



THE PRE-TRIAL JUDGE

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

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

The Registrar: **Mr. Daryl Mundis**

Date: **25 February 2014**

Original language: **English**

Classification: **Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**PUBLIC REDACTED VERSION OF “DECISION ON THE MOTION OF THE
LEGAL REPRESENTATIVE OF VICTIMS SEEKING CERTIFICATION OF THE
15 AUGUST 2013 DECISION” DATED 21 OCTOBER 2013**

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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”) seeking certification of the Pre-Trial Judge’s decision on the Fourth Motion of the LRV for Protective Measures for 22 Victims Participating in the Proceedings (respectively the “Motion”,¹ the “15 August 2013 Decision”² and the “VPPs”).

II. PROCEDURAL BACKGROUND

2. On 29 October³ and 2 November 2012,⁴ the LRV filed three requests for protective measures with respect to 31 VPPs.

3. On 19 December 2012, the Pre-Trial Judge issued a decision relating to the aforementioned requests in which he declined to recognise the validity of total anonymity as a protective measure.⁵

4. On 30 January 2013, the Pre-Trial Judge granted the LRV’s request for certification in part of that decision with respect of the question of total anonymity.⁶

5. On 8 February 2013, the LRV lodged an appeal of the 19 December 2012 Decision.⁷ On 10 April 2013, the Appeals Chamber dismissed the appeal and considered that the

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Corrected Version of the Motion of the Legal Representative of Victims seeking Certification of the Pre-Trial Judge’s “*Décision portant sur la quatrième requête du représentant légal des victimes aux fins d’assurer la protection de 22 victimes participant à la procédure*”, Confidential and *Ex Parte*, 27 August 2013. On 22 August 2013, the LRV filed the Motion confidential and *ex parte*. On the same day, the LRV filed a confidential redacted version of the Motion. On 27 August 2013, the LRV informed the Pre-Trial Judge that the addressees on the Motion’s cover page inadvertently included the Parties, and therefore filed a *corrigendum* to the confidential and *ex parte* Motion, together with a corrected version of the Motion, on the same day. All further references to filings and decisions relate to this case number unless otherwise stated.

² Corrected Version, Decision on the Fourth Motion of the Legal Representative of Victims for Protective Measures for 22 Victims Participating in the Proceedings, Confidential, 15 August 2013.

³ First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012.

⁴ 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.

⁵ 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 “19 December 2012 Decision”).

⁶ 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 (the “30 January Decision”).

⁷ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.3, Appeal of the Legal Representative of Victims Against the Decision of the Pre-Trial Judge Refusing Protective Measures, 8 February 2013.

measure of total anonymity was “generally prejudicial to and inconsistent with the rights of the accused and the fairness of the trial”.⁸

6. On 14 March 2013, the Pre-Trial Judge issued a decision relating to eight further requests for protective measures (confidentiality) from the LRV.⁹

7. On 11 April 2013, the LRV sought a leave of 11 weeks within which to comply with the 19 December 2012 Decision in order to notify the victims concerned and, where appropriate, to allow them to withdraw or modify their requests for protective measures.¹⁰

8. On 10 May 2013, the Pre-Trial Judge ordered the LRV to submit, on behalf of the VPPs concerned and by 7 June 2013 at the latest, notices informing him, either: (1) that in the absence of anonymity, they intended to retain their status of VPPs; or (2) they were seeking alternative appropriate protective measures where applicable; or (3) that they intended to withdraw from the proceedings.¹¹

9. On 6 June 2013, the LRV filed a fourth request for protective measures for 22 VPPs.¹²

10. On 15 August 2013, the Pre-Trial Judge granted 21 of the 22 renewed applications for appropriate protective measures and denied V062’s request for confidentiality as a protective measure.¹³

11. On 27 August 2013, following the 15 August 2013 Decision, the LRV filed the Motion.

12. On 28 August 2013, the Prosecution filed a response to the Motion (the “Response”).¹⁴

⁸ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge’s Decision on Protective Measures, 10 April 2013, (the “10 April 2013 Decision”), para. 39.

⁹ Decision on the Legal Representative of Victims’ Resubmission of Eight Requests for Protective Measures (Confidentiality), 14 March 2013 (the “14 March 2013 Decision”).

¹⁰ Request on Behalf of the Legal Representative of Victims for a Leave of Eleven Weeks to Allow Compliance with the Pre-Trial Judge’s Decision on Protective Measures, 11 April 2013.

¹¹ Decision on the Legal Representative of Victims’ Request for Leave of Eleven Weeks to Comply with the Pre-Trial Judge’s Decision on Protective Measures, 10 May 2013 (the “10 May 2013 Decision”).

¹² Fourth Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of 22 Victims Participating in the Proceedings, 6 June 2013.

¹³ Decision on the Fourth Motion of the Legal Representative of Victims for Protective Measures for 22 Victims Participating in the Proceedings, 15 August 2013, para. 13.

