations.

27. First, the Legal Representative cannot attend meetings, status conferences and hearings where the Pre-Trial Judge has so decided.²⁰

28. Second, the Legal Representative's attendance at meetings, status conferences and hearings may not extend to the full event, and may be limited to those agenda items of concern to the VPPs.

29. With respect to transcripts, the Pre-Trial Judge considers that the Legal Representative must have access to the full transcript of public status conferences and hearings. The Legal Representative must furthermore be provided with the portions of the transcripts of meetings, status conferences and hearings held in camera or *ex parte* which the Legal Representative attended.²¹

30. With respect to minutes of meetings, the Pre-Trial Judge considers that the Legal Representative must have access thereto in the same manner as he has access to transcripts.

²⁰ The Rules envisage specific meetings at which victims are not present. See e.g. Rule 91(E) STL RPE, providing that meetings on the preparation of the case are held *ex parte* if the Pre-Trial Judge so decides at the request of a Party. Rule 89(C) STL RPE, cited above, recognises the Pre-Trial Judge's authority to convene meetings "without [...] the victims participating in the proceedings being present".

²¹ See *Ruto Victims' Participation Decision* of 5 August 2011, para. 93



B. Filings of Written Motions, Briefs and Related Documents

31. While there are instances in the Rules where victims are required to submit written filings,²² the Rules are silent on whether victims may file written submissions before the Pre-Trial Judge on their own initiative. Nevertheless, in order to give effect to their entitlement to participate in proceedings, the Pre-Trial Judge considers that the Legal Representative may file — in addition to responses and replies²³ — motions or briefs on any issue that affects the victims' personal interests. This approach — consistent with the principle recalled in paragraph 19 above — has been adopted in other jurisdictions.²⁴ The Pre-Trial Judge will decide on an application from a Legal Representative to file a document on his own initiative taking into consideration whether the issue affects the personal interests of the victims and the right of the accused to a fair and expeditious trial, and after hearing the Parties if he considers it necessary.²⁵

²² E.g.: Rule 89(D) STL RPE provides that: "The Pre-Trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he may order the Parties and the victims participating in the proceedings to file written submissions."

Rule 89(F) and (G) STL RPE state that: "The Pre-Trial Judge may set time-limits for the making of pre-trial motions or preliminary motions until the submission of the file to the Trial Chamber. Failure by a Party or a victim participating in the proceedings to raise objections or to make requests in accordance with the time-limits set by the Pre-Trial Judge or under these Rules, shall constitute waiver thereof, but the Pre-Trial Judge or a Chamber, for good cause, may grant relief from the waiver.

Pursuant to Rule 91(H) of the Rules, VPPs are required to file — within a time-limit set by the Pre-Trial Judge — the list of witnesses they would like the Trial Chamber to call, as well as the list of exhibits they would like the Trial Chamber to admit into evidence. These filings form part of the case file that the Pre-Trial Judge will transmit to the Trial Chamber pursuant to Rule 95 of the Rules (Cf. in particular, Rule 95(A)(i) and (vii) STL RPE).

²³ The Practice Directive on Filing of Documents before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.1, 23 April 2012, includes "a victim participating in the proceedings or a victims' legal representative" as a participant in its definition of the term. See also Rule 87(B) STL RPE.

²⁴ Cf. *Lubanga* Decision on Victims' Participation, para. 118: "Finally, in relation to the request of the victims legal representatives to be granted the right to initiate procedures (for instance by filing applications and requests), the Trial Chamber considers that there is nothing in the Court's statutory and regulatory provisions which prevents victims from filing requests or applications to the Chamber whenever an issue arises that affects their interests (individually or collectively), in accordance with Article 68(3) of the Statute. The Trial Chamber will decide on any application or request of this kind, having consulted with the parties and other participants to the extent that is appropriate, and bearing in mind the right of the accused to a fair and expeditious trial."

See also Practice Direction on Filings, Definitions, p. 2, in which the same approach is partially anticipated, since it includes within its definition of "participant" *inter alia* "a victim participating in the proceedings or a victim's legal representative".

²⁵ Cf. *Lubanga* Decision on Victims' Participation, para. 118.



C. Access to Documents and Filings

32. Turning now to the Legal Representative's access to documents, Rule 87(A) of the Rules provides that:

Unless the Pre-Trial Judge or the Trial Chamber, *proprio motu* or at the request of either Party, determines any appropriate restriction in the interests of justice, a victim participating in the proceedings is entitled to receive documents filed by the Parties, in so far as they have been disclosed by one Party to the other as well as the file, excluding any confidential and *ex parte* material, handed over by the Pre-Trial Judge to the Trial Chamber before commencement of trial pursuant to Rule 95.²⁶

33. The Practice Direction on Filings sets out four different levels of classification of documents filed before the Tribunal. Pursuant to Article 7 of that Practice Direction, documents may be filed with one of the following classifications: (i) "Public"; (ii) "Confidential"; (iii) "Confidential and *Ex Parte*"; and (iv) "Under Seal and *Ex Parte* with Limited Distribution"

34. The Pre-Trial Judge notes that Rule 87(A) of the Rules is unclear in three respects. First, Rule 87(A) of the Rules refers to documents that have been "filed [...], in so far as they have been disclosed by one Party to the other", thereby confounding the provision of documents to another participant with the technical exercise of disclosing materials pursuant to an obligation to do so.²⁷

35. Second, Rule 87(A) of the Rules entitles the VPP to "receive" documents filed, while the French version grants the VPP the right to inspect ("*droit de consulter*") the same.

