



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Herman von Hebel**

Date: **30 January 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON THE MOTION OF THE LEGAL REPRESENTATIVE OF VICTIMS
SEEKING CERTIFICATION TO APPEAL THE DECISION OF
19 DECEMBER 2012 ON PROTECTIVE MEASURES**

Office of the Prosecutor:
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I. Introduction

1. In this decision, the Pre-Trial Judge rules on the motion of the Legal Representative of Victims (the “LRV”)¹ seeking certification to appeal the Pre-Trial Judge’s “Decision on the Legal Representative of Victims’ First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings” (the “Impugned Decision”).²

II. Procedural background

2. Pursuant to the Pre-Trial Judge’s decision of 21 September 2012,³ the LRV filed his first, second and third notices of the disclosure of the identities of 34 victims participating in the proceedings (“VPPs”) on 3 October 2012,⁴ 15 October 2012⁵ and 2 November 2012,⁶ respectively.

3. On 16 October 2012, the Prosecution filed its submission for an order reclassifying — as confidential — the identities and applications of the VPPs.⁷ On 23 October 2012, the LRV⁸ and the Victims’ Participation Unit (the “VPU”)⁹ each filed their responses, following which the Prosecution filed a reply on 5 November 2012.¹⁰

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Motion of the Legal Representative of Victims Seeking Certification of the “Decision on the Legal Representative of Victims’ First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings”, 21 December 2012.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Legal Representative of Victims’ First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, 19 December 2012.

³ 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 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.

⁵ 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.

⁶ 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.

⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission for an Order on Re-classification of Victims Identities and Applications for Victim Participation Status, as Confidential, 16 October 2012.

⁸ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, 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”, confidential, 23 October 2012, with an amended public redacted version filed on 24 October 2012.

⁹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Response of the Victims’ Participation Unit to Prosecution’s Request for Reclassification of Victims’ Identities and Applications, 23 October 2012.

¹⁰ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Reply to 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’ and ‘Response of the

4. On 29 October 2012, the LRV filed a first motion for protective measures for 17 VPPs.¹¹ On 2 November 2012, the LRV filed a second¹² and third¹³ motion for protective measures for six and eight VPPs, respectively. The First Motion and the Second Motion sought the total anonymity of the VPPs concerned; the Third Motion sought the confidentiality of the VPPs concerned, that is, an order limiting the disclosure of the VPPs' identities to the Parties.

5. On 13 December 2012, the LRV filed his witness and exhibit lists, which contained no VPPs who had requested anonymity as a protective measure.¹⁴

6. On 19 December 2012, following receipt of Responses from the Counsel for Messrs Sabra¹⁵ and Badreddine¹⁶, as well as the Prosecution,¹⁷ the Pre-Trial Judge rendered the Impugned Decision denying all 31 requests for protective measures.¹⁸

Victims' Participation Unit to Prosecution's Request for Reclassification of Victims' Identities and Applications", Confidential, 5 November 2012, with a Public Redacted Version filed the same day. See STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Reply to 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' and 'Response of the Victims' Participation Unit to Prosecution's Request for Reclassification of Victims' Identities and Applications'", 25 October 2012, and Corrected Version of Scheduling Directive from the Pre-Trial Judge, 30 October 2012, which granted leave to reply.

¹¹ STL, *The Prosecutor v. Ayyash et al.*, First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012 ("First Motion").

¹² STL, *The Prosecutor v. Ayyash et al.*, Second Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 2 November 2012 ("Second Motion").

¹³ STL, *The Prosecutor v. Ayyash et al.*, Third Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of Eight Victims Participating in the Proceedings, 2 November 2012 ("Third Motion").

¹⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, public redacted version List of Witnesses and Exhibits Filed on Behalf of the Participating Victims with Confidential and *Ex Parte* Annexes, 13 December 2012.

¹⁵ 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.

¹⁶ 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").

¹⁷ 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

7. On 21 December 2012, the LRV filed a motion seeking certification to appeal the Impugned Decision (the “Motion”).¹⁹

8. On 11 January 2013, the Prosecution filed its response to the Motion, in which it took no position on the Motion but reserved its rights to participate in proceedings before the Appeals Chamber should certification to appeal the Impugned Decision be granted.²⁰

9. On 18 January 2013, the Pre-Trial Judge issued an interim decision in this matter, ordering the LRV to file a notice before the Pre-Trial Judge either identifying the VPPs on whose behalf he has filed the Motion, or confirming that he is acting on behalf of all current VPPs.²¹

10. On 24 January 2013, the LRV filed a notice pursuant to that interim order, advising that in filing the Motion, the LRV is acting on behalf of all current VPPs.²²

III. The Submissions of the LRV

11. Rule 126 of the Rules of Procedure and Evidence (the “Rules”) requires that decisions on motions requiring certification, such as the instant case:

are without interlocutory appeal save with certification, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. The LRV seeks certification to appeal the Impugned Decision pursuant to Rule 126(C) and the leave granted by the Pre-Trial Judge to file motions or briefs on any

Legal Representatives First Motion for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 14 November 2012.

