



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. Daryl Mundis, Acting Registrar**

Date: **31 May 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION'S REQUEST FOR THE RECLASSIFICATION AS
CONFIDENTIAL OF THE IDENTITIES AND APPLICATIONS OF VICTIMS
SEEKING TO PARTICIPATE IN THE PROCEEDINGS**

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



I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on the Prosecution's request for an order reclassifying, as confidential instead of confidential and *ex parte*, the identities and applications of persons seeking to participate in the proceedings as victims (the "Prosecution's Submission"), and thus effectively providing the Parties access thereto.¹

2. The Pre-Trial Judge notes the time that has elapsed since the filing of the Prosecution's Submission on 16 October 2012. The reason for the delay in rendering this decision is that its determination was suspended by supervening litigation, as becomes apparent below. The conclusion of that litigation allows for this decision to be rendered at this time.

II. PROCEDURAL BACKGROUND

3. On 5 April 2012, the Pre-Trial Judge issued a decision dismissing a motion from the Defence Counsel for Mr. Assad Hassan Sabra (the "Sabra Defence")² for access to the applications of victims seeking to participate in the proceedings filed before him.³

4. In three separate decisions on 8 May 2012,⁴ 3 September 2012⁵ and 28 November 2012,⁶ the Pre-Trial Judge accepted the applications of 68 persons for the status of victims participating in the proceedings ("VPPs" or "VPP"). In all three decisions, the Pre-Trial Judge ordered that the identities and applications of the applicants were to remain confidential and *ex parte* pending any possible requests for protective measures.⁷

¹ STL, *Prosecution 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. All further references to filings and decisions relate to this case number unless otherwise stated.

² Motion for an Order to VPU to Re-File its Annexes *Inter Partes* or to Seek Protective Measures from the Pre-Trial Judge, 17 February 2012.

³ Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Re-file 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 ("Decision of 5 April 2012").

⁴ Decision on Victims' Participation in the Proceedings, 8 May 2012 ("First Decision on VPPs").

⁵ Second Decision on Victims' Participation in the Proceedings, 3 September 2012 ("Second Decision on VPPs").

⁶ Third Decision on Victims' Participation in the Proceedings, 28 November 2012 ("Third Decision on VPPs").

⁷ First Decision on VPPs, paras 129-131; Second Decision on VPPs, para. 17; Third Decision on VPPs, para. 14.

5. In a decision of 19 December 2012, the Pre-Trial Judge accepted the requests from two VPPs to withdraw their participation.⁸ Currently, there are therefore 66 VPPs.⁹

6. The Legal Representative of Victims (“LRV”) filed three motions for protective measures on behalf of the VPPs, one on 29 October 2012¹⁰ and two on 2 November 2012.¹¹ These motions concerned a total of 31 VPPs.

7. Having been authorised by the Pre-Trial Judge to do so,¹² the LRV notified by way of four public notices the identities of 35 VPPs on 3 October 2012,¹³ 15 October 2012,¹⁴ 2 November 2012¹⁵ and 14 January 2013¹⁶ respectively. The LRV submitted requests for confidentiality on behalf of eight VPPs on 15 February 2013.¹⁷

8. On 16 October 2012, the Prosecution filed the Prosecution’s Submission.¹⁸

9. On 23 October 2012, the LRV¹⁹ and the Victims’ Participation Unit (“VPU”)²⁰ filed their respective responses to the Prosecution’s Submission.

⁸ Decision Relating to the Request of the Legal Representative of Victims to Authorise Two Victims to Withdraw their Participation, 19 December 2012.

⁹ The Pre-Trial Judge notes that he is currently seized of the Request of the Legal Representative of Victims to Withdraw One Participating Victim from the Proceedings, 29 May 2013.

¹⁰ First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012.

¹¹ Second Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 2 November 2012; Third Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of Eight Victims Participating in the Proceedings, 2 November 2012.