36. Third, it remains to be determined whether the notion of "documents filed by the Parties" in Rule 87(A) of the Rules includes documents classified as confidential. The

²⁶ The French version of the Rule, with which the Arabic version is more consistent, reads as follows: « *À moins que le Juge de la mise en état ou la Chambre de première instance n'impose, d'office ou à la demande de l'une des parties, une quelconque restriction dans l'intérêt de la justice, une victime participant à la procédure a le droit de consulter les documents déposés par les parties, dans la mesure où lesdits documents ont été communiqués par l'une des parties à l'autre, ainsi que le dossier, à l'exclusion des documents confidentiels et ex parte, remis par le Juge de la mise en état à la Chambre de première instance avant l'ouverture du procès, en application de l'article 95* », emphasis added.

²⁷ See Rules 110 to 122 STL RPE in general.



Registrar has sought clarification, under Rule 48(E) of the Rules²⁸ on this matter,²⁹ and the Pre-Trial Judge invited the Parties to file their submissions in response.

1. Submissions

a. The Registrar

37. The Registrar points out that neither the Rules nor the Practice Direction on Filings identify the recipients of confidential filings in general. The Registrar avers that clarifying the matter now would facilitate the expeditious course of proceedings by ensuring that the Legal Representative — once designated — could begin work immediately, assured of the extent of the victims' entitlement to confidential materials and his ability to access such materials from the moment of his designation.³⁰

38. The Registrar submits that all filings that are classified as confidential should be “distributed to the VPU and to the [L]egal [R]epresentatives except where one or both have been specifically excluded from receiving a particular document or category of documents by the Pre-Trial Judge or the Trial Chamber”.³¹ Further, the Registrar avers that Rule 87(A) of the Rules is “clearly intended to exclude receipt only in relation to those documents classified as ‘confidential and *ex parte*’.”³²

39. To the extent that the meaning of Rule 87(A) of the Rules lacks clarity between the “receipt” and “inspection” of confidential filings,³³ the Registrar avers that the reading that means “receipt” is correct.³⁴

²⁸ Pursuant to Rule 48(E) STL RPE, “the Registrar shall receive and file all filings and distribute them to all intended recipients.”

²⁹ Registrar's Submission, para. 1.

³⁰ Registrar's Submission, para. 3.

³¹ Registrar's Submission, para. 20.

³² Thus, the Registrar excludes from the scope of his observations on applicability of Rule 87(A) of the Rules to evidence and material which is disclosed between the Parties; Registrar's Submission, para. 6.

³³ See the Discussion below, para. 54.

³⁴ Registrar's Submission, para. 9. The Registrar reasons that “A mere right to inspect confidential documents but not to receive them would prove logistically problematic and undermine the ability of the legal representatives to participate fully in proceedings on behalf of their clients.”



b. The Prosecution

40. In its Response to the Registrar's Submission, the Prosecution submitted that the issue is premature, and initially declined to make submissions on Legal Representative's access to confidential filings.³⁵ The Prosecution did, however, seek leave to address the matter in its subsequent Submission,³⁶ which leave the Pre-Trial Judge hereby grants.³⁷ The Prosecution further argues that the Legal Representative should be provided with confidential filings on a case-by-case basis, if the content is relevant to specific issues pertaining to the victims, and if this access is consistent with any protective measures that may apply.³⁸

c. The Defence

41. The Defence likewise considers the matter to be premature.³⁹ The Defence challenges the Registrar's standing to request clarification from the Pre-Trial Judge in this regard, averring that "[t]he Registry and any of its organs are not permitted to become a *party* to the proceedings".⁴⁰ On the contrary, the Defence submits that it is for the Legal Representative — once designated — to make submissions regarding the access of victims to confidential filings.⁴¹

2. Discussion

42. At the outset, the Pre-Trial Judge considers that taking a decision at this stage is justified. Pre-Trial proceedings are ongoing, and the Trial Chamber is seised of matters which may conceivably be of concern to the VPPs. Indeed, the Pre-Trial Judge notes that the Trial Chamber has invited "the lead legal representative to file observations on behalf of all participating victims in regard to the four Defence motions, if any, by Wednesday, 6 June

³⁵ Prosecution's Response, para. 11.

³⁶ Prosecution's Submission, para. 4.

³⁷ The Pre-Trial Judge considers that, since the subject matter on which the Prosecution was invited to make submissions in the Prosecution's Response, and the Prosecution's Submission, both concern Rule 87(A) and are therefore linked and need to be read together, the request to make its observations "out of time" should be granted.

³⁸ Prosecution's Submission, paras 5(c), 19.

³⁹ Defence Submission, para. 6. The Defence Submission predates the Decision on Victims' Participation.

⁴⁰ Defence Response, para. 10.

⁴¹ Defence Response, paras 9 and 10.



2012”.⁴² The designation of the Legal Representative at this late stage necessitates providing him with the materials required in order to carry out his mandate forthwith. Making the determination now will help to ensure that the proceedings are not unduly delayed and the case is prepared for a fair and expeditious trial, pursuant to Rule 89(D) of the Rules.

a. The Meaning of “Disclosed” in Rule 87(A) of the Rules

43. Rule 87(A) entitles VPPs to receive documents filed by the Parties in so far as they have been “disclosed by one Party to the other”. The French equivalent of the Rule is “*dans la mesure où lesdits documents ont été communiqués*”. On the face of it, these appear to be distinct concepts, and the Pre-Trial Judge considers that clarification is needed.

44. As the Prosecution and the Defence have pointed out, “disclosure” in the technical sense is governed by Rules 110 to 122 of the Rules.⁴³ According to those Rules, various participants in the proceedings have obligations to disclose *inter alia* supporting material, statements obtained from the accused, and witness statements.⁴⁴ “Disclosure” in the technical sense furthermore includes other obligations to be determined by the Trial Chamber in specific circumstances.⁴⁵ The Prosecution is obliged to disclose any other information he has which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of his evidence.⁴⁶ Rules 110 to 122 of the Rules do not, however, refer to “documents filed by the Parties” as generating a disclosure obligation.