¹⁸ See footnote 2 above.

¹⁹ See footnote 1 above.

²⁰ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to the Motion of the Legal Representative of Victims Seeking Certification of the “Decision on the Legal Representative of Victims’ First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings”, 11 January 2013.

²¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Interim Order on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measures, 18 January 2013.

²² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims Pursuant to the Pre-Trial Judge’s Interim Order of the 18 January 2013, 24 January 2013, para. 5. Furthermore, the LRV submits that “absent any indication to the contrary, all future filings or submissions by the LRV should be presumed to be so filed”, *Id.*, para. 6.

issue affecting the victims' personal interests.²³ The LRV submits that the following two issues both satisfy the requirements of Rule 126(C): (1) whether VPPs have a *per se* right to request total anonymity as a protective measure; and (2) whether the Pre-Trial Judge is precluded from granting a VPP any protective measure absent an indication from the Victims and Witnesses Unit (the "VWU") that a protective measure is appropriate.²⁴

13. With respect to the first issue, the LRV argues that the Impugned Decision, by "[r]ejecting 'total anonymity' as a protective measure *per se*, without assessing the individual security situations as well as the necessity and proportionality of each requested measure, effectively removes, for a significant number of the VPPs, their right of participation, since they will be compelled by their circumstances to withdraw from the proceedings in order to protect their security and/or privacy."²⁵ The LRV submits that the Impugned Decisions' rejection of "total anonymity" also significantly affects the expeditiousness of the proceedings, in that it "will require a number of steps for its implementation which may prove time-consuming and could further delay the proceedings."²⁶ Lastly, the LRV alleges that if the rejection of total anonymity as a protective measure "will result in [the] withdrawal of (a significant number of) VPPs, their right to reparation will also be removed", thereby affecting the outcome of the trial.²⁷

14. With respect to the second issue, namely whether the Pre-Trial Judge is precluded from granting a VPP any protective measure absent an indication from VWU that the protective measure is appropriate, the LRV submits that the imposition of this requirement has a similar effect on the fairness of the proceedings.²⁸ In the LRV's view, it would serve to make the VWU — and not the Judge — the final arbiter in determining protective measures,²⁹ and the resubmission to the VWU of the requests for protective measures would adversely affect the expeditiousness of the proceedings.³⁰

²³ Motion, para. 1, citing 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 the Proceedings before the Pre-Trial Judge, 18 May 2012.

²⁴ Motion, paras 2, 19.

²⁵ *Id.*, para. 22.

²⁶ *Id.*, para. 23.

²⁷ *Id.*, para. 24.

²⁸ *Id.*, para. 25.

²⁹ *Id.*, para. 26.

³⁰ *Id.*, para. 27.

15. The LRV avers furthermore that an immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings,³¹ and would establish the clarity required in order to advise those victims whose applications remain outstanding.³²

16. In addition to his request for certification, the LRV seeks the suspension of the Impugned Decision pending the resolution of the matter.³³

IV. Discussion

17. The application of Rule 126 was considered in a Decision by the Pre-Trial Judge of 18 September 2012.³⁴ Furthermore, the Appeals Chamber has since held with respect to Rule 126 that:

[...] decisions on certification are not discretionary and a Chamber must certify an issue for appeal once it is satisfied that the two requirements of Rule 126(C) are met. However, these requirements are strict and a Chamber must take great care in assessing them.³⁵

18. The Appeals Chamber emphasised the fact that, in order to justify certification to appeal, a request must meet two cumulative requirements. On the one hand, that issue must be one which *would significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. On the other hand, issues are only certifiable where an *immediate* resolution of them by the Appeals Chamber may advance the proceedings.³⁶

19. The Pre-Trial Judge now turns to the two issues raised by the LRV, without prejudice to the question of whether all current VPPs — even those who have not requested protective measures — have the necessary standing to seek certification.³⁷ Dealing first with second issue raised, namely whether the VWU must indicate that a requested protective measure is appropriate, the Pre-Trial Judge is not persuaded that the submissions of the LRV meet the

³¹ *Id.*, paras 28-29.

³² *Id.*, para. 30.

³³ *Id.*, para. 32.

³⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Badreddine Defence Motion for Certification to Appeal the Decision of 29 August 2012, 18 September 2012 (the “Decision of 18 September 2012”), para. 8.

³⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.2, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012 (“Appeals Chamber Decision”), para. 15.

³⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Requests for Certification of the Decisions of 25 October 2012 and 15 November 2012, 19 December 2012; see Appeals Chamber Decision, paras 13, 14.

³⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims Pursuant to the Pre-Trial Judge’s Interim Order of the 18 January 2013, 24 January 2013.

requirements of Rule 126(C). This is because the Appeals Chamber has effectively pronounced on the matter in another case before it,³⁸ and it was partly on this authority that the Pre-Trial Judge relied in the Impugned Decision.³⁹ In its decision, the Appeals Chamber held as follows:

In a previous decision, we noted that the VWU can speak authoritatively about the risk faced by witnesses. A judge does not generally possess the expertise required to perform such a task. The VWU is the competent body to conduct risk assessments and weight must be given to its expertise. However, the VWU's expertise does not justify rubber-stamping its assessments; that it can speak authoritatively does not absolve a Chamber from consideration of whether it has erred.⁴⁰

20. In another decision concerning the same matter, the Appeals Chamber held:

It may be that on such reconsideration the Prosecutor will be able to demonstrate that the VWU is happy with the methodology adopted in making the risk assessment; or that in any event the VWU agrees with the Prosecutor's assessment.⁴¹

21. From the foregoing analysis of the role of the VWU, it is clear that the VWU can speak authoritatively about the risk faced by an applicant for protective measures, and that a judge does not generally possess the expertise required to perform such a task. It would be consistent with this analysis — and logical in its own right — for the VWU furthermore to advise the requesting party on the appropriateness of the protective measures sought. Reliance by a judge on the provision of a report by a competent body having unique expertise — such as the VWU — does not amount to a delegation or transfer of the judicial function by the former to the latter. To appropriate the language used by the Appeals Chamber, the VWU's unique expertise does not justify rubber-stamping its assessments, and its assessment of particular protective measures requested does not absolve the Pre-Trial Judge or a Chamber from its own consideration of the matter rightly before it.

22. As detailed above, issues are only certifiable where their immediate resolution by the Appeals Chamber may advance the proceedings. Since from the foregoing this is not such a matter, it follows that this requirement of Rule 126(C) has not been met, and the LRV's request for certification to appeal it is denied.

³⁸ 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 (the "*El Sayed Appeal Decision*"), para. 15.

³⁹ Impugned Decision, para. 33.

⁴⁰ *El Sayed Appeal Decision*, para. 15 (footnote omitted).

⁴¹ STL, *In the matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, Public with Confidential and *Ex Parte* Annexes,, 7 October 2011, para. 34.

23. Regarding the issue of “total anonymity”, the Pre-Trial Judge is likewise not persuaded that the arguments of the LRV meet the requirements of Rule 126(C). It is speculative to claim that by denying the validity of total anonymity of VPPs in deference to the rights of the accused, the Pre-Trial Judge is effectively depriving those VPPs of their participatory rights because the VPPs may withdraw from participating in the proceedings.

24. Nevertheless, the Pre-Trial Judge is satisfied that the Motion has identified a matter of principle, the determination of which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and the immediate resolution of which by the Appeals Chamber may materially advance the proceedings. That matter is whether or not total anonymity, as that term was defined in the Impugned Decision, is a valid protective measure that a VPP may be accorded for the duration of the proceedings, and which the VWU may recommend.

25. Without certainty in this regard, the VPPs who have applied for and been denied the protective measure of total anonymity may be irremediably prejudiced if their names would be divulged to the Parties, since this cannot be rectified *ex post facto*. The immediate resolution of this matter would preclude the potential prejudice that might be caused to the VPPs, and whom the Appeals Chamber may otherwise decide are validly entitled to request total anonymity as a protective measure. It would also clarify the mandate of the VWU, and enable the VWU to exercise its mandate promptly.

26. Certification to appeal this aspect of the Impugned Decision is accordingly granted.

27. In partially granting this certification to appeal, the Pre-Trial Judge remains cognisant of his responsibility, pursuant to Rule 89(B), to ensure that the proceedings are not unduly delayed, and to take any measures necessary to prepare the case for a fair and expeditious trial. Consequently, the Impugned Decision is suspended only to the extent that its execution requires the clarification of the Appeals Chamber regarding the issue of total anonymity. The VWU remains obliged, in the interim, to furnish its advice on the appropriateness of confidentiality as a protective measure sought by the relevant VPPs. To temporarily relieve the VWU of this obligation would only serve to postpone it, which would amount to further undue delay.

V. Ancillary Matter

28. The Pre-Trial Judge recalls that he is seised of a request by the Prosecution to reclassify — as confidential — the identities and applications of the VPPs, which would serve to provide access thereto to the Parties. The LRV and the VPU have each responded to this request, and the Prosecution has replied.⁴² Since a decision on the Prosecution's request is subject to this present decision, which refers the matter of the protective measures to which VPPs are entitled to the Appeals Chamber, the Pre-Trial Judge considers that a decision on the Prosecution's request should be deferred until after the resolution of the appeal.

⁴² See para. 3 above.

VI. Disposition

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 126(C);

GRANTS the Motion to appeal the Impugned Decision inasmuch as it determined that “total anonymity” is not a valid protective measure;

DENIES the Motion in all other respects;

SUSPENDS the Impugned Decision only to the extent that its execution requires the clarification of the Appeals Chamber regarding the issue of total anonymity; and

RECALLS that the VWU, in the preparation of its risk assessments, remains obliged to comment on the appropriateness of the protective measures requested.

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

Leidschendam, 30 January 2013.



A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a vertical line that curves downwards.

Daniel Fransen
Pre-Trial Judge