¹² Decision on the Victims’ Legal Representative’s Request for Reclassification as Public of Identities of Seven Victims Participating in Proceedings, 21 September 2012.

¹³ Notice of the Legal Representative of Victims of Disclosure of the Identity of Thirteen Victims Participating in the Proceedings, 3 October 2012.

¹⁴ Second Notice of the Legal Representative of Victims of Disclosure of the Identity of Nine Victims Participating in the Proceedings, 15 October 2012.

¹⁵ Third Notice of the Legal Representative of Victims of Disclosure of the Identity of Twelve Victims Participating in the Proceedings, 2 November 2012.

¹⁶ Fourth Notice of the Legal Representative of Victims of Disclosure of the Identity of One Victim Participating in the Proceedings, 14 January 2013.

¹⁷ Notice of the Legal Representative of Victims of Resubmission of Eight Requests for Protective Measures (Confidentiality), 15 February 2013.

¹⁸ The Prosecution’s Submission reduced to writing an oral request made to the Pre-Trial Judge during a Status Conference held on 28 September 2012, Status Conference before the Pre-Trial Judge, 28 September 2012, Transcript, pp. 10-12; “[...] the parties should be provided with all information contained in the victim participation applications that is of potentially evidential value”, p. 12, ¶ 4-6.

¹⁹ 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 (“LRV Response”). A public redacted version was filed on 23 October 2012, but was made confidential by a Pre-Trial Judge’s order on 24 October 2012. An amended public redacted version of the LRV Response was filed on 24 October 2012.

²⁰ Response of the Victims’ Participation Unit to Prosecution’s Request for Reclassification of Victims’ Identities and Applications, 23 October 2012 (“VPU Response”).

10. On 5 November 2012, the Prosecution filed its consolidated reply to the LRV Response and the VPU Response.²¹

11. On 19 December 2012, the Pre-Trial Judge rendered his decision on the LRV's three motions for protective measures for VPPs.²² In that decision, the Pre-Trial Judge declined to recognise the validity of "total anonymity" as a protective measure and found that it was not available under the Statute or the Rules of Procedure and Evidence ("Rules").

12. On 14 March 2013, the Pre-Trial Judge authorised confidentiality as a protective measure for eight VPPs.²³ On 18 March 2013, the LRV notified the Parties of the identities of the eight VPPs who had been accorded confidentiality.²⁴

13. The LRV obtained certification²⁵ to appeal the Decision of 19 December 2012 in relation to the specific issue of anonymity, and on 10 April 2013 the Appeals Chamber rendered its decision, in which it unanimously dismissed the appeal, and affirmed the Pre-Trial Judge's decision that VPPs cannot remain totally anonymous.²⁶

III. SUBMISSIONS

14. Since the Prosecution's Submission, the context has evolved notably in light of the Prosecution filing its Pre-Trial Brief,²⁷ and the rendering of the Appeals Chamber Decision. To the extent that several of the submissions of the Prosecution, the LRV and the VPU were rendered moot by these subsequent events, they are not addressed in this decision.

²¹ 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 Victims' Participation Unit to Prosecution's Request for Reclassification of Victims' Identities and Applications", Confidential, 5 November 2012 ("Prosecution Reply"). The Prosecution's request for leave to reply was authorised by the Pre-Trial Judge in a memorandum, Corrected Version of the Scheduling Directive from the Pre-Trial Judge, 30 October 2012.

²² Decision on the Legal Representative of Victims' First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, 19 December 2012 ("Decision of 19 December 2012").

²³ Decision on the Legal Representative of Victims' Resubmission of Eight Requests for Protective Measures (Confidentiality), 14 March 2013 ("Confidentiality Decision").

²⁴ Notice of the Legal Representative of Victims of Reclassification of the Identity of Eight Victims Participating in the Proceedings as Confidential, confidential, 18 March 2013.

²⁵ 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.