45. The Pre-Trial Judge notes that materials disclosed by the Parties, in the technical sense of the term, are not limited to disclosure materials that have been filed in the *Ayyash et al.* case file. It also includes other materials that are otherwise disclosed by the Parties, pursuant to their disclosure obligations in the Rules, and are not filed.

46. The Pre-Trial Judge therefore understands the phrase “disclosed by one Party to the other” in Rule 87(A) of the Rules to mean “communicated to or provided by” one Party to another, an understanding which is consistent with the Arabic and French versions of the

⁴² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Procedural Decision on Defence Motions Challenging Jurisdiction, 18 May 2012, para. 8.

⁴³ Prosecution’s Submission, paras 5(b), 17, Defence Submission, para. 8.

⁴⁴ Rule 110(A), 112(A) STL RPE See also Rule 113 STL RPE.

⁴⁵ Rule 112 *bis* STL RPE.

⁴⁶ Rule 113 STL RPE.



same Rule. Accordingly, “Disclosed by one Party to the other” in Rule 87(A) of the Rules does not mean “disclosure” in the technical sense.

47. The degree of access to be granted to the Legal Representative to “disclosure materials” in the technical sense will be addressed in sub-section D below.

b. The Legal Representative’s Access to Documents Pursuant to Rule 87(A)

48. Rule 87(A) of the Rules entitles the VPPs to receive documents filed by the Parties except those that are *ex parte*.

49. Rule 87(A) is clear inasmuch as it precludes the access by the VPPs to confidential and *ex parte* material, a prohibition which necessarily extends to the more sensitive category of materials that are under seal and *ex parte* with limited distribution. Moreover, the Pre-Trial Judge considers that the Legal Representative clearly is entitled to receive public documents. What remains at issue is whether Rule 87(A) of the Rules grants the Legal Representative access to documents classified as “confidential”.

50. Having considered the submissions of the Registrar and of the Parties, the Pre-Trial Judge considers that the Legal Representative should be granted access to all documents filed confidentially in the *Ayyash et al.* case, subject to the conditions in Section (d) below. This approach is consistent with the plain reading of the Rule, and will ensure and promote the effective and efficient participation of victims in the proceedings.⁴⁷ Such access to confidential filings in the *Ayyash et al.* case should be provided retrospectively.

⁴⁷ Authorities on the issue are inconsistent. Trial Chamber II of the ICC has held that “Legal Representatives must be able to consult all of the public and confidential decisions and documents in the record of the case.” (ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010 (“*Katanga* Decision on Modalities”), para. 121.) See also *Lubanga* Decision on Victims’ Participation, para. 106: “the presumption will be that the legal representatives of victims shall have access only to public filings”; *Lubanga* Trial Judgment, para. 14(vi) “[i]n principle, victims have the right to access and receive notification of all public filings and those confidential filings which concern them (as identified by the parties), insofar as this does not breach any protective measures that are in place.”; ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11-326, Decision on the Request for Access to Confidential *Inter Partes* Material, 14 September 2011, paras 12-13: “[a]ccess to confidential material should not be granted except on a case-by-case basis, and only when the victims can demonstrate that the material relates to issues specific to their interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information.”



51. The Pre-Trial Judge furthermore observes that Rule 87(A) does not create an ongoing review regime, but instead simply provides that victims' access to confidential filings is accorded. This is in contrast to the subsequent Rules 87(B), (C) and (D), all of which subject a victim's entitlement to "the authorisation" of the relevant Chamber. Rules 87(C) and (D) furthermore require that the Parties be heard before such modalities are authorised. Clearly, it is not necessary that the VPPs' entitlement to receive documents filed by the Parties be assessed on a case-by-case basis.

52. For the same reasons as those indicated above, the Pre-Trial Judge considers that the Legal Representative should also be granted access to confidential decisions and orders which form part of the *Ayyash et al.* case file.

53. Moreover, with specific reference to the applications for participation submitted by the victims admitted to participate in the proceedings in the Decision on Victims' Participation, which are classified as confidential and *ex parte*, the Pre-Trial Judge considers that, in order for the Legal Representative duly to perform his duties as well as meaningfully exercise his entitlements pursuant to the instant decision, he shall be granted access thereto, as well as all related material in the case file.⁴⁸

c. The Meaning of "Receive" in Rule 87(A)

54. The Registrar has addressed the meaning of 'receive' in Rule 87(A) of the Rules, submitting that its ordinary meaning should be preferred over the French terminology which is reminiscent of 'inspection'.⁴⁹ The Registrar is correct to point out that an entitlement only to 'inspect' confidential documents would generate logistic challenges. Moreover, it would weaken the Legal Representative's ability effectively to be able to represent the views and concerns of the victims and exercise his mandate. On the basis of this reasoning, the Pre-Trial Judge considers that Rule 87(A) provides the legal Representative with an entitlement to receive the materials in question.

⁴⁸ In particular, the Registrar is requested to provide the "Transmission of Applications for the Status of Victim Participating in the Proceedings", along with the confidential *ex parte* "Annexes to Transmission of Applications for the Status of Victim Participating in the Proceedings", 9 February 2012 (and as corrected by 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). He is furthermore requested to provide copies of the Decision on Victims' Participation in the Proceedings of 8 May 2012, together with its confidential and *ex parte* Annex.

