



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: **19 December 2012**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON THE LEGAL REPRESENTATIVE OF VICTIMS' FIRST, SECOND
AND THIRD MOTIONS FOR PROTECTIVE MEASURES FOR VICTIMS
PARTICIPATING IN THE PROCEEDINGS**

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan

Legal Representative of Victims:
Mr. Peter Haynes

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz

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

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young



I. Introduction

1. In this decision, the Pre-Trial Judge of the Special Tribunal for Lebanon (“Tribunal”) rules on three motions filed by the Legal Representative of Victims (“LRV”) for protective measures for certain victims participating in the proceedings (“VPPs” or “VPP”).¹ The motions seek relief pursuant to *inter alia* Article 12(4) of the Statute and Rule 133 of the Rules of Procedure and Evidence (the “Rules”).²

II. Procedural Background

2. In the respective decisions of 8 May 2012, 3 September 2012 and 28 November 2012, the Pre-Trial Judge authorised 68 applicants to participate in the proceedings as victims in the *Ayyash et al.* case, ruling that their identities be withheld from the parties and the public pending the resolution of their participation.³

3. Pursuant to the Pre-Trial Judge’s Decision of 21 September 2012,⁴ the LRV filed his first, second and third notices of the disclosure of the identities of 34 VPPs as public on 3 October 2012,⁵ 15 October 2012⁶ and 2 November 2012,⁷ respectively.

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012 (the “First Motion”) (filed publicly with 1 confidential annex and 18 confidential and *ex parte* annexes); STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Second Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 2 November 2012 (the “Second Motion”) (filed publicly with 1 confidential and 7 confidential and *ex parte* annexes); STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Third Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of Eight Victims Participating in the Proceedings 2 November 2012 (the “Third Motion”) (filed publicly with 1 confidential and 9 confidential and *ex parte* annexes).

² First Motion, para. 7; Second Motion, para. 9, Third Motion, para. 9.

³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on Victims’ Participation in the Proceedings, 8 May 2012, Public with confidential and *ex parte* annex (the “Decision of 8 May 2012”); STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Second Decision on Victims’ Participation in the Proceedings, 3 September 2012, public with confidential and *ex parte* annex (the “Decision of 3 September 2012”). See also STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on Defence Motion of 17 February 2012 for an Order to the Victims’ Participation Unit to Refile Its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, 5 April 2012 (the “Decision of 5 April 2012”), para. 53; and STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the VPU’s Access to Materials and the Modalities of Victims’ Participation in Proceedings before the Pre-Trial Judge, 18 May 2012 (the “Decision of 18 May 2012”); STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Third Decision on Victims’ Participation in the Proceedings, 28 November 2012, public with confidential and *ex parte* annex (the “Decision of 28 November 2012”).

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Victims’ Legal Representative’s Request for Reclassification as Public of Identities of Seven Victims Participating in Proceedings, 21 September 2012 (the “Decision of 21 September 2012”).

4. On 29 October 2012, the LRV filed a first motion for protective measures for 17 VPPs.⁸ On 2 November 2012, the LRV filed a second⁹ and third¹⁰ motion for protective measures for six and eight VPPs, respectively. The First Motion and the Second Motion seek the anonymity of the VPPs concerned; the Third Motion seeks the confidentiality of the VPPs concerned, that is, an order limiting the disclosure of the VPPs' identities to the Parties. The First Motion, Second Motion and Third Motion are referred to collectively as the "Motions".

5. On 16 November 2012, counsel for Messrs Sabra¹¹ and Badreddine¹² each filed a consolidated response to the LRV's First Motion and Second Motion for VPP anonymity.

6. On 23 November 2012, the Prosecution filed its consolidated response to the First Motion and the Second Motion for VPP anonymity.¹³

III. Submissions of the LRV and the Parties

A. The Motions

7. The LRV recalls that in accordance with the Pre-Trial Judge's Decision of 21 September 2012, a VPP's request for protective measures pursuant to Rule 133 should

⁵ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims of Disclosure of the Identity of Thirteen Victims Participating in the Proceedings, 3 October 2012

⁶ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Second Notice of the Legal Representative of Victims of Disclosure of the Identity of Nine Victims Participating in the Proceedings, 15 October 2012.

