

The Pre-Trial Judge



Le Juge de la mise en état

**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: **23 March 2012**  
Original: **French**  
Type of document: **Public**

**THE PROSECUTOR**

**v.**  
**SALIM JAMIL AYYASH,**  
**MUSTAFA AMINE BADREDDINE,**  
**HUSSEIN HASSAN ONEISSI &**  
**ASSAD HASSAN SABRA**

---

**ORDER RELATING TO THE MOTION FROM THE DEFENCE FOR MR SABRA FOR COMPLIANCE WITH THE PRE-TRIAL JUDGE'S ORDER OF 24 JANUARY 2012 AND SCHEDULING OF A TIME FRAME FOR PRESENTING OBSERVATIONS ON THE PROSECUTION'S APPLICATION OF 21 DECEMBER 2011**

---

**Office of the Prosecutor:**  
Mr Norman Farrell

**Counsel for Mr Salim Jamil Ayyash:**  
Mr Eugene O'Sullivan  
Mr Emile Aoun

**Counsel for Mr Mustafa Amine Badreddine:**  
Mr Antoine Korkmaz  
Mr John Jones

**Counsel for Mr Hussein Hassan Oneissi:**  
Mr Vincent Courcelle-Labrousse  
Mr Yasser Hassan

**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young  
Mr Guénaél Mettraux



1. **NOTING** the Motion from the Defence Counsel for Mr Sabra (the “Defence for Mr Sabra”) of 23 February 2012 for compliance with the Pre-Trial Judge’s Order of 24 January 2012 (the “Motion”);<sup>1</sup>
2. **NOTING** the Prosecution Response to the Motion of 2 March 2012 (the “Response”);<sup>2</sup>
3. **NOTING** the Prosecution’s Notice of 16 February 2012 regarding compliance with the Pre-Trial Judge’s Orders of 24 January and 7 February 2012 (the “Notice of 16 February 2012”);<sup>3</sup>
4. **NOTING** the “Provisional Order [by the Pre-Trial Judge] on the Prosecution’s Application of 21 December 2011 Filed Pursuant to Rules 115, 116 and 133 of the Rules of Procedure and Evidence” of 24 January 2012 (the “Order of 24 January 2012”);<sup>4</sup>
5. **NOTING** the Prosecution’s Application of 21 December 2011 for interim non-disclosure of the identity of witnesses pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence (the “Rules”) and witness protective measures pursuant to Rule 133 of the Rules (the “Application of 21 December 2011”);<sup>5</sup>
6. **CONSIDERING** that, in the Motion, the Defence for Mr Sabra considers that the Prosecution has violated the obligations by which it is bound under the Order in two respects:
  - i) by redacting the documents that were provided to them in compliance with the Order to such a degree that they are unable to make any observations thereon;<sup>6</sup> and
  - ii) by failing to disclose the following documents to them:

---

<sup>1</sup> STL, Case No. STL-11-01/PT/PTJ, Motion for Prosecution Compliance with Pre-Trial Judge’s Order of 24 January 2012 and for Disclosure of Additional Material, 23 February 2012.

<sup>2</sup> STL, Case No. STL-11-01/PT/PTJ, Prosecution Response to the Defence of Sabra’s “Motion for Prosecution Compliance with Pre-Trial Judge’s Order of 24 January 2012 and for Disclosure of Additional Material”, 2 March 2012.

<sup>3</sup> STL, Case No. STL-11-01/PT/PTJ, Notice Regarding the Prosecution’s Compliance with the Pre-Trial Judge’s Orders of 24 January and 7 February 2012, 16 February 2012.

<sup>4</sup> STL, Case No. STL-11-01/PT/PTJ, Provisional Order on the Prosecution’s Application of 21 December 2011 Filed Pursuant to Rules 115, 116 and 133 of the Rules of Procedure and Evidence, 24 January 2012.

<sup>5</sup> STL, Case No. STL-11-01/PT/PTJ, Prosecution’s Application for Interim Non-Disclosure of the Identity of Witnesses Pursuant to Rules 115 and 116 and Witness Protective Measures Pursuant to Rule 133, 21 December 2011.

