



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: **14 March 2013**

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' RESUBMISSION
OF EIGHT REQUESTS FOR PROTECTIVE MEASURES (CONFIDENTIALITY)**

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Mr. Norman Farrell

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Counsel for Mr. Mustafa Amine Badreddine:
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I. Introduction

1. In this decision, the Pre-Trial Judge rules on the Legal Representative of Victims' (the "LRV") resubmission of requests for confidentiality as a protective measure by eight victims participating in the proceedings (the "Notice").¹

II. Procedural background

2. Pursuant to the Pre-Trial Judge's decision of 21 September 2012,² the LRV filed notices of the disclosure of the identities of 34 victims participating in the proceedings (the "VPPs").³

3. On 29 October 2012, the LRV filed a first motion for protective measures for 17 VPPs (the "First Motion").⁴ On 2 November 2012, the LRV filed a second⁵ and third⁶ motion for protective measures for six and eight VPPs, respectively (the "Second Motion" and "Third Motion"). 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.

4. On 16 November 2012, Counsel for Messrs Sabra⁷ and Badreddine⁸ filed their responses to the First Motion, Second Motion and Third Motion. On 23 November 2012, the Prosecution filed its response to the same.⁹

¹ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims of Resubmission of Eight Requests for Protective Measures (Confidentiality), 15 February 2013. All further references to filings and decisions relate to this case and case number unless otherwise stated.

² 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").

³ Notice of the Legal Representative of Victims of Disclosure of the Identity of Thirteen Victims Participating in the Proceedings, 3 October 2012; Second Notice of the Legal Representative of Victims of Disclosure of the Identity of Nine Victims Participating in the Proceedings, 15 October 2012; Third Notice of the Legal Representative of Victims of Disclosure of the Identity of Twelve Victims Participating in the Proceedings, 2 November 2012.

⁴ First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012.

⁵ Second Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 2 November 2012.

⁶ Third Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of Eight Victims Participating in the Proceedings, 2 November 2012.

⁷ 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.

⁸ *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").

5. On 19 December 2012, the Pre-Trial Judge rendered a decision denying all pending requests for protective measures *inter alia* because they were submitted absent the VWU's assessment of the appropriateness of the measures requested.¹⁰ In the same decision, the Pre-Trial Judge invited the LRV to resubmit, if he so wished, requests for protective measures made on behalf of the VPPs in the First Motion, Second Motion and Third Motion, in accordance with the orders.¹¹

6. On 21 December 2012, the LRV filed a motion seeking certification to appeal the Decision of 19 December 2012,¹² and on 11 January 2013, the Prosecution filed its response.¹³

7. On 30 January 2013, the Pre-Trial Judge granted certification for the LRV to appeal a discrete issue, which appeal is currently pending before the Appeals Chamber.¹⁴

8. On 5 February 2013, the Pre-Trial Judge invited the LRV to resubmit any request for protective measures on behalf of those VPPs concerned by the Third Motion, together with the Victims and Witnesses Unit's ("VWU") risk assessment and assessment of the appropriateness of the protective measure requested, if he so wished, by 15 February 2013.¹⁵

9. On 15 February 2013, the LRV filed the Notice.

III. Submissions

10. In the Notice, the LRV re-submits requests for protective measures on behalf of the eight VPPs concerned by the Third Motion. The re-submission seeks the reclassification of the identities of eight VPPs as confidential, "in the sense of disclosing their names to the Parties, but not to the public" and relies on arguments previously advanced in the Third

⁹ 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").

¹⁰ Decision on the Legal Representative of Victims' First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, 19 December 2012 (the "Decision of 19 December 2012").

¹¹ Decision of 19 December 2012, disposition.

¹² 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.

¹³ 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.

¹⁴ Decision on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measures, 30 January 2013

¹⁵ Scheduling Directive from the Pre-Trial Judge, confidential, 5 February 2013.

Motion.¹⁶ The re-submission includes the VWU's risk assessment and assessment of the appropriateness of the protective measures requested, pursuant to the Decision of 19 December 2012.¹⁷

11. In the Third Motion, the LRV relies on Article 12(4) of the Statute and Rule 133 of the Rules of Procedure and Evidence (the "Rules"). In particular, the LRV submits that pursuant to Rule 133(C) of the Rules, expunging names and identifying information from the Tribunal's public records, together with the non-disclosure to the public of any records identifying a VPP, are of relevance.¹⁸ The LRV recognises that any such measures have to be appropriate for the privacy and protection of victims, and they must be consistent with the rights of the accused.¹⁹

12. The LRV makes further submissions regarding the requirement that protective measures be both necessary and proportionate, taking note of prior jurisprudence of the International Criminal Court ("ICC") which he avers "instructs the [...] protective measure requests".²⁰

13. With respect to the *necessity* of confidentiality as a protective measure (i.e. seeking to keep the identities of VPPs from the public domain), the LRV submits that the nature of the threat they face ranges from intimidation and trauma to grave physical injury and death, and that the threat can originate from the locality or neighbourhood in which they live or work, from specific members, or from hostile organisations or family members. Furthermore, the age and/or psychological condition of the VPP may exacerbate the threat in some cases.²¹

14. With respect to the *proportionality* of confidentiality measures, the LRV submits that the measure sought is proportionate since, on the one hand, the rights of the accused are unaffected, and on the other hand, most of the VPPs have effectively conditioned their participation in the proceedings on the measure of confidentiality being accorded, such that

¹⁶ Notice, para. 2.