²⁶ Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("Appeals Chamber Decision").

²⁷ Prosecution's Submission pursuant to Rule 91, 15 November 2012 with a public redacted version dated the same day.

A. Prosecution Submissions

15. The Prosecution notes that the VPP application form contains a section entitled “information relating to the events as a result of which you became a victim”. Consequently, “there is likely to be information of evidential value in some of the VPP responses under this heading”²⁸ which may “impact witness selection by the Prosecution, as there may be evidence contained in the VPP application which is unknown to the Prosecution.”²⁹

16. Furthermore — and with reference to Rule 150(D)³⁰ — the Prosecution notes that the identities of the VPPs “may impact on witness selection by the Prosecution as the Prosecution is unlikely to knowingly select a witness who is also a VPP to avoid potential problems under Rule 150(D).”³¹

17. In support of its submissions, the Prosecution recalls its position that it does not pose a threat to victims, that “the Prosecution will suffer prejudice if it does not receive the identity of the VPP and the content of their applications [...]”,³² and that VPPs are adequately protected by the Rules and Orders currently in force regarding the non-dissemination of confidential materials.³³

18. In particular, the Prosecution submits that even where the identities of specific VPPs are known to the Parties, their applications, or at least the “evidential content” of their applications, should either be reclassified as confidential instead of confidential and *ex parte*,³⁴ or transmitted to the Prosecution.³⁵

B. LRV Submissions

19. The LRV opposes the Prosecution’s Submission, for several reasons.³⁶ First, the LRV is opposed to the Prosecution’s Submission inasmuch as it “seeks to deny those [VPPs] who

²⁸ Prosecution’s Submission, para. 7, citing the Application Form to Participate in Proceedings under the Jurisdiction of the Special Tribunal for Lebanon (“Application Form”), p. 7, section C.

²⁹ *Id.*, para. 8.

³⁰ This Rule provides that “A victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require.”

³¹ Prosecution’s Submission, para. 9.

³² *Id.*, para. 11, citing Prosecution’s Submission Pursuant to the Scheduling Directive dated 24 February 2012, 7 March 2012, paras 12-13.

³³ *Id.*, para. 12, citing Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012.

³⁴ *Id.*, para. 13.

³⁵ *Id.*, para. 14.

³⁶ LRV Response, para. 74(1).

have expressed fears about their safety, security and dignity, the possibility of having that risk properly and professionally assessed, and/or the opportunity to be protected from that risk by duly considered judicial order.”³⁷

20. Second, the LRV avers that the Prosecution’s Submission is procedurally impermissible since the relief sought effectively seeks to review other decisions of the Pre-Trial Judge determining the classification of the applications, and the submissions amount to an appeal thereof which is “impermissible without consideration of the merits.”³⁸

21. Third, the LRV considers that there is no general duty of disclosure incumbent on VPPs, and that the Rules only envisage two situations in which VPPs are under disclosure obligations at all: Rules 112*bis*³⁹ and 113.⁴⁰ With reference to Rule 112*bis*, the LRV points out that Rule 86 — governing applications for VPP status — does not include a provision similar to Rule 89(1) of the Rules of Procedure and Evidence of the International Criminal Court (“ICC”), which requires the transmission of victims’ application forms to the Parties.⁴¹ For the LRV, it is “inconceivable” that the drafters of the Rules did not consider the VPP’s application forms when preparing Rule 112*bis* and omitting them from an express disclosure obligation.⁴² For this reason, the LRV avers that the Prosecution’s Submission has no legal basis, and that the Prosecution’s quest for information of “evidentiary value” is based on the instructions in the victims’ application form.⁴³

22. Fourth, the LRV highlights the entitlement of VPPs to protect their identities, as reflected in the application form,⁴⁴ and in respect of the applications in particular, the LRV argues that they are immune from disclosure in any event by reason of “being covered by

³⁷ *Id.*, para. 4.