⁴⁹ Registrar's Submission, para. 9.



d. The Conditions Applicable to the Legal Representative's Access to Confidential Documents

55. The Pre-Trial Judge considers that certain conditions apply to the Legal Representative's access to confidential filings. Since the Tribunal is concerned with the protection of those affected by its activities, the foregoing entitlement is subject to the condition that the security of individuals or organisations will not be adversely affected. Therefore, the Pre-Trial Judge may order appropriate measures pursuant to Rule 133 of the Rules.⁵⁰

56. The Pre-Trial Judge furthermore recalls that victims' legal representatives are professional counsel with ethical obligations. Pursuant to the Code of Professional Conduct for Counsel Appearing before the Tribunal, "Counsel shall [...] protect the confidentiality of evidence and proceedings identified as such by the Tribunal."⁵¹ Furthermore, pursuant to the Directive on Victims' Legal Representation, "[a]ll members of the victims' legal team shall be bound as applicable by the Statute, the Rules, the Joint Code of Conduct, the Code of Conduct for Victims' Legal Representatives, the Directive, and any other applicable regulations."⁵²

57. In the instant case, the Pre-Trial Judge considers that access to confidential documents is limited to the Legal Representative and cannot be extended to include his clients. He is therefore prevented from providing the confidential materials he has received to the VPPs. If he considers that it is necessary to do so in order to represent his clients' interests, he shall first seek the consent of the Party who provided the material. Only when this process yields no result may the Legal Representative seize the Pre-Trial Judge, who will decide on a case-by-case basis, after having heard the Party who provided the material.⁵³

⁵⁰ Rule 133(A) STL RPE provides that "[t]he Trial Chamber may, *proprio motu* or at the request of a Party, the victim or witness concerned, the Victims' Participation Unit or the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused." Pursuant to Rule 97 STL RPE, Rule 133 STL RPE applies *mutatis mutandis* in proceedings before the Pre-Trial Judge.

⁵¹ STL, "A Code of Professional Counsel Appearing before the Tribunal," adopted pursuant to Rule 60(C) of the Rules, 28 February 2011, STL-CC-2011-01, para. 5.

⁵² Directive on Victims' Legal Representation, STL/BD/2012/04, 4 May 2012, Art. 24(B).

⁵³ This approach is consistent with the jurisprudence of the ICC, which has recognised the need to prevent legal representatives from communicating confidential information to their clients without the Chamber's permission.



58. In addition, the Pre-Trial Judge considers that, where restrictions attach to Defence Counsel's communications *inter alia* with third parties, the same restrictions shall apply to the Legal Representative *mutatis mutandis*.⁵⁴

59. The Pre-Trial Judge reminds VPPs and their Legal Representative that they may only participate in a manner consistent with the Statute and the Rules, and invites them to cooperate with the Parties in the interests of the expeditiousness of the proceedings, the rights of the accused, and a fair and impartial trial.

60. Lastly, the Pre-Trial Judge notes that Rule 150(D) of the Rules permits VPPs to give evidence if a Chamber decides that the interests of justice so require.⁵⁵ The Rules therefore provide for the circumstance where a VPP — notwithstanding his capacity as a VPP — is called to give evidence as a witness. This circumstance, where a VPP also appears as witnesses (so-called “dual status victims”) generates distinct considerations.⁵⁶

61. One consideration is that the participation of dual status victims may require tailored protective measures.⁵⁷ It must be managed carefully in order to safeguard the rights of the accused to a fair and expeditious trial,⁵⁸ as well as the interests of the Prosecution and the VPPs themselves. Should the situation of dual status victims arise, the applicable modalities shall be determined by the appropriate Chamber in due course.

Cf., e.g. ICC, *Prosecutor v. Jen-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-807-Corr, *Corrigendum* to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, 12 July 2010, para. 47; *Katanga* Decision on Modalities, para. 123.

⁵⁴ The Pre-Trial Judge is currently seised of a Prosecution motion for an order of non-disclosure which addresses, *inter alia*, certain restrictions to Defence counsel's communications with the public. STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for an Order of Non-Disclosure, 2 May 2012, para. 26(e).

⁵⁵ The Pre-Trial Judge also notes that Rule 86(B)(v) STL RPE permits the Pre-Trial Judge — when considering an application to participate in the proceeding as a victim — to consider “whether the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness.” Furthermore, Rule 165 STL RPE permits the Trial Chamber, after hearing the Parties, “*proprio motu* or at the request of a Party, [to] order either Party or a victim participating in the proceedings to produce additional evidence.”

⁵⁶ See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1379, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, Trial Chamber I, 5 June 2008, paras 52-78.

⁵⁷ *Id.* para. 135.

⁵⁸ See *Lubanga* Decision on Victims' Participation, para. 134: “when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.”



62. An additional consideration is that further “conditions of strict confidentiality” may apply when the Legal Representative seeks to transmit materials to dual status victims.⁵⁹ In this regard, the Pre-Trial Judge recalls his finding in paragraph 57 above that a Legal Representative’s access to confidential documents does not extend to his clients. Should the situation of dual status victims arise, and if the Legal Representative considers that it is necessary to transmit confidential materials to him, the same mechanism established above will apply. The specific status of this VPP will be taken into account at this stage.

D. The Legal Representative’s Access to Disclosure Materials

63. The Pre-Trial Judge invited the submissions of the Parties and the VPU on victims’ legal representatives’ access to disclosure materials.⁶⁰

1. Submissions

a. The VPU

64. The VPU submits that, pursuant to Rule 87(A) of the Rules, the Legal Representative is entitled to receive and access material disclosed by one Party to another subject to any restrictions imposed by the Pre-Trial Judge or the Trial Chamber.⁶¹ Such interpretation of Rule 87(A) of the Rules is based on the drafting history of the provision and is necessary in order to enable the Legal Representative to give full effect to victims’ participation in the proceedings.⁶² Moreover, granting the Legal Representative access to disclosure material as a matter of course — and not based on a case-by-case assessment of victims’ personal interests or other criteria — ensures the expeditiousness of proceedings.⁶³

b. The Prosecution

65. In the Prosecution’s view, Rule 87(A) of the Rules only entitles the Legal Representative to receive documents filed by the Parties, not disclosure materials in the

⁵⁹ *Id.* para. 63(b).