<sup>6</sup> Application, para. 12.

- a. six of the eight Annexes to the Application of 21 December 2011;<sup>7</sup>
- b. further written submissions of 10 January 2012 relating to the risk assessment methodology devised by the Prosecution with the assistance of the Victims and Witnesses Unit (the “VWU”);<sup>8</sup>
- c. two audio recordings and one video, from which the information cannot be redacted, and which, according to the Prosecution, will be submitted to counsel for the defence at a later date;<sup>9</sup>
- d. expert reports that will subsequently be the subject of a separate application by the Prosecution pursuant to Rule 115 of the Rules;<sup>10</sup> and
- e. correspondence between the Prosecution and the VWU, as well as written submissions from the VWU of 6 February 2012;<sup>11</sup>

7. **CONSIDERING** that the Motion states that the Defence Counsel for Mr Oneissi, Mr Ayyash and Mr Badreddine (the “Defence for Mr Oneissi, Defence for Mr Ayyash and Defence for Mr Badreddine) have signalled their support for the Motion;<sup>12</sup>

8. **CONSIDERING** that the Prosecution first makes the observation that before seizing the Pre-Trial Judge of the Motion, the Defence for Mr Sabra did not direct any enquiries to the Prosecution regarding the issues raised in the Motion; that it notes, in this regard, that in the interest of efficient and expeditious proceedings, any difficulty arising from the disclosure of documents between the parties should, as far as possible, be resolved through dialogue between the parties;<sup>13</sup>

9. **CONSIDERING** that, in its Response, the Prosecution states that: (i) the redactions in those documents already submitted to Counsel for the defence of the accused (the “Defence”) are necessary to ensure the protection of witnesses and the interests of the investigation and will, *in fine*, be subject to the decision of the Pre-Trial Judge;<sup>14</sup> (ii) Annexes A 2, B, E, G and F to the Application of 21 December 2011 mentioned in point (a) above

---

<sup>7</sup> *Id.*, para. 15.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Id.*, para. 23.

<sup>12</sup> *Id.*, para. 11.

<sup>13</sup> Response, para. 27.

<sup>14</sup> *Id.*, para. 6.

could not be redacted – given the sheer volume and nature of the sensitive information therein – and therefore could not be provided to the Defence for Mr Sabra ;<sup>15</sup> (iii) Annex D to the Application of 21 December 2011 mentioned in point (a) above cannot be disclosed to the Defence at this stage of the proceedings, so as to ensure the protection of the victims and witnesses, as well as the interests of the investigation;<sup>16</sup> (iv) the methodology in the further written submissions of 10 January 2012 and referred to in point (b) above must remain *ex parte* because it goes to the heart of the process for the protection of witnesses and its confidentiality is essential to ensure its integrity;<sup>17</sup> (v) the transcripts of the two audio recordings and one video mentioned in point (c) above were provided to the Defence for Mr Sabra in redacted form on 16 February 2012;<sup>18</sup> (vi) the expert reports referred to in point (d) above were submitted to the Defence for Mr Sabra on 16 February 2012;<sup>19</sup> and (vii) correspondence between the Prosecution and the VWU, as well as the written submissions from the VWU mentioned in point (e) above, are not necessary for the Defence for Mr Sabra to take a position on the Application of 21 December 2011 and their disclosure would reveal the methodologies used by the Prosecution to assess the risks and threats to witnesses;<sup>20</sup>

10. **CONSIDERING** that, according to the Prosecution, the declaration to the effect that the Defence for Mr Oneissi, the Defence for Mr Ayyash and the Defence for Mr Badreddine support the Motion is without effect insofar as the individual counsel have not themselves expressly confirmed such support; that this practice is a source of confusion and legal uncertainty;<sup>21</sup>

11. **CONSIDERING** that the Pre-Trial Judge is of the view that the parties should endeavour to resolve any differences that may arise among them – notably those relating to the disclosure of documents – through dialogue and seize the Pre-Trial Judge only in the event of a breakdown in that dialogue;

12. **CONSIDERING** that the Pre-Trial Judge, noting that this was not done in this specific case, invites and encourages the parties to do so in the future;

---

<sup>15</sup> *Id.*, para. 8.