³⁸ *Id.*, para. 11.

³⁹ This Rule provides that: “Where the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed.”

⁴⁰ This Rule provides that: “Victims participating in the proceedings shall have the same obligations as set out in paragraph (A) [to disclose exculpatory material in his possession or actual knowledge]. Before disclosing to the Defence any information that victims participating in the proceedings have reason to believe falls under Rule 116 or 117, they shall disclose that material to the Prosecutor.”

⁴¹ LRV Response, paras 17-19. ICC Rule 89(1) provides, in relevant part, that “the Registrar shall provide a copy of the [victim’s written] application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.”

⁴² *Id.*, para. 19.

⁴³ *Id.*, para. 23. With respect to Rule 113, the LRV merely takes note of the “second and separate obligation is created by Rule 113(B)” of which the LRV is mindful (*Id.*, paras 20-21).

⁴⁴ *Id.*, paras 24-34. The LRV makes extensive submissions about the protective measure of anonymity which, in light of the Appeals Chamber Decision, are now moot.

legal professional privilege”.⁴⁵ The completed application forms are “highly personal documents, which not only contain personal data, but also speak of grief and of harm suffered by applicants”.⁴⁶

Many VPPs were assisted in completing their forms by Lebanese lawyers.⁴⁷ Concretely, the LRV refers to Rule 163 on legal professional privilege, which provides that “[c]ommunications made in the context of the professional relationship between a person and his legal counsel shall be regarded as privileged and consequently not subject to disclosure at trial” unless certain exceptions apply.⁴⁸ In the view of the LRV, Rule 163 applies to both communications between the LRV and the VPPs, as well as communications between the VPPs, their original lawyers, and the members of the VPU, and includes the information contained in the application forms.⁴⁹ Absent a court order to the contrary, the privileged nature of the applications, according to the LRV, can only be compromised by the VPP consenting to its waiver.⁵⁰

23. In response to the Prosecution’s alternative submission that it alone should receive the applications, the LRV avers that this is without legal basis and would offend considerations of fairness and the principle of the equality of arms.⁵¹

C. VPU Submissions

24. The VPU submits that the relief sought by the Prosecution should be denied,⁵² arguing that the Prosecution identifies no legal basis for its request and the Parties have no legal entitlement to the applications, and furthermore that neither the LRV nor the VPU are required to disclose the materials sought.⁵³

25. The VPU “notes with concern the wide-reaching consequences for victims’ participation if the Pre-Trial Judge was to” uphold the entitlement asserted by the Prosecution to access any information in the possession of the LRV “which may be of use or evidential value to the Prosecution.” Such an approach could oblige VPPs to communicate to the

⁴⁵ *Id.*, section D.

⁴⁶ *Id.*, para. 48.

⁴⁷ *Id.*, para. 51.

⁴⁸ *Id.*, para. 52.

⁴⁹ *Ibid.*

⁵⁰ LRV Response, paras 53, 73(4).

⁵¹ *Id.*, para. 56.

⁵² VPU Response, paras 10, 28.

⁵³ *Id.*, paras 13-14, 17, 27.

Prosecution all information not otherwise covered by legal professional privilege pursuant to Rule 163. The VPU emphasises that the role of victims' participation in the proceedings is not to provide evidence to the Prosecution, but rather to permit their "views and concerns" to be heard.⁵⁴

26. With respect to the VPU itself, the VPU avers that entitling the Prosecution to information and material in the VPU's possession would adversely affect the neutrality of the Registry "by making it a source of evidence" in the proceedings. It would also undermine the ability of the VPU to exercise its mandate, which ability is based on the premise that the VPU will respect the confidentiality of information provided to it by victims.⁵⁵

27. The VPU suggests that there are alternative solutions available to the Prosecution, other than a blanket reclassification of the materials, and that VPP-related information could be "sought in a targeted manner through discussions with the [LRV] about specific victim-witnesses" resulting in "consent-based disclosure of information by the [LRV]."⁵⁶

