The Pre-Trial Judge

Le Juge de la mise en état

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case no.:	**STL-11-01/I**
Before:	**Judge Daniel Fransen**
Registrar:	**Mr Herman von Hebel**
Date:	**19 January 2011**
Original language:	**English**
Type of document:	**Public**

ORDER ON THE PROSECUTOR'S URGENT MOTIONS FOR NON-DISCLOSURE

Office of the Prosecutor:
Mr Daniel Bellemare, MSM, QC

Defence Office:
Mr François Roux

1. On 17 January 2011, the Prosecutor filed, confidentially and *ex parte*, a combined Submission of an Indictment for Confirmation, including an "Urgent Motion for the Non-Disclosure of the Indictment (Rule 74)" (the "Rule 74 Motion") and an "Urgent Motion for an Order for Interim Non-Disclosure of the Identities of Witnesses Pending the Implementation of Appropriate Witness Protection Measures (Rules 77 and 115)" (the "Rules 77 and 115 Motion").

2. In both Motions, the Prosecutor provides his reasons for his respective requests: "so that unauthorised disclosure can be considered contempt of the Tribunal under Rule 60 *bis* (A) (iii)".

3. The Rule 74 Motion relies on Rule 74, which empowers the Pre-Trial Judge, "in the interests of justice, [to] order the non-disclosure to the public of the indictment, or any related document or information until further order." In the Rule 74 Motion, the Prosecutor requests such an order for the non-disclosure of the indictment filed on 17 January 2011, together with all documents filed therewith for confirmation. The Prosecutor avers the "exceptional circumstances" required by Rule 74 which, he submits, are sufficient to justify the order requested.

4. In the Rules 77 and 115 Motion, the Prosecutor requests the Pre-Trial Judge to order "the interim non-disclosure to any parties of the identities and identifying features of all the witnesses in the supporting material that accompany the indictment." Rule 77 provides for a party to request the Pre-Trial Judge to issue "such orders … as may be necessary for the purposes of an investigation or for the preparation or conduct of the proceedings." Rule 115 provides for the Prosecutor – in exceptional circumstances – to "apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until appropriate protective measures have been implemented." In the Rules 77 and 115 Motion, the Prosecutor also avers the "exceptional circumstances" required by Rule 115(A), which he submits are sufficient to justify the order requested. The

Prosecutor furthermore submits that the interim non-disclosure order sought does not constitute prejudice to any accused.

5. Regarding the Rule 74 Motion, the Pre-Trial Judge recalls that the Submission of an Indictment for Confirmation, together with its supporting material, has been filed confidentially, and that Rule 96 (B) provides that "[a]ny filing or order relating to ... a request for confirmation of an indictment that is filed confidentially by the Prosecutor, shall remain confidential for as long as is necessary for the effective conduct of the investigation and/or the protection of any person". Furthermore, Rules 73 and 74 of the Rules of Procedure and Evidence (the "Rules") read together provide that an indictment is made public only upon its confirmation,[1] after which its non-disclosure may be ordered in exceptional circumstances upon application from the Prosecutor or the Defence.[2] This is without prejudice to the Prosecutor's authority to disclose an indictment or part thereof to the authorities of a State pursuant to Rule 74 (B). Rule 74 therefore only applies once an indictment is confirmed, and the relief sought by the Prosecutor in his Rule 74 Motion is already provided for in part by Rule 96.

6. Regarding the Rules 77 and 115 Motion, the Pre-Trial Judge considers that the purpose of Rule 115 is to allow the non-disclosure *ad interim* of the identity of a witness after the confirmation of the indictment, when the Prosecution must disclose the supporting material to the Accused or his Counsel.[3] An interim order under Rule 115 would, at that stage of proceedings, allow the Prosecution to redact certain information in its supporting materials after the confirmation of the indictment, until a decision on protective measures with specific disclosure deadlines is made.

7. Notwithstanding the foregoing, the Pre-Trial Judge recalls that Rule 60 *bis* (A) provides that the Tribunal, "in the exercise of its inherent power, may hold in contempt those who

[1] Rule 73 of the Rules.
[2] Rule 74(A) of the Rules.
[3] Rule 110 of the Rules.

knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal's jurisdiction according to the Statute." That provision furthermore lists types of conduct which constitute interference with the administration of justice and which amount to contempt, while expressly stating that the list does not constitute a *numerus clausus*.

8. The Pre-Trial Judge notes that the two types of conduct of concern to the Prosecutor – the unauthorised disclosure of the indictment or its supporting materials and the unauthorised disclosure of identities of witnesses included in the supporting materials (*prima facie* a breach of Rule 96 (B)) – could be considered as interference with the Tribunal's administration of justice amounting to contempt of the Tribunal in violation of Rule 60 bis (A).

9. The Pre-Trial Judge considers that there is no reason to issue this order confidentially, since no confidential information is revealed by its public issuance.

FOR THESE REASONS, THE PRE-TRIAL JUDGE,

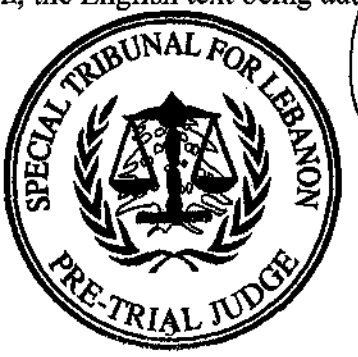
PURSUANT to Rules 60 *bis* and 96 (B) of the Rules,

REQUALIFIES the bases for the Prosecutor's Rule 74 Motion and Rules 77 and 115 Motion as instead being pursuant to Rule 96 (B) of the Rules, and

RECALLS that the unauthorised disclosure of the confidential and *ex parte* Submission of an Indictment for Confirmation, together with its supporting materials which include *inter alia* witness identities, could constitute interference with the Tribunal's administration of justice amounting to contempt pursuant to Rule 60 *bis* of the Rules.

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

Leidschendam, 19 January 2011.



Daniel Fransen
Pre-Trial Judge