⁷ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Third Notice of the Legal Representative of Victims of Disclosure of the Identity of Twelve Victims Participating in the Proceedings, 2 November 2012.

⁸ First Motion.

⁹ Second Motion.

¹⁰ Third Motion.

¹¹ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Sabra's Consolidated Response to the Motions of the Legal Representative of Victims for Protective Measures (Anonymity) of Twenty-Three Victims Participating in the Proceedings, confidential, 16 November 2012 (the "Sabra Response"), with a public redacted version filed on the same day.

¹² STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Réponse de la Défense de M Badreddine aux requêtes du Représentant légal des victimes tendant à l'octroi de mesures de protection (anonymat)*, 16 November 2012 (the "Badreddine Response").

¹³ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Consolidated Response to the Legal Representatives First Motion for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings and Second Motion for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 23 November 2012 (the "Prosecution Response"). On 13 November 2012, the Prosecution filed a request for an extension of the time to file its responses to the First Motion and the Second Motion, in order to file a consolidated response by 22 November 2012. This request was granted by the Pre-Trial Judge on 14 November 2012. See STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Request for an Extension of Time to File a Response to the Legal Representatives First Motion for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 13 November 2012, STL, *The Prosecutor v. Ayyash et al.*, Order on Prosecution Request for an Extension of Time to File a Response to the Legal Representatives First Motion for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 14 November 2012.

include a risk assessment carried out by the Tribunal's Victims and Witnesses Unit (the "VWU").¹⁴ Pursuant thereto, the LRV avers that the VWU has conducted risk assessments for all VPPs for whom protective measures are sought under a collective reading of Rules 93, 115, 116 and 133. The results of the assessments are contained in the relevant confidential, and confidential and *ex parte* annexes to the Motions.¹⁵

8. In the First Motion and the Second Motion, the LRV requests the Pre-Trial Judge to maintain the anonymity of the following VPPs: V005, V007, V010, V016, V020, V021, V022, V025, V026, V030, V035, V043, V047, V051, V054, V055, V058,¹⁶ V042, V060, V061, V062, V073 and V078.¹⁷ According to the LRV, the potential risks to VPPs must be assessed in the same way as those of a witness.¹⁸ The LRV acknowledges that protective measures must be consistent with the rights of the accused, as well as necessary and proportionate.¹⁹ Accordingly, he submits that the absence of information on victim identity cannot affect an accused's capability to prepare for his defence in the same way as a lack of information on witness identity would. Finally, the LRV adds that the requests for anonymity are supported by international jurisprudence.²⁰

9. In the Third Motion, the LRV requests the Pre-Trial Judge to reclassify the identity of the following eight VPPs as confidential, "in the sense of disclosing their names to the Parties, but not to the public": V012, V013, V027, V028, V033, V036, V037 and V038.²¹ The LRV submits that the rights of the accused in the *Ayyash et al.* case (the "Accused") are unaffected by the request in the Third Motion for confidentiality.²²

10. The LRV advocates a cautious approach to deciding requests for protective measures for VPPs at this stage of proceedings. He underlines that the risk assessment exercise was undertaken expeditiously, with the primary objective of ensuring that the proscribed timetable

¹⁴ Decision of 21 September 2012, para. 5.

¹⁵ First Motion, para. 21; Second Motion, para. 13; Third Motion, para. 19.

¹⁶ First Motion, para. 27. None of the 17 VPPs concerned by the First Motion have expressed the intention to testify at trial (First Motion, para. 24).

¹⁷ Second Motion, para. 16.

¹⁸ First Motion, para. 22.

¹⁹ First Motion, paras 15-16; Second Motion, paras 11-12.

²⁰ First Motion, para. 13.

²¹ Third Motion, paras 2, 23. The LRV incorporates by reference the arguments made in a previous filing: STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Amended Public Redacted Version of the Response of the Legal Representative of Victims to the "Prosecution's Submission for an Order on Re-Classification of Victims Identities and Applications for Victim Participation Status, as Confidential", 24 October 2012 (the "LRV Response of 24 October 2012").