¹⁷ *Id.*, para. 1.

¹⁸ Third Motion, para. 13.

¹⁹ *Id.*, para. 14.

²⁰ Notice, para. 4; Third Motion, paras 15-16, citing ICC-01/04-01/06, *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber I Decision on the Prosecution and Defence Applications for Leave to Appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, paras 27-28; and ICC-01/05-01/08, *Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber III Decision Defining the Status of 54 Victims who Participated at the Pre-Trial Stage, and Inviting the Parties' Observations on Applications for Participation by 86 Applicants, 22 February 2010, paras 25-26

²¹ Third Motion, para. 18

“granting their requests is in the majority of cases the only legal means in which their continued participation in the trial can be assured.”²²

15. Finally, the LRV requests that should the Pre-Trial Judge consider that any of these VPPs do not warrant confidentiality as a protective measure, the Pre-Trial Judge accord the LRV a reasonable period within which to inform the VPPs, and to consult with them as regards their continued participation in the proceedings.²³

IV. Discussion

16. The Pre-Trial Judge has specified that if a VPP seeks protective measures, a request to that end should be submitted to him pursuant to Rule 133(A) of the Rules, and such a request must follow a risk assessment of the relevant applicant(s) with the assistance of the VWU.²⁴ The VWU must also provide its assessment of whether the protective measures requested are appropriate in mitigating the risk to the VPPs; the absence of such assessment was in part the basis on which the initial requests were rejected in the Decision of 19 December 2012.²⁵

17. The Pre-Trial Judge observes that the Notice, together with its annexes, now meet the foregoing requirements. Confidential Annex 1 to the Notice is an overview of the applications of the eight VPPs for protective measures, while confidential and *ex parte* Annexes 2-9 contain information on the eight requests themselves, together with the VWU assessment. Confidential and *ex parte* Annex 10 contains the VWU’s report.

18. Rule 133 of the Rules concerns Measures for the Protection of Victims and Witnesses. Neither Rule 133(A) of the Rules, nor any other provision, specifies expressly the further legal criteria of necessity and proportionality to which the LRV refers. Nevertheless, previous pronouncements of the Pre-Trial Judge in this regard have effectively determined that these criteria are implicit in the current construction of Rule 133(A) of the Rules. Furthermore, and as the LRV advances, the approach is consistent with the evolution of the jurisprudence of the ICC. It is clear from the terms of Rule 133(A) of the Rules that “appropriate measures for the privacy and protection of victims and witnesses” presupposes that measures of some kind are necessary to protect their beneficiaries; they would otherwise be inappropriate. The same Rule states that the measures have to be “consistent with the rights of the accused”, and

²² *Id.*, paras 20-21.

²³ *Id.*, para. 24.

²⁴ Decision of 19 December 2012, para. 32

²⁵ *Id.*, para. 36.

therefore implies that they must be proportionate, insofar as they may restrict the rights of an accused only as much as necessary while still being sufficient to provide the protection required.

19. In addition to the foregoing, the Statute of the Tribunal mandates that its proceedings must in principle be public, subject to exceptional measures ordered to the contrary.²⁶ As the Appeals Chamber has stated:

We are mindful of and emphasize the need for transparency in the proceedings before this Tribunal, especially considering that the accused are entitled to a “fair and *public* hearing” under Articles 16(2) and 20(4) of the Statute. Rules 96 and 136 of the Rules reflect this important principle and permit exceptions only in specific and limited circumstances.²⁷

20. When considering the provision of protective measures in general, the Pre-Trial Judge has previously held that:²⁸

[...] Rules 115 and 133(A) [...] constitute derogations from the rights of the accused. As such, the measures should only be accorded when the interests of justice so require. The Pre-Trial Judge must determine what risk to a VPP, if any, can be addressed by the protective measures sought. 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 [if] in the affirmative, whether a balance between the interests concerned can be established.²⁹

21. With respect to the protective measure of confidentiality in particular, the Pre-Trial Judge held:

The confidentiality of the identities of VPPs *vis-à-vis* the public is only envisaged by Rule 133. According to the jurisprudence of other international tribunals, it can only be granted under specific conditions. There must be a real, objective fear for the security of the VPP and the measure taken should be strictly necessary. The measure must also be the least restrictive one necessary to provide for the protection of the applicant.³⁰

22. The relevant ICC jurisprudence is therefore consistent with the approach that the Pre-Trial Judge has already employed with respect to Rule 133 of the Rules, and which approach will henceforth assist Parties and the LRV when determining whether and how to apply for protective measures.