<sup>16</sup> *Id.*, para. 10.

<sup>17</sup> *Id.*, paras 15 to 17.

<sup>18</sup> *Id.*, paras 18 and 19.

<sup>19</sup> *Id.*, paras 20 and 21.

<sup>20</sup> *Id.*, paras 22 and 24.

<sup>21</sup> *Id.*, paras 25 and 26.

13. **CONSIDERING** that, as to the merits of the Motion, the Pre-Trial Judge recalls that pursuant to the Order “within ten working days following the appearance of the accused and/or defence counsel has been designated or assigned as duty counsel, the Prosecution shall disclose to it a redacted version of the Application [of 21 December 2011], taking into account, where appropriate, the results of the review by the VWU, as well as the evidentiary materials mentioned in the Application [of 21 December 2011] to which the Prosecution will have applied the protective measures that it seeks, taking into account, where appropriate, the results of the review by the VWU”;<sup>22</sup>

14. **CONSIDERING** that the aim of the Order was for the Prosecution to disclose to the Defence the evidentiary materials referred to in the Application of 21 December 2011 to which it will have applied the protective measures it deems necessary and that it seeks, so as to enable the Defence to take cognizance of those measures and gauge the scope thereof before it could make its observations;<sup>23</sup>

15. **CONSIDERING** that consequently, the Prosecution was justified in redacting from the Application of 21 December 2011, as well as the evidentiary materials mentioned therein, any information that, in its view, might, in particular, endanger the witnesses, bearing in mind the VWU’s evaluation, and of which it intends to request redaction;

16. **CONSIDERING** that it is only after having received the Defence observations on the protective measures sought by the Prosecution that the Pre-Trial Judge intends to make a determination on the appropriateness of taking such measures, taking into account the need, on the one hand, to protect the individuals affected by the case and the interests of the ongoing investigation and, on the other hand, to ensure that the rights of the accused are respected by enabling the Defence to adequately prepare their defence;

17. **CONSIDERING** that at this stage of the proceedings, the Pre-Trial Judge therefore does not consider that he must make a determination on the protective measures, and in particular on the redactions proposed by the Prosecution and considers that the observations of the Defence for Mr Sabra on this point are, at the very least, premature;

18. **CONSIDERING** that the Pre-Trial Judge notes that Annexes A 2, B, D, E, F and G to the Application of 21 December 2011, which were not provided to the Defence,<sup>24</sup> contain respectively the following confidential items: the list of witnesses in respect of whose identity

---

<sup>22</sup> Order of 24 January 2012, Disposition.

<sup>23</sup> *Id.*, para. 6.

<sup>24</sup> Notice of 16 February 2012, p. 3.

the Prosecution is seeking interim non-disclosure pursuant to Rule 116 of the Rules; an overall and individual assessment of the risks to the witnesses; a schedule of the documents contained in the evidentiary materials; the Declaration of the Chief of Investigations of 3 May 2011 and updated on 23 November 2011; summaries of certain witness statements taken pursuant to Rule 116 of the Rules; and the list of protected witnesses, together with their pseudonyms;

19. **CONSIDERING** that the Pre-Trial Judge is of the view that, given the argument advanced by the Prosecution that it is impossible to redact the information appearing in the aforementioned Annexes without them losing all meaning, there is justification for not disclosing such information to the Defence at this stage of the proceedings; that he will decide whether, and to what degree, it will subsequently be disclosed when he makes a determination as to the merits of the Application of 21 December 2011;

20. **CONSIDERING** that the Pre-Trial Judge acknowledges the statements made by the Prosecution in its Notice of 16 February 2012<sup>25</sup> and, in particular, the fact that it disclosed to the Defence, in redacted form, the transcripts of the two recordings and one video mentioned in paragraph 6, point (c) above;<sup>26</sup>