²² Third Motion, para. 20.

for the pre-trial process was undisturbed, and further information could be forthcoming.²³ The LRV avers that several VPPs have expressed that their continued participation is conditional on the protective measures requested being granted.²⁴ Therefore, should the Pre-Trial Judge consider that the protective measures requested by some or all of these VPPs is not justified, the LRV asks that any orders denying anonymity “not be immediately effective” so as to permit him to consult with the VPPs affected, and determine their continued participation in the proceedings.²⁵

B. Sabra Response

11. In response to the First Motion and Second Motion, Counsel for Mr. Sabra objects to anonymity being granted as a general protective measure for any VPP who “intends to testify, who might be called to do so or who intends to request the Trial Chamber to authorize him to call witnesses or tender evidence.” Counsel for Mr. Sabra submits that neither Rule 133 nor international jurisprudence permit the anonymity of VPPs “towards the Defence”, and that absent an express provision, such anonymity could adversely affect the rights of the accused, particularly in trials *in absentia*.²⁶

12. However, to the extent that the VPPs who seek anonymity do not intend to testify, are not proposed Prosecution witnesses and do not intend to call or tender evidence, Counsel for Mr. Sabra does not oppose the First or Second Motions.²⁷

C. Badreddine Response

13. Counsel for Mr. Badreddine submits that protective measures must have a legal basis and remain exceptional in nature, and that in the case of VPPs, any assessment of the appropriateness of protective measures depends largely on the role the VPPs intend to play in the proceedings. Should a VPP who benefits from protective measures intend to testify during the proceedings, or should the VPP possess information potentially of interest to either of the Parties, then the Defence should be afforded the opportunity to contest the protective

²³ First Motion, para. 23.

²⁴ First Motion, para. 25.

²⁵ First Motion, para. 28; Second Motion, para. 17; Third Motion, para. 24.

²⁶ Sabra Response, paras 2, 7, 9-10, 15, 17, 20.

²⁷ Sabra Response, paras 2, 22, 26.

measures in question. The LRV should be required to exercise a high degree of vigilance when dealing with information in the possession of the VPPs.²⁸

D. Prosecution Response

14. The Prosecution requests that the Pre-Trial Judge deny the LRV's First Motion and Second Motion "for want of a legal basis" for anonymity *vis-à-vis* the Parties. In the alternative, the Prosecution requests that anonymity not be granted to any VPP who will seek to actively participate in the proceedings, either by testifying and/or calling or tendering evidence on any topic, and that the threshold for granting VPPs anonymity must be consistent with Rule 93.²⁹

IV. Statement of Reasons

A. General Principles

15. An accused is entitled to a fair and public hearing, subject to measures ordered by the Pre-Trial Judge or a Chamber for the protection of victims and witnesses.³⁰ The Rules provide for the protection of VPPs. Rule 133(A) recognises that appropriate measures for the privacy and protection of victims may be taken, provided that the measures are consistent with the rights of the accused. Rule 115 empowers the Pre-Trial Judge to order interim non-disclosure of the identity of a victim who may be in danger or at risk until appropriate protective measures have been implemented, but only in exceptional circumstances.

16. Both Rules 115 and 133(A) thus constitute derogations from the rights of the accused. As such, the measures should only be accorded when the interests of justice so require.³¹ As stated, in the case of Rule 115, the moving party must therefore demonstrate *inter alia* the exceptional circumstances justifying the measure and the risk that would be occasioned by denying it. These circumstances must be assessed on a case-by-case basis for each VPP

²⁸ Badreddine Response, paras 3, 4.

²⁹ Prosecution Response, paras 2, 3, 5, 10, 11. Rule 93 relates to the questioning of anonymous witnesses by the Pre-Trial Judge.

³⁰ Art. 16(2) STLSt.