D. The Prosecution Reply

28. The Prosecution clarifies that it does not seek the "disclosure" of the VPP's identities and applications, but rather their reclassification as confidential.⁵⁷

29. The Prosecution replies to the LRV's assertion of legal professional privilege and submits that this privilege does not apply to VPP applications, since they are intended for submission to the Pre-Trial Judge.⁵⁸ Furthermore, the relationship between the victims and the VPU is not subject to legal professional privilege since the application forms are intended for the Pre-Trial Judge's examination, and themselves contain the express provision that they may be provided to the Parties.⁵⁹ Lastly, the Prosecution argues that international jurisprudence does not support the LRV's assertion of legal professional privilege.⁶⁰

⁵⁴ *Id.*, para. 16.

⁵⁵ *Id.*, para. 17.

⁵⁶ *Id.*, para. 21.

⁵⁷ Prosecution Reply, paras 8-11.

⁵⁸ *Id.*, para. 11.

⁵⁹ *Id.*, para. 13, referring to the Application Form, p. 4, and section E: "This application form to participate in the proceedings will be forwarded by the Pre-Trial Judge to the Defence and to the Prosecution for their observations. If, out of concern for your safety or that of your family or your close acquaintances, you do not want all or any part of this information by which you might be identified to be disclosed to the Defence or the Prosecution or made public, please tick the corresponding boxes in Section E and provide the information requested". Section E of the form, entitled "REQUEST FOR NON-DISCLOSURE OF CERTAIN

E. Defence Submissions

30. Counsel for the accused have declined to make submissions in this matter.

IV. DISCUSSION

31. On 5 April 2012, the Pre-Trial Judge issued a decision in which several findings pertinent to the issues now before him were made. These findings included: that all of the applications for VPP status “should remain confidential and *ex parte* for the time being”; that the Parties were not entitled to receive them, or the information contained therein, at that time; and that the impact of whether the Prosecution intends to call VPPs as witnesses during trial will be dealt with at the appropriate stage.⁶¹

32. Similarly, in the subsequent First Decision on VPPs, the Pre-Trial Judge reiterated the findings of the Decision of 5 April 2012. He maintained the classification of the applicants’ identities and applications as confidential and *ex parte* because: the outcome of each application was still pending; the applicants were yet to have access to informed legal counsel before submitting any requests for protective measures; and the performance of a risk assessment of each applicant by the Tribunal’s Victims and Witnesses Unit (“VWU”) was yet to be conducted.⁶² At the same time, the Pre-Trial Judge indicated that “the Parties may either be provided with the identities of some or all of the VPPs, or be granted access to some or all of their Applications.”⁶³

33. With respect to the identities of VPPs, the Appeals Chamber has now clarified that “the identities of VPPs should be disclosed [to the Parties] sufficiently in advance to give the Defence adequate time to prepare.”⁶⁴ This aspect of the Prosecution’s Submission — the reclassification of VPPs’ identities as confidential — is therefore moot, since the LRV is now required to notify the Parties at least of the identities of the VPPs.

34. There remains however the matter of the classification of — and the Parties’ access to — the VPPs’ application forms. Two questions arise. First, does legal professional privilege

INFORMATION”, warns that “[c]ompleting this section does not automatically mean that your request for the non-disclosure of information will be accepted. Please note that the Pre-Trial Judge will rule on this request.”

⁶⁰ *Id.*, para. 15.

⁶¹ Decision of 5 April 2012, paras 44, 54-55.

⁶² First Decision on VPPs, para. 129.

⁶³ *Id.*, para. 130.

⁶⁴ Appeals Chamber Decision, para. 39.

apply to VPP application forms? Second, and if not, do other reasons exist for not providing the VPP application forms to the Parties at this stage of the proceedings?