23. In sum, protective measures must be:

²⁶ STLSt. Art 16(2)

²⁷ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Corrected version of Decision on the Pre-Trial Judge’s Request pursuant to Rule 68(G), 29 March 2012 (the “Appeals Chamber Decision”), para. 12.

²⁸ Decision of 19 December 2012, para. 15 *et seq*

²⁹ *Id.*, paras 16-18 (internal citations omitted).

³⁰ *Id.*, para 19 (internal citations omitted).

- a) necessary in the sense that there must be a real, objective fear for the security of the victim or witness, and the measures sought must be appropriate for their privacy and protection; and
- b) in the interests of justice and consistent with the rights of the accused, or proportionate, so that they restrict the rights of an accused — if at all — only as much as necessary while remaining both sufficient to provide the protection required for the victim or witness and consistent with the other relevant requirements of the Statute and the Rules, notably the principle of a public hearing.

24. Furthermore, as stated above, protective measures sought must be assessed by VWU, and such a request must follow a risk assessment of the relevant applicant(s) with the assistance of the VWU. The VWU must also provide its assessment of whether the protective measures requested are appropriate in mitigating the risk to the VPPs. In this way, the Pre-Trial Judge is provided with an objective assessment.

25. With respect to the requirement of proportionality in general, granting the protective measure of confidentiality would result in the Defence being aware of the VPPs' identities, but not the public. The risk of causing any prejudice to the accused thereby is minimal.³¹ The Pre-Trial Judge is unable to conclude at this stage that granting the protective measure of confidentiality to any of the individual applicants, whose applications for participation have been thoroughly reviewed, would be inconsistent with the rights of the accused.

26. The Pre-Trial Judge furthermore recalls the finding of the Appeals Chamber that all decisions and all submissions filed before that Tribunal shall be public unless there are exceptional reasons for keeping them confidential.³² In this instance, and with respect to the public, the Pre-Trial Judge is satisfied that alleviating the risks to which the VPPs would otherwise be exposed — and which are examined in the confidential annex to this Decision — justifies classifying the identities of these eight VPPs as confidential at this stage of the proceedings.

27. The Pre-Trial Judge has not considered the LRV's submission that most of the VPPs have effectively conditioned their participation in the proceedings on the measure of

³¹ The Pre-Trial Judge notes that VPPs benefitting from protective measures, and participating in other stages of the proceedings, may as a result have their modalities of participation limited accordingly.

³² Appeals Chamber Decision, paras 12-14.

confidentiality being accorded, and that granting their requests is in the majority of cases the only legal means in which their continued participation in the trial can be assured. This argument is misplaced. While Article 12(4) of the Statute does require the Tribunal to provide measures to protect the safety, physical and psychological well-being, dignity and privacy *inter alia* of VPPs, it does not entitle VPPs to dictate the terms of their participation. Victims are entitled to participate in proceedings in a manner consistent with the exigencies thereof. They are neither required to participate, nor to do so subject to conditions against their will.

28. In this decision, the Pre-Trial Judge has carefully examined the information available to him. This information includes the VWU's assessments of both the risk to the VPPs and of the appropriateness of confidentiality as an effective protective measure in each case. Furthermore, the Pre-Trial Judge's decision has taken into account whether or not the interests of justice require that protective measures be granted in each case.

29. In a confidential and *ex parte* Annex to this decision, the Pre-Trial Judge sets out his specific considerations of the applications of each of the eight VPPs for the protective measure of confidentiality.

30. The Pre-Trial Judge notes that — with respect to three individual VPPs — a final determination of their assessed level of risk, together with an assessment of the appropriateness of confidentiality as a protective measure, remains to be made, pending the receipt and analysis of supplementary information by the VWU.³³ The Pre-Trial Judge recalls that in his Decision of 21 September 2012, he determined that where the LRV, on the basis of an ongoing assessment, recognises that the protective measures which have been accorded to VPPs are no longer required, the LRV is authorised to reclassify them as public without further need for authorisation from the Pre-Trial Judge.³⁴ By extension of the same principle, and with respect to all VPPs applying for protective measures generally and to the three individual VPPs concerned by this decision, the LRV is likewise obliged to reassess the confidentiality of their identities as a protective nature should supplementary information come to light, and either reclassify them as public, or seise the Pre-Trial Judge with an appropriate request if necessary.

³³ Annex 10.

³⁴ Decision of 21 September 2012, para. 9

V. Disposition

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 133 of the Rules;

GRANTS the LRV's request;

ORDERS the LRV to reclassify the identities of the following VPPs as confidential: V012, V013, V027, V028, V033, V036, V037 and V038;



ORDERS the LRV to file a confidential notice notifying the Parties of these VPPs' identities;

ORDERS the LRV to reassess, on an ongoing basis, the need for the protective measures accorded by this decision; and

ORDERS that the annex to this decision be classified as confidential and *ex parte*.

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

Leidschendam, 14 March 2013



Daniel Fransen
Pre-Trial Judge