³¹ See STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Décision relative à la requête du Procureur sollicitant des mesures provisoires de protection de témoins experts*, 13 December 2012, para 24. (the "Decision of 13 December 2012").

applying for protective measures. Furthermore, the measure should generally be rescinded sufficiently in advance of the trial to allow adequate time for preparation of the defence.³²

B. Confidentiality and Anonymity

17. The Pre-Trial Judge must determine what risk to a VPP, if any, can be addressed by the protective measures sought.

18. The determination is not whether the accused's rights are prejudiced as a result of the measure, but rather whether the interests of justice require that the accused be deprived of their rights, or part of them, in this regard, and in the affirmative, whether a balance between the interests concerned can be established.³³

a. Confidentiality

19. The confidentiality of the identities of VPPs *vis-à-vis* the public is only envisaged by Rule 133.³⁴ According to the jurisprudence of other international tribunals, it can only be granted under specific conditions.³⁵ There must be a real, objective fear for the security of the VPP and the measure taken should be strictly necessary.³⁶ The measure must also be the least restrictive one necessary to provide for the protection of the applicant.³⁷

³² Decision of 13 December 2012, para. 25.

³³ *Id.*, para. 24.

³⁴ Rule 133(C) in particular concerns the non-dissemination of information to third parties. See STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012, para. 12.

³⁵ Decision of 13 December 2012, para. 29.

³⁶ International Criminal Tribunal for the former Yugoslavia ("ICTY"), Case No. IT-95-14/2-A. *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Motion for Clarification and Motions for Protective Measures, 13 October 2003, para. 23; International Criminal Tribunal for Rwanda ("ICTR"), Case No. ICTR-97-21-T, *The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* – under seal - Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, para. 17.

³⁷ ICTY, Case No. IT-02-54-T, *Prosecutor v. Slobodan Milošević*, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, para. 5: "Furthermore, the minimum measure required to protect the witness's legitimate fears should be utilised."; ICTR, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19, Special Court for Sierra Leone ("SCSL"), Case No. SCSL-03-01-T, Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388, and 390, 13 March 2008, p. 4 at fn. 14.

b. Anonymity

20. With respect to maintaining the anonymity of VPPs *vis-à-vis* the Parties and not only the public, this poses the difficulty that such a measure inherently risks violating the rights of the accused.

21. A distinction must be made between requests for the total anonymity, being for the entire duration of the proceedings, and interim anonymity.

i. Total anonymity

22. While the arguments of, and jurisprudence cited by, the LRV may illustrate the position in other *fora*, the Pre-Trial Judge is of the view that, before the Tribunal, the total anonymity of VPPs *vis-à-vis* the Parties for the duration of the proceedings cannot legally be recognised.

23. First, total anonymity is not provided for by the Rules, and notionally contravenes the rights of the accused. Indeed, it is not conceivable to convict a person for a crime committed against a VPP who is involved in the trial proceedings and yet, by remaining anonymous, does not allow the accused a full defence.³⁸

24. Moreover, Article 25 of the Statute regulates compensation to victims, and recognises that the Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.³⁹ As a general matter, a VPP (or persons claiming through him) may thereafter “bring an action in a national court or other competent body to obtain compensation”, and the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person.⁴⁰ Where a VPP is found to have suffered harm resulting from an act for which an accused is held criminally responsible, and then proceeds against the accused for compensation, the accused is entitled to know the identity of the claimant VPP in order to be able to contest whether the claimant was indeed harmed by the accused’s alleged criminal act, and is thereby entitled to seek compensation.

³⁸ International Criminal Court (“ICC”), Situation in the Democratic Republic of the Congo *in the case of The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victims’ participation, 18 January 2008, para. 131: “While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial.”

³⁹ Art. 25(1) STLSt.

⁴⁰ Arts 25(2)-(4) STLSt.

25. Furthermore, where a particular VPP calls or cross-examines witnesses, or tenders evidence during the proceedings, files submissions on sentencing or participates in an appeal,⁴¹ this active form of participation by the VPP requires that the accused be informed of that VPP's identity at the very least, in order to be able to safeguard the accused's rights to a fair trial.