⁶⁰ Cf. paras 10-11 above.

⁶¹ VPU’s Submission, para. 8(a).

⁶² *Id.*, para. 10.

⁶³ *Id.*, para. 30.



technical sense pursuant to Rules 110 to 122 of the Rules.⁶⁴ With respect to Rule 87(A) materials,⁶⁵ the Prosecution submits that the Legal Representative is entitled to receive them in so far as they have not been filed confidentially and *ex parte*. However, such access to “non-confidential documents” should not be automatic and the Prosecution should be given the opportunity to make submissions on whether: (1) additional or different redactions compared to those required for disclosure to the Defence are required; and (2) the Legal Representative should undertake not to provide the Rule 87(A) materials to his clients.⁶⁶

66. Furthermore, the Prosecution submits that legal representatives acting on behalf of anonymous victims should be denied access to any Rule 87(A) materials.⁶⁷

67. The Prosecution accepts that the Legal Representative could be provided with further materials “in order to give effect to the rights afforded to Victims by the Statute and the Rules.”⁶⁸ It avers that it would be beneficial to indicate how this could be done.⁶⁹ In this regard, the Prosecution suggests that the Legal Representative identifies those materials in writing. Access thereto would be granted on a case-by-case basis, subject to an assessment of whether the requested materials are relevant to victims’ personal interests.⁷⁰

c. The Defence

68. The Defence argues that, at the time of its Submission — and prior to the Pre-Trial Judge’s Decision on Victims’ Participation or the designation of the Legal Representative — it was premature to determine victims’ access to disclosure material.⁷¹

69. Alternatively, the Defence submits that, pursuant to Rule 87(A) of the Rules, victims or their legal representatives only have access to the supporting materials submitted along with the indictment for confirmation. These materials form part of the case file which is handed over by the Pre-Trial Judge to the Trial Chamber, and to which victims have access

⁶⁴ Prosecution’s Submission, para. 5(b).

⁶⁵ As defined in the Prosecution’s Submission, that is “documents filed by the Parties, in so far as they have been disclosed by one Party to the other.” Filings are not included in this category. Cf. *Id.*, para. 3.

⁶⁶ *Id.*, para. 17.

⁶⁷ *Id.*, para. 18.

⁶⁸ *Id.*, para. 21.

⁶⁹ *Id.*, para. 22.

⁷⁰ *Id.*, para. 23.

⁷¹ Defence Submission, para. 6.



pursuant to Rule 87(A).⁷² However, in the Defence's view, victims' access to the supporting material is subject to several limitations. In particular, it should take place after the case file is handed over to the Trial Chamber. Moreover, it should be limited to public documents that are of material relevance to the personal interests of the VPPs.⁷³

2. Discussion

70. At the outset, the Pre-Trial Judge notes that there is no provision in the Rules that expressly entitles the Legal Representative to receive disclosure materials provided by one Party to another. He furthermore recalls his finding in paragraph 46 above that Rule 87(A) of the Rules does not provide the Legal Representative with an entitlement to receive disclosure materials, only public and confidential documents filed by the parties.

a. Supporting Materials

71. Rule 87(A) of the Rules provides that VPPs have access to the file transmitted by the Pre-Trial Judge to the Trial Chamber before the commencement of trial, pursuant to Rule 95 of the Rules.⁷⁴ What is relevant to the present discussion is that the case file contains *inter alia* "any evidentiary material received by [the Pre-Trial Judge]."⁷⁵ This includes in principle the materials submitted for confirmation by the Prosecution in support of the indictment of 10 June 2011 (the "Indictment").⁷⁶

72. In light of the foregoing, and by virtue of being entitled to have access to the *Ayyash et al.* case file pursuant to Rule 87(A) of the Rules, Legal Representatives are ordinarily be entitled to receive the Indictment supporting materials, subject to any restriction that the Pre-Trial Judge or the Trial Chamber may determine in the interests of justice, at such time as they are transmitted to the Trial Chamber pursuant to Rule 95(A)(ii) of the Rules. The Pre-Trial Judge notes that Rule 87(A) of the Rules is a novel provision. In other pertinent international jurisdictions, the extent to which participating victims or *parties civiles* have

⁷² *Id.*, para. 8.

⁷³ *Id.*, para. 9.

⁷⁴ Rule 87(A) expressly states that such access is subject to whether "the Pre-Trial Judge or the Trial Chamber, *proprio motu* or at the request of either Party, determines any appropriate restriction in the interests of justice".

⁷⁵ Cf. Rule 95(A)(ii) STL RPE.

⁷⁶ Rule 68(B) STL RPE provides that: "The Prosecutor shall, if satisfied in the course of an investigation that there is sufficient evidence that a suspect has committed a crime that may fall within the jurisdiction of the Tribunal, file an indictment for confirmation by the Pre-Trial Judge, together with supporting material."



access to evidence varies depending on the rules of procedure and evidence and how they are interpreted.⁷⁷ However, access to evidentiary materials is generally treated as a prerogative of the parties. Therefore, the victim's right of access to evidence tends to be narrowly interpreted.⁷⁸

73. The Pre-Trial Judge makes two observations with respect to the Legal Representative's access to the supporting materials. First, this automatic access mechanism — which avoids the need for litigation on whether the VPPs' personal interests are affected by the evidence in question — ensures victims' effective participation in the proceedings. It equally serves the interests of the celerity of the proceedings, in that it avoids *inter partes* litigation of the question, which has characterised other tribunals. Second, the Pre-Trial Judge considers that certain conditions apply to the Legal Representative's access to the supporting materials, which will be discussed below.