A. Whether legal professional privilege applies to VPP application forms

35. Rule 163 provides that:

Communications made in the context of the professional relationship between a person and his legal counsel shall be regarded as privileged and consequently not subject to disclosure at trial, unless:

- (i) the client consents to such disclosure;
- (ii) the client has voluntarily disclosed the content of the communications to a third party, and that third party then gives evidence of that disclosure; or
- (iii) the client intended to perpetrate a crime and the communications were in furtherance of that crime.

36. This Rule does not apply to the present circumstances for the following reasons. It is the VPU's function to "receive applications from victims seeking to participate in the proceedings in accordance with Rule 87, verify that these applications are complete and, once this has been done, transmit them to the Pre-Trial Judge."⁶⁵ The applications are not, therefore, confidential exchanges made in the context of the professional relationship between a person and his legal counsel. Rather, they are received by the VPU, a unit established within the Registry pursuant to Rule 51(A), and they are intended for transmission to the Pre-Trial Judge, in order that he may determine their applications.

37. The application form itself informs applicants that it "will be forwarded to the Pre-Trial Judge of the Tribunal."⁶⁶ The VPPs were therefore aware that their application forms were not completed and submitted as "communications made in the context of the professional relationship between a person and his legal counsel",⁶⁷ and also that the VPPs have consented to the disclosure of the content thereof to the Pre-Trial Judge. Furthermore, as the Prosecution highlights, the application form expressly states that it "will be forwarded by the Pre-Trial Judge to the Defence and to the Prosecution for their observations" save for any ulterior determination made in light of section E of the form to be completed by the applicants, and which permits applicants to request non-disclosure of certain information.⁶⁸

⁶⁵ Rule 51(B)(iii) STL RPE.

⁶⁶ Application Form, p. 1.

⁶⁷ Rule 163 STL RPE.

⁶⁸ Application Form, p. 4.

38. Therefore, the Pre-Trial Judge does not consider that the VPP application forms are protected by legal professional privilege.

B. Whether other reasons exist for not reclassifying the VPP application forms

39. The VPU has raised several matters for consideration as reasons for not reclassifying the VPPs applications as confidential, which are persuasive.

40. First, as provided for by the Tribunal's Statute, the role of victims' participation in the proceedings is not to provide evidence to the Prosecution, but rather to permit their "views and concerns" to be heard.⁶⁹ Where VPPs have sought to participate in the proceedings, and have indicated on their application forms that if successful they would seek the non-disclosure of certain information by completing Section E of the application form, due consideration must be given to their concerns.

41. Second, compromising the confidential nature of the correspondence during the application process between potential VPPs and the VPU, an organ of the Registry, could adversely affect the neutrality in the proceedings of the Registry in general, and the VPU in particular, if it were to become perceived as a source of evidence. In this regard, Rule 51(F) specifically provides that a member of the VPU is precluded from taking "any instruction from a victim or be involved in any manner in a specific case or proceeding before the Tribunal such that the independence of the Unit or of the Registry may be, or may be perceived to be, compromised."⁷⁰

42. Third, the VPU must cultivate a trust-based relationship with potential and actual VPPs in order to be able to exercise its mandate, which ability is based on the premise that the VPU will respect the confidentiality of information provided to it by victims and/or VPPs. While it is foreseeable that the identities of the VPPs could be provided to the Parties once that status is determined, the effective correspondence that leads to that determination — including the application forms — relies at least in part in the VPU gaining and maintaining the VPPs' confidence.

⁶⁹ Art. 17 STL St.: "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."

⁷⁰ Rule 51(F) STL RPE.