26. It is true that the Rules do provide for instances where anonymity may be granted, but these are tightly constrained by a special procedure, and they does not apply to VPPs.⁴²

27. For the foregoing reasons, the Pre-Trial Judge declines to recognise the validity of total anonymity.

ii. Interim anonymity

28. Interim anonymity, on the other hand, can be compatible with balancing the rights of the accused against the interests of VPPs, subject to certain stringent limitations. Rule 115(A) allows the Prosecutor to apply for the interim non-disclosure of the identity of a victim or witness in exceptional circumstances, and "until appropriate protective measures have been implemented." Rule 115(C) expressly requires that — subject to Rule 133 — the identity of the victim "shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."⁴³

29. The validity of the measure depends on the duration of the anonymity sought, when viewed in light of the time required for the rights of the accused to be balanced effectively therewith. While recourse to the Rule is on the face of it limited to the Prosecutor's discretion, to deprive the Defence and the LRV of the same facility would not be justified.⁴⁴ The essence of the Rule is to protect victims and witnesses and should therefore apply to all participants in the proceedings. In any event, Rule 133(A) empowers the Pre-Trial Judge and Trial Chamber to order "appropriate measures" for the privacy and protection of victims, and

⁴¹ These initiatives are available to VPPs, subject to judicial authorisation, pursuant to Rules 87(B)-(D) and 171(B).

⁴² Rule 93 — the questioning of anonymous witnesses by the Pre-Trial Judge — is inapplicable as it is limited to witnesses.

⁴³ See also Rule 116, which permits the Prosecutor to apply to be relieved of an obligation under the Rules to disclose that material that would ordinarily be required under Rule 110 or 113, but subject to specific conditions.

⁴⁴ ICTR, *The Prosecutor v Callixte Kalimanzira*, Case No. ICTR-2005-88-I, Decision on Prosecution Motion for Protective Measures, 8 November 2007, para. 3: "A further consideration [with respect to measures for the protection of witnesses] is trial fairness, which favours similar or identical protective measures for Defence and Prosecution witnesses."

such measures must include those envisaged by Rule 115(A) when the other requirements elaborated in Rule 115(A) are met.

30. Determining the duration of the interim anonymity sought depends, in turn, on the role the VPP is to play in the proceedings. The participation of VPPs is generally intended to “permit their views and concerns to be presented and considered at stages of the proceedings” where appropriate.⁴⁵ Accordingly, the Rules provide them with certain basic entitlements.⁴⁶ VPPs are furthermore entitled to participate in proceedings before a Judge or Chamber, subject to prior judicial authorisation, and are in particular permitted to call or cross-examine witnesses and to tender evidence.⁴⁷ Where a VPP plays an active role in the proceedings, for instance by calling or cross-examining witnesses, tendering evidence or participating in sentencing or appeal proceedings, then care must be taken to ensure that their identities are provided to the Parties — and to the accused in particular — sufficiently in advance of that action in order to permit them to prepare adequately.

31. Where a VPP assumes a passive role in the proceedings, however, the provision of his identity to the Parties can be delayed until such time as the interests of justice require otherwise, which is normally no later than the start of the trial.

C. Risk assessment

32. In the Decision of 8 May 2012, the Pre-Trial Judge stated that “[i]f persons who have been granted VPP status wish to remain anonymous or seek other protective measures, a request to that end should be submitted to the Pre-Trial Judge as soon as possible, pursuant to Rule 133(A) of the Rules.” Such requests were to follow a risk assessment for the relevant applicant(s) with the assistance of the VWU.⁴⁸

33. The VWU possesses unique competencies, enshrined in Article 12(4) of the Statute and further detailed by Rule 50, to provide measures to protect the safety, physical and psychological well-being, dignity and privacy of victims. In another case before the Tribunal,

⁴⁵ Art. 17, STLSt.

⁴⁶ See Rules 51(G)(i) (legal representation), 86(F) (receive information about procedural developments in the case); 87(A) (receive documents in the case file, subject to any restrictions imposed); 143 (make opening statements); 147(A) (make closing arguments); 147(B) (file a final trial brief); 168(A) (notice of judgement); 171(E) (presence at pronouncement of sentence); and 188(D) (presence at pronouncement of appeal judgement). See also Rules 91(B), 125(E), 161(A), 108(B), 114, 116(E) and 155(A)(i)(b).

⁴⁷ See, *inter alia*, Rule 87(B)-(D) (call or cross-examine witnesses, tender evidence, file submissions on sentencing, participate in an appeal) and 171(B).