⁷⁷ For instance, at the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), victims have the status of civil parties (*parties civiles*) and enjoy broad access rights to the record of the case accordingly. Cf. ECCC Internal Rules, Rev. 8, Glossary: "Party" (*partie* - [...]) refers to the Co-Prosecutors, the Charged Person/Accused and Civil Parties." Rule 55(6) ECCC Internal Rules further provides that "[t]he Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC."

At the ICC, victims participating in the proceedings do not have the status of civil parties. Rule 121(10) ICC RPE provides that: "[t]he Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91." Thus, participating victims may only consult the record of the case. This entitlement is subject to restrictions based on confidentiality or the protection of national security information. Different ICC Chambers have interpreted this Rule differently. Victims participating in proceedings ordinarily are only granted access to *public* evidence disclosed by the Prosecutor and the Defence which is contained in the record of the case effective as of the date of their recognition to participate in the proceedings. Cf., e.g., ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Fourth Decision on Victims' Participation, Pre-Trial Chamber III, 12 December 2008, para. 104 ("*Bemba* Fourth Decision on Victims' Participation"); ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber II, 5 August 2011, para. 91. *Contra see* ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, 13 May 2008, para. 132, where victims' legal representatives have been granted access to confidential evidence. Cf. also *id.*, para. 150, where the single Judge held that: "according to the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules, preventing victims, when victims are not granted anonymity, from accessing confidential materials is the exception and not the general rule - at least in relation to the pre-trial proceedings of a case, where the record of the case is certainly limited." Cf. also *Katanga* Decision on Modalities, para. 122.

⁷⁸ Cf. the discussion in note above with particular reference to the jurisprudence of the ICC.



i. Conditions Applicable to the Legal Representative's Access to the Supporting Material

74. The Pre-Trial Judge recalls his findings in paragraph 55 above concerning the application of protective measures to the Legal Representative's access to confidential filings. He considers that the same considerations apply, *mutatis mutandis*, to the access to disclosure materials.

75. Furthermore, the Legal Representative is bound by the same obligations of confidentiality in his communications with the VPPs and/or with third parties as apply to confidential filings.⁷⁹

ii. Modalities

76. An issue that remains to be determined is when the Legal Representative will have access to the supporting materials. While Rule 87(A) may seem to indicate that VPPs receive the supporting materials at the time of the transmission of the case file to the Trial Chamber, the Pre-Trial Judge also notes Rules 91(H) and 95(A)(i) and (vii) of the Rules, which set out some requirements for the preparation and implementation of a working plan by the Pre-Trial Judge and the transmission of the case file to the Trial Chamber. In particular, as has already been mentioned, Rule 91(H) of the Rules requires VPPs to file the list of witnesses they would like the Trial Chamber to call at trial, as well as the list of exhibits they would like the Trial Chamber to admit into evidence. Both filings form part of the case file, pursuant to Rule 95(A)(i) of the Rules. In addition, as part of the obligations incumbent on him pursuant to Rule 95(A)(vii) of the Rules, the Pre-Trial Judge has to include in the case file:

a detailed report setting out: (a) the arguments of the Parties and the victims participating in the proceedings on the facts and the applicable law; [...] (c) the probative material produced by each Party and by the victims participating in the proceedings

77. The Pre-Trial Judge considers that, in order for VPPs to produce the documents required by Rule 91(H) of the Rules, and to formulate arguments on the facts of the case, the Legal Representative must be in a position to prepare the case. Therefore, the Legal

⁷⁹ Cf. para. 58 above.



Representative needs to receive the relevant supporting materials before the case file is handed over to the Trial Chamber, and not at the time of transmission.

78. In conclusion, the Pre-Trial Judge considers that, in order for the Legal Representative to duly perform his duties as well as to meaningfully participate in the proceedings on behalf of the VPPs in line with the modalities established in the present decision, it is in the interests of justice that he be granted access to the material supporting the Indictment as soon as possible after his designation.

b. Remaining Disclosure Materials

79. Insofar as disclosure materials other than the supporting materials are concerned, the Pre-Trial Judge notes that there is no explicit provision in the Rules entitling VPPs to have access thereto. He nevertheless considers that, in order for victims' participation in the proceedings to be effective, the Legal Representative needs to have access to such materials in the same format⁸⁰ in which they are made available to the Party to which they were disclosed. The same conditions and restrictions discussed above with respect to the supporting materials also apply to these other disclosure materials.⁸¹

c. Disclosure Materials and Anonymous Victims

80. With respect to Prosecution's submission regarding the context where a legal representative acts on behalf of anonymous victims, the Pre-Trial Judge recalls his observation in paragraph 20 above that all VPPs shall participate in the proceedings in the *Ayyash et al.* case as part of a group having common legal representation. Consequently, even if one or more VPPs are permitted to participate anonymously, they will do so through the same common legal representative as the other participating victims. This Legal Representative is in principle precluded from providing such materials to the VPPs.⁸² The Prosecution's request not to grant the Legal Representative acting on behalf of anonymous victims with any Rule 87(A) material is therefore moot.

⁸⁰ E.g., unredacted versions, redacted versions or summaries.

⁸¹ See paras 56-58 above.

⁸² Cf. para. 74 above.



V. The Registrar's Submission and Related Filings on VPU's Access to Documents

81. Having determined the modalities of victims' participation in proceedings before him, the Pre-Trial Judge will now examine the Registrar's Submission and related filings insofar as they concern VPU's access to documents and filings. In particular, the Registrar's Submission seeks an order from the Pre-Trial Judge clarifying that the VPU shall receive confidential filings. The VPU Submission is concerned with access to disclosure materials *inter alia* by the VPU.