43. The Pre-Trial Judge is also cognisant of the international precedent to which he is referred by the LRV and the VPU. In particular, and as the LRV has pointed out, the Tribunal's Rules do not contain any provision similar to the ICC's Rule 89(1) requiring the transmission of victims' application forms to the Parties. This is notable especially in light of the Appeals Chambers' observation that "the ICC's provisions on victim participation are the most comparable to those of the Tribunal."⁷¹

44. Notwithstanding the Appeals Chamber's observation, there are differences between the ways in which the respective Rules of the ICC and the Tribunal deal with victim participation. In particular, ICC Rule 89(1) accords to the Parties the right to receive victims' applications before participating status is decided "by a relevant Chamber", so that they can file written replies to the applications.⁷² Where an applicant (or the ICC equivalent of the VPU) desires that certain information not be disclosed to the Parties, they must apply for protective measures pursuant to Article 68(1) of the ICC Statute.⁷³ The Tribunal's approach differs inasmuch as it is the Pre-Trial Judge who shall decide a request *ex-parte* for the status of victim participating in the proceedings, "after seeking submissions from the Parties and the Victims' Participation Unit on relevant legal issues."⁷⁴ The Tribunal's Rules therefore do not anticipate the Parties having access to the applicants' applications, at least when the applicants' status is determined, since they are not entitled to make submissions in that regard in any event.

45. The foregoing considerations favour denying the reclassification of the applications sought by the Prosecution, and maintaining their confidential and *ex parte* nature.

46. The Rules are likewise silent on whether the Parties may have access to the VPPs' applications. Rule 133,⁷⁵ which was the basis on which the VPPs' applications were classified as confidential and *ex parte* in the first instance,⁷⁶ provides as follows:

⁷¹ Appeals Chamber Decision, para. 26.

⁷² Rule 89(1) ICC RPE.

⁷³ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, paras 127-129. See also ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, 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, Trial Chamber III, 22 February 2010, para. 24; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Redacted Version of the Corrigendum of Decision on the Applications by 15 Victims to Participate in the Proceedings, Trial Chamber I, 8 February 2011, paras 36-37.

⁷⁴ Rule 86(C)(i) STL RPE.

⁷⁵ Rule 133 applies *mutatis mutandis* in proceedings before the Pre-Trial Judge by virtue of Rule 97.

The [Pre-Trial Judge or] 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.

47. Rule 133 therefore requires that protective measures such as the classification of materials as confidential and *ex parte* be consistent with the rights of the accused.

48. The Pre-Trial Judge has no reason to consider that maintaining the classification of the VPPs' applications as confidential and *ex parte* is inconsistent with the rights of the accused. In particular, the VPPs remain obliged, pursuant to Rule 113, to disclose to the Defence any information in their possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence.⁷⁷ As a result, should such exculpatory information be contained within the application forms, that information (and not the application form *per se*) must be disclosed.

49. In light of the foregoing analysis, and in the absence of any pleadings alleging the inconsistency of the current classification of the VPP applications as confidential and *ex parte* with the rights of the accused, the Pre-Trial Judge considers that sufficient reasons remain to retain the current classification of the VPPs' applications.

50. This decision is without prejudice to any decision or order that the Trial Chamber may make during trial regarding the Parties' access to the VPPs' applications. In particular, the Pre-Trial Judge recalls Rule 150(D), which anticipates the circumstance where a VPP "may be permitted to give evidence if a Chamber decides that the interests of justice so require."⁷⁸

51. Lastly, this decision is without prejudice to any determination that individual VPPs may make — via the LRV — voluntarily to classify their applications as confidential or public. The LRV and his Co-Legal Representatives are encouraged, during the course of their ongoing consultations with their clients, to reassess the need for their clients' applications to remain classified as confidential and *ex parte*.

⁷⁶ See the dispositions of the First Decision on VPPs; the Second Decision on VPPs, and the Third Decision on VPPs.

⁷⁷ Rule 113(A) STL RPE, read with Rule 113(B) STL RPE.

⁷⁸ Rule 150(D) STL RPE.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 133 of the Rules,

DENIES the Prosecution's Submission.

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

Leidschendam, 31 May 2013.



Daniel Fransen
Pre-Trial Judge