⁴⁸ Decision of 8 May 2012, para 131.

the Appeals Chamber has recognised that a “judge does not generally possess the expertise required to perform such a task”.⁴⁹

34. In annexes to the Motions,⁵⁰ the LRV has submitted individual overviews of the situation of each VPP requesting protective measures. In further annexes to the Motions, the LRV has filed reports from the VWU which set out the methodology and findings of the VWU, in respect of its risk assessments of each individual VPP who has applied for protective measures.⁵¹

35. The VWU’s reports indicate the risk level related to the exposure to the public (either deliberately or inadvertently) of the VPPs’ identities, according to different possible categories. Where VPPs are assessed to have a certain risk rating, the VWU considers that measures mitigating the risk are required. Some VPPs requesting anonymity, and some VPPs requesting confidentiality, are assessed with a level of risk implying that measures mitigating the risk are not required. All of the remaining VPPs applying for protective measures are assessed with a risk rating implying that the VWU effectively recommends protective measures.

36. The Pre-Trial Judge has analysed these 31 confidential and *ex parte* risk assessments for each of the VPPs, and notes that the VWU’s risk assessments neither recommend nor support the specific protective measures requested or that would be required in order to effectively mitigate the risk. The LRV must be able to demonstrate that the VWU is satisfied that the protective measures requested are appropriate for mitigating the risk to the VPPs.

37. In the absence of any indication that the VWU is satisfied that the protective measures requested by the LRV are appropriate for mitigating the risk to the VPPs concerned, the Pre-Trial Judge is unable to grant the requests in the Motions. In any event, for the reasons stated above, the Pre-Trial Judge could not grant a request for total anonymity.

⁴⁹ STL, *In the matter of El Sayed*, Case No. CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed against Pre-Trial Judge’s Decision of 8 October 2012, 23 November 2012, para. 15.

⁵⁰ First Motion, confidential Annex 1; Second Motion, confidential Annex 1; Third Motion, confidential Annex 1.

⁵¹ First Motion, confidential and *ex parte* Annex 19; Second Motion, confidential and *ex parte* Annex 8, Third Motion, confidential and *ex parte* Annex 10.

V. Conclusion

38. Based on the foregoing analysis, the Pre-Trial Judge rejects the Motions, since they are not supported by an assessment of the VWU on the appropriateness of the protective measures sought. Furthermore, in respect of the First Motion and the Second Motion, they appear to contain requests for total anonymity by the VPPs concerned which cannot be granted in principle.

39. Consequently, the LRV must disclose the identity of the VPPs to the Parties. However, and as requested by the LRV, in order to inform the VPPs of the content of this decision and to take any appropriate measure, the deadline for disclosure will not run before 15 January 2013.

40. The LRV is nevertheless invited, if he so wishes, to file new requests for protective measures on behalf of the VPPs whose requests were submitted in the Motions, taking into account this decision and the VWU's assessment of the protective measures sought. With respect to any request for interim anonymity *vis-à-vis* the Parties, this assessment should take into consideration the expected role of the VPPs in the proceedings. Such submission should specify — in respect of each VPP — the VWU's assessment of the threat as well as its views on the appropriateness of the protective measures requested, be that confidentiality *vis-à-vis* the public, interim anonymity *vis-à-vis* the public and the Parties, or some other appropriate measure.

41. The LRV is furthermore invited to provide the clarification sought by Counsel for Mr. Sabra of the issues surrounding common legal representation and anonymous VPPs, notably their obligation to disclose exculpatory material, and their access to other materials, should interim anonymity be accorded to any VPPs.⁵²

⁵² Sabra Response, paras 33-36.

PUBLIC

FOR THESE REASONS,

PURSUANT TO pursuant to Article 12(4) of the Statute, and Rule 133(A) of the Rules;

THE PRE-TRIAL JUDGE,

DENIES the requests for protective measures made in the First Motion, the Second Motion and the Third Motion;

INVITES the LRV to resubmit, if he so wishes, requests for protective measures made on behalf of the VPPs in the First Motion, the Second Motion and the Third Motion in accordance with this decision; and

SUSPENDS the disclosure of the identities of the VPPs to the Parties until 15 January 2013 pending the filing of any appropriate requests.

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

Leidschendam, 19 December 2012



Daniel Fransen
Pre-Trial Judge