¹⁴ Prosecution’s Response to the Redacted Confidential Version of the Motion of the Legal Representative of Victims Seeking Certification of the Pre-Trial Judge’s “*Décision portant sur la quatrième requête du*

III. SUBMISSIONS

A. The Motion

13. The LRV seeks certification of the 15 August 2013 Decision pursuant to Rule 126(C) of the Rules of Procedure and Evidence (the “Rules”) on the basis that “the denial of protective measures for V062 raises an issue that could significantly affect the fair and expeditious conduct of the proceedings and also requires an immediate resolution by the Appeals Chamber to materially advance the proceedings.”¹⁵

14. The LRV recalls the cumulative criteria that must be satisfied under Rule 126(C) of the Rules¹⁶ and recalls further that decisions on certification are not discretionary. As such, a Chamber must be satisfied that the two above criteria are met before granting the certification of a decision for appeal.¹⁷

15. The LRV recalls that the Appeals Chamber discerned three specific situations where the VPPs’ own interests as participants in the proceedings were fundamentally concerned. Among them was the situation involving decisions on protective measures for VPPs and the variation of such measures.¹⁸

1. The issue significantly affects the fair and expeditious conduct of the proceedings

16. The LRV avers that the Pre-Trial Judge has previously considered that the question of the total anonymity of VPPs meets the criteria for certification.¹⁹ The LRV considers that the interpretation and application of the “legal test of confidentiality” is equally a matter of principle that meets the first criterion for certification, and that in the present case, the denial of protective measures sought by V062 raises the issue of “the interpretation and application of the legal test regarding the necessity and proportionality of confidentiality, as a protective measure”.²⁰

représentant légal des victimes aux fins d’assurer la protection de 22 victimes participant à la procédure”, Confidential, 28 August 2013.

¹⁵ Motion, paras 2 and 18.

¹⁶ *Id.*, para. 12.

¹⁷ *Id.*, para. 14.

¹⁸ *Id.*, paras 16 and 17; 10 April 2013 Decision, para.15.

¹⁹ Motion, para. 21; 30 January Decision, para. 24.

²⁰ Motion, paras 19 and 21.

17. As such, with respect to the significance requirement, the LRV recalls that in his 14 March 2013 Decision, the Pre-Trial Judge clarified the notion of protective measures, while considering the previous practice of the Tribunal, the requirements of Rule 133 of the Rules and the criteria of the necessity and proportionality of confidentiality.²¹ According to the Pre-Trial Judge, protective measures must be:

- 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.²²

18. The LRV advances three arguments in order to substantiate that the denial of confidentiality for V062 in the 15 August 2013 Decision raises a matter of interpretation and application of this test, and that it affects the fair and expeditious conduct of the proceedings. The first two arguments concern the criterion of necessity and the third argument concerns the criterion of proportionality.

19. The LRV first deems that the Pre-Trial Judge omitted to consider V062's psychological vulnerability "which could greatly affect [the] need for protective measures".²³

20. Second, the LRV further recalls that the Appeals Chamber has acknowledged the authority and expertise of the Victims and Witnesses Unit ("VWU") in assessing the risks faced by witnesses.²⁴ Although the LRV is aware that a Chamber can disagree with the VWU, the LRV enquires of the Pre-Trial Judge to articulate the basis of that dismissal when determining whether the criterion of necessity is met.²⁵

21. Third, according to the LRV, it is unclear whether the Pre-Trial Judge has applied the element of proportionality when determining whether confidentiality could be granted to V062. In so far as "a protective measure is rendered proportionate if it is in the interests of justice and is consistent with the rights of the accused (...) [t]he question then arises whether

²¹ 14 March 2013 Decision, paras 19-22.

²² Motion, para. 23; 14 March 2013 Decision, para. 23.

²³ Motion, para. 25.

²⁴ *Id.*, para. 26; 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.

²⁵ Motion, para. 27.

the interests of justice would require the public disclosure of the identity of V062.”²⁶ The LRV also avers that although the principle of publicity of the proceedings is enshrined in Rule 96 of the Rules as well as the ruling of the Appeals Chamber, “it cannot be automatically applied to individuals, be that victims or witnesses”.²⁷

2. Immediate resolution would materially advance the proceedings

22. With respect to the urgency requirement, the LRV deems that its submissions fundamentally concern the VPPs’ own interests as participants of the proceedings. Furthermore, the Appeals Chamber’s clarification of the interpretation and application of the legal test for protective measures would permit both the LRV and the Pre-Trial Judge to find alternatives for resolving V062’s situation in order to prevent “[REDACTED] withdrawal from the proceedings”. Consequently, the LRV submits that an immediate resolution of this matter would materially advance the proceedings.²⁸

23. For the aforementioned reasons, the LRV requests that the Pre-Trial Judge grant the Motion and suspend the relevant parts of the 15 August 2013 Decision, pending a decision on appeal.²⁹

B. The Response

24. In its Response, the Prosecution takes no position on the Motion. However, the Prosecution “reserves its right to be heard in response to an appeal” should the Certification be granted by the Pre-Trial Judge, since the Motion raises legal issues that may be relevant in the future proceedings.³⁰

IV. DISCUSSION

25. The Pre-Trial Judge notes that it is settled law that the LRV can move for certification.³¹

²⁶ *Id.*, para. 28.