A. Submissions

a. The Registrar and the VPU

82. In its Submission, the Registrar requests the Pre-Trial Judge to grant the VPU the entitlement to receive confidential filings, subject to any restrictions imposed by the Pre-Trial Judge or Trial Chamber. The Registrar's request is grounded on two main arguments. First, it submits that — in order for the VPU to ensure that the victims or their Legal Representative receive documents filed by the Parties and the files submitted by the Pre-Trial Judge pursuant to Rule 51(B)(iv) of the Rules — the “VPU must receive at least the same range of documents as are available to the legal representatives under Rule 87(A)” of the Rules,⁸³ and possibly even more.⁸⁴

83. Second, the Registrar further argues that the VPU's support and assistance mandate with respect to the Legal Representative under Rule 51(C) of the Rules is “broadly analogous” to the mandate of the Defence Office with regard to Defence counsel under Rule 57 of the Rules. The Registrar points out that the Defence Office is entitled to receive confidential documents addressed to the Defence pursuant to Rule 48(E) of the Rules and Section 3 of the Practice Direction on the Role of the Head of Defence Office in Proceedings before the Tribunal (“Practice Direction on the Role of the Head of Defence Office”).⁸⁵ The

⁸³ Registrar's Submission, para. 14.

⁸⁴ *Id.*, para. 18.

⁸⁵ Practice Direction on the Role of the Head of Defence Office, 30 March 2011; Registrar's Submission, para. 16.



Registrar therefore submits that the VPU's entitlement to filings must be analogous to the Defence Office's entitlement to receive filings addressed to Defence counsel.⁸⁶

84. With respect to disclosure material, the VPU submits that ongoing receipt of such material by the VPU is not required, but may be requested where necessary to assist the VPU in the discharge of its duties on a case-by-case basis.⁸⁷ In the VPU's view, such material can be provided by the Legal Representatives as and when required.⁸⁸

b. The Prosecution

85. The Prosecution does not object to the transmission of some confidential filings to the VPU.⁸⁹ However, the Prosecution contends that such decision should be made by the Pre-Trial Judge or the relevant Chamber on a case-by-case basis, considering the impact of the issues at stake on the VPU's ability to carry out its mandate, and in any event following submissions from the Parties.⁹⁰ Indeed, in the Prosecution's view the VPU does not need to receive all confidential filings in order to carry out its mandate.⁹¹

86. Regarding the VPU's access to disclosure material, the Prosecution argues that there is no legal basis for the VPU to receive any Rule 87(A) materials.⁹² Indeed, the VPU is not included as an intended recipient of such materials. Moreover, the VPU does not require these materials in order to carry out its mandate pursuant to Rule 51 of the Rules.⁹³ On the contrary, the VPU's neutrality can be safeguarded by avoiding any involvement in a specific case.⁹⁴

c. The Defence

87. Concerning VPU's access to confidential filings, the Defence requests that the VPU be denied access thereto unless otherwise authorised by the Pre-Trial Judge or the Trial

⁸⁶ *Id.*, para. 17.

⁸⁷ VPU's Submission, para. 8(b).

⁸⁸ *Id.*, para. 27.

⁸⁹ Prosecution's Response, para. 4.

⁹⁰ *Id.*, paras 4 and 12.

⁹¹ *Id.*, para. 8.

⁹² Prosecution's Submission, paras 5(a), 13.

⁹³ *Id.*, para. 14.

⁹⁴ *Ibid.*



Chamber.⁹⁵ The Defence Counsel’s position is grounded on two arguments. First, VPU’s mandate under Rule 51(B)(iv) of the Rules does not provide the VPU with such access to confidential filings.⁹⁶ Second, even if the analogy between the VPU and the Defence Office was to be viewed favourably, the receipt of confidential filings by the VPU would be subject to and dependent on authorisation by the Legal Representative. Indeed, the Registrar misunderstood the Practice Direction on the Role of the Head of Defence Office.⁹⁷ Section 3 of this Practice Direction provides that “the Registry shall distribute to the Head of the Defence Office ‘all public and *confidential orders and decisions*’” and that “[c]onfidential filings by the parties *may* be distributed to the Head of the Defence Office if requested by the Defence”.⁹⁸ Therefore, the Defence submits that a decision thereon at this stage would be premature.⁹⁹

88. With regard to VPU’s access to disclosure materials, the Defence argues in its Submission that there is no basis for the VPU to be granted access to such materials.¹⁰⁰ It accordingly requests the Pre-Trial Judge to deny the VPU access to disclosure materials.¹⁰¹

B. Discussion

89. The Pre-Trial Judge notes that the Rules are silent on the issues both of the VPU’s receipt of confidential filings and its access to disclosure material.

90. Regarding the Registrar’s request that the VPU be granted access to confidential filings in order to carry out its mandate, the Pre-Trial Judge considers that an analogy can be drawn between the role of the VPU with respect to the Legal Representative, on the one hand, and the role of the Head of Defence Office *vis-à-vis* Defence counsel, on the other. Even if the status of the VPU is distinct from that of the Defence Office — the former being a “unit within the Registry”¹⁰² and the latter being an Organ of the Tribunal¹⁰³ — a reading of Rules 51 and 57 of the Rules illustrates that they exercise largely the same prerogatives in practice.

⁹⁵ Defence Response, para. 19.

⁹⁶ *Id.*, para. 14.

⁹⁷ *Id.*, para. 15.

⁹⁸ *Ibid.*

⁹⁹ *Id.*, para. 16.

¹⁰⁰ Defence Submission, para. 11.

¹⁰¹ *Id.*, para. 13.

¹⁰² Rule 51(A) STL RPE.

¹⁰³ Art. 7(d) STLSt. See also Rule 57 STL RPE.



Indeed, Rule 51(C)(v) of the Rules provides that the VPU shall “exercise, *mutatis mutandis*, in respect of victims’ legal representatives, the powers granted to the Head of Defence Office under Rule 57(G) and, where appropriate, request the Registrar to exercise his powers under Rule 51(G).” These powers include *inter alia*:

- (i) Ensuring that the representation of the persons concerned meets internationally recognised standards of practice and is consistent with the provisions of the Statute, the Rules, the Code of Professional Conduct for Counsel, and other relevant provisions;¹⁰⁴
- (ii) Monitoring the performance and work of representative and the persons assisting them;¹⁰⁵ and
- (iii) Ensuring that the appropriate advice is given to the representative as would contribute to effective representation.¹⁰⁶

91. In this regard, the Pre-Trial Judge notes that, pursuant to Section 3 of the Practice Direction, the Head of Defence Office receives:

- a) All public and confidential orders and decisions filed in a case;¹⁰⁷ and
- b) All public filings other than orders and decisions to and from the Defence.¹⁰⁸

The Head of Defence Office may receive all confidential filings to and from the Defence only if authorised by Defence counsel in order properly to exercise his duties of support and assistance pursuant to Article 13 of the Statute.¹⁰⁹ He may only receive *ex parte* filings if specifically authorised by the Pre-Trial Judge or a Chamber.¹¹⁰

92. The Pre-Trial Judge considers that the same regime shall apply, *mutatis mutandis*, to the VPU.

¹⁰⁴ Rule 57(G) STL RPE.

¹⁰⁵ Rule 57(G)(i) STL RPE. See also Directive on Victims’ Legal Representation, Art. 30.

¹⁰⁶ Rule 57(G)(iii) STL RPE; see also Rule 51(C)(iii) STL RPE.

¹⁰⁷ Practice Direction on the Role of the Head of Defence Office, para. 9(a).

¹⁰⁸ *Id.*, para. 9(b).

¹⁰⁹ *Id.*, para. 10.

¹¹⁰ *Id.*, para. 11.



93. Concerning VPU's role to "ensure that the victims or their representatives receive documents filed by the Parties" pursuant to Rule 51(B)(iv) of the Rules, the Pre-Trial Judge considers that the VPU does not need to have automatic access to all confidential filings in order to perform this function. It suffices that the Registry provides the VPU with a list of all the documents that have been filed by the Parties, so that the VPU can ensure that the Legal Representative duly received them.

94. With respect to VPU's access to disclosure material, the Pre-Trial Judge considers that, for the reasons mentioned above, the modalities that apply to the transmission of documents by the Defence to the Defence Office should apply *mutatis mutandis* to the Legal Representative and the VPU.

95. In this regard, by application *mutatis mutandis* of Section 4 of the Practice Direction on the Role of the Head of Defence Office, the VPU may receive from the Legal Representative any information legitimately in its possession as part of a request for legal assistance or other support.



FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Article 17 of the Statute and Rules 51(E), 87(A), 89(C) and (D), 91(D) and (E) and 94(A) of the Rules;

GRANTS the Prosecution's request to make submissions on the Legal Representative's access to the confidential materials beyond the stated deadline;

DECIDES that the following modalities shall apply to victims' participation during proceedings before the Pre-Trial Judge, without prejudice to any other entitlement that the Pre-Trial Judge may grant the Legal Representative:

1. The Legal Representative may attend and participate in meetings, status conferences and hearings, or the relevant portions thereof, including both public and closed sessions, unless the Pre-Trial Judge has decided otherwise;
2. The Legal Representative is entitled to receive the public transcripts of status conferences and hearings, as well as the portions of the transcripts of status conferences and hearings held in camera or *ex parte* which correspond to the duration for which the Legal Representative was present;
3. The Legal Representative is entitled to receive the minutes of meetings, as well as the portions of the minutes of meetings held in camera or *ex parte* which correspond to the duration for which the Legal Representative was present;
4. The Legal Representative may file motions or briefs on any issue that affects the victims' personal interests, and in relation to which he intends to present their views and concerns, subject to the authorisation of the Pre-Trial Judge, in addition to responses and replies;
5. The Legal Representative is entitled to receive the *Ayyash et al.* case file, except for any documents classified as confidential and *ex parte*, or as under seal and *ex parte*



with limited distribution, and subject to any other conditions imposed by the Pre-Trial Judge;

6. The Legal Representative is entitled to receive the materials disclosed by one Party to the other, subject to any protective measures or other restriction that the Pre-Trial Judge may determine *proprio motu* or at the request of the disclosing Party;
7. The Legal Representative is prohibited from transmitting to the victims participating in the proceedings any confidential materials he has received without first obtaining the consent of the Party who provided it, failing which he shall seek an Order from the Pre-Trial Judge authorising him to do so;

RECALLS that the Legal Representative is required to respect the ethical obligations incumbent upon him, as well as any order or decision that may impose further conditions on his conduct;

DECIDES that the VPU shall receive all confidential filings addressed to and emanating from the Legal Representative, subject the Legal Representative's authorisation, as well as *ex parte* filings when specifically authorised by the Pre-Trial Judge;

ORDERS the Registrar to provide the Legal Representative, by Tuesday 29 May 2012, with the victims' individual applications and the relevant material in the case file related thereto, as defined in this Decision;

ORDERS the Registrar to provide the Legal Representative, by Tuesday 29 May 2012, with access to the minutes and transcripts of meetings, status conferences and hearings, as provided for in this Decision; and

ORDERS the Prosecution to provide the Legal Representative, by Tuesday 29 May 2012, with materials it has disclosed to the Defence in the *Ayyash et al.* case, on the same terms as that disclosure was made to the Defence.



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

Leidschendam, 18 May 2012.



Daniel Fransen
Pre-Trial Judge