²⁷ *Ibid.*

²⁸ *Id.*, paras 30-32.

²⁹ *Id.*, para. 33.

³⁰ Response, paras 1 and 2.

³¹ 10 April 2013 Decision, paras 7-18; 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, para. 31.

26. Furthermore, the Pre-Trial Judge previously held that pursuant to Rule 126(C) of the Rules in order to certify an appeal, two cumulative criteria must be satisfied: firstly, the decision in question must involve an issue that *would significantly*³² affect the fairness and expeditiousness of the proceedings or the outcome of the trial and, secondly, an *immediate* resolution by the Appeals Chamber would materially advance the proceedings.³³

27. The Appeals Chamber has itself described the cumulative requirements of Rule 126(C) of the Rules as a “high threshold”, and has clarified that:

not all interlocutory decisions [...] are subject to automatic appeal. [...] [O]nly those decisions that fulfil the stringent requirements of Rule 126(C) [...] may be challenged before the Appeals Chamber before final judgment. Certification must necessarily be the exception.³⁴

[C]ertification ‘requirements are strict and a Chamber must take great care in assessing them.’³⁵

28. Neither the Pre-Trial Judge nor the Trial Chamber retains any discretion to grant certification; once it is satisfied that the two cumulative requirements of Rule 126(C) of the Rules are met, the Pre-Trial Judge or Chamber “must certify the decision for appeal with respect to that issue.”³⁶ The standard for certification must be properly applied, and the specific issue or issues requiring immediate resolution by the Appeals Chamber must be identified clearly.³⁷

29. In this case, the issue which the LRV seeks certification to appeal concerns the 15 August 2013 Decision in respect of the Pre-Trial Judge’s denial of protective measure for V062.

30. Regarding the significance requirement, the Pre-Trial Judge considers that the LRV does not substantiate that the denial of protective measures for V062 raises an issue that would have a significant impact on the fair and expeditious conduct of the proceedings. In

³² STL, *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 (“13 November 2012 Decision on Appeal”), para. 13, where the Appeals Chamber itself placed this emphasis on the words “*would significantly*”.

³³ *Id.*, para. 14. The Appeals Chamber itself placed this emphasis on the word “*immediate*”.

³⁴ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.1, Corrected Version, Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision, 1 November 2012, para.8.

³⁵ 13 November 2012 Decision on Appeal, para. 15.

³⁶ *Id.*, para. 12.

³⁷ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”, 5 August 2013, paras 6 and 7.

this regard, the Pre-Trial Judge recalls that in the 15 August 2013 Decision, he considered that neither the risk incurred by V062, nor [REDACTED] status, justified maintaining the confidentiality of [REDACTED] identity as a protective measure. As mentioned by the LRV in his Motion, the Pre-Trial Judge noted that although the VWU considered confidentiality as an appropriate measure for V062, the Pre-Trial Judge is not bound by the VWU's assessments, an assessment which, in any event, rated V062's risk as in the "low" category.

31. The Pre-Trial Judge further recalls that the VWU has provided risks assessments for V062 as well as for V060 and V061, [REDACTED]. For all three of these VPPs, the risk was assessed by the VWU as low. The only justification for maintaining the confidentiality of [REDACTED].³⁸ [REDACTED] as a protective measure.

32. [REDACTED] considers, that providing confidentiality as a protective measure to V060 and V061 does not necessarily mean that the same protective measure should apply to V062.

33. In this regard, the Pre-Trial Judge considers that the question at stake is a question of fact rather than a question of interpretation and application of the legal test regarding the necessity and proportionality of confidentiality, as a protective measure. Therefore, the Pre-Trial Judge concludes that the denial of confidentiality as a protective measure for V062 does not involve an issue that would significantly affect the fairness and expeditiousness of the proceedings.

34. Having concluded that the first cumulative condition referred to in Rule 126(C) of the Rules has not been fulfilled, it is not necessary to review the second. As the requirements of Rule 126(C) have not having been fulfilled, the LRV's Motion is denied.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 126(C) of the Rules;

³⁸ [REDACTED].

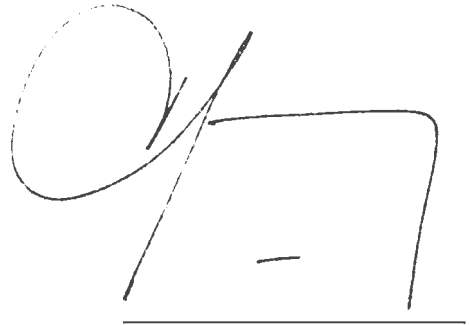
DENIES the LRV's request to certify the 15 August 2013 Decision for appeal;

RECALLS that the LRV is required to comply with the 15 August 2013 Decision; and

ORDERS that this decision, and its filings, shall remain confidential until further order.

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

Leidschendam, 25 February 2014.



Daniel Fransen
Pre-Trial Judge