21. **CONSIDERING** that, in this respect, the Pre-Trial Judge indicates that he was seized of an Application from the Prosecution of 9 March 2012<sup>27</sup> and that, as a consequence, he will address that issue in a separate order;

22. **CONSIDERING** that, furthermore, the expert reports mentioned in paragraph 6, point (d) above are not covered by the Order of 24 January 2012; that, on 15 March 2012, the Pre-Trial Judge was seized of an application from the Prosecution<sup>28</sup> and that, as a consequence, he will address that issue in a separate order;

23. **CONSIDERING** that disclosure of the correspondence between the Prosecution and the VWU, as well as the written submissions of the VWU mentioned in paragraph 6, point (e) above, would be tantamount to revealing the methodologies used by the VWU to assess the risks and threats to the witnesses, and might, consequently, cause them harm; there is

---

<sup>25</sup> Notice of 16 February 2012. para. 10.

<sup>26</sup> *Id*, para. 11.

<sup>27</sup> STL, Case No. STL-11-01/PT/PTJ, Prosecution's Application Regarding Disclosure of Two Audio-Files and One Video-File, 9 March 2012.

<sup>28</sup> STL, Case No. STL-11-01/PT/PTJ, Prosecution's Second Application for Interim Non-disclosure of the Identity of Witnesses Pursuant to Rule 115 and Witness Protective Measures Pursuant to Rule 133, 15 March 2012.

therefore justification for not disclosing those documents to the Defence, at least at this stage of the investigation;

24. **CONSIDERING** that the Pre-Trial Judge lastly acknowledges the fact that, according to the Defence for Mr Sabra, the Defence for Mr Oneissi, the Defence for Mr Ayyash and the Defence for Mr Badreddine joined the Motion;<sup>29</sup> that he considers nonetheless that whenever they wish to join an application or any other written submission from one of their learned colleagues, it would be appropriate that the Counsel for the Defence confirm such intention in writing so as to avoid any ambiguity in that regard;

25. **CONSIDERING** that the Pre-Trial Judge therefore invites the Defence to do so henceforth;

26. **CONSIDERING** that in view of the foregoing, the Pre-Trial Judge considers that the Prosecution has met its obligations as to disclosure pursuant to the Order of 24 January 2012;

27. **CONSIDERING** that it is appropriate, therefore, in accordance with the Order of 24 January 2012 to establish the period within which the Defence will be invited to present its observations on the Application of 21 December 2011 and the evidentiary materials attached thereto;<sup>30</sup>

28.

#### **FOR THESE REASONS,**

Pursuant to Rules 89 (A) and (B), 110, 115, 116 and 133 of the Rules;

#### **THE PRE-TRIAL JUDGE**

**TAKES NOTE** of the statements made by the Prosecution in its Notice of 16 February 2012 and, in particular, the fact that it submitted to the Defence in redacted form the transcripts of the two audio recordings and one video mentioned in paragraph 6, point (c) above;

**CONSIDERS** that the Prosecution has met its obligations as to disclosure pursuant to the Order of 24 January 2012;

---

<sup>29</sup> Motion, para. 11.

<sup>30</sup> Order of 24 January 2012, Disposition.

**DECLARES** the Motion without merit;

**INVITES** the Defence for Mr Sabra, the Defence for Mr Oneissi, the Defence for Mr Ayyash and the Defence for Mr Badreddine to present their observations on the Application of 21 December 2011 and on the materials attached thereto by 11 April 2012 at the latest;

**INVITES** the Defence for Mr Sabra, the Defence for Mr Oneissi, the Defence for Mr Ayyash and the Defence for Mr Badreddine to confirm in writing, where appropriate, their wish to join procedural documents filed by any one of them in the course of subsequent proceedings; and

**INVITES** the parties to seek to resolve any differences that may arise among them through dialogue, prior to seizing the Pre-Trial Judge of them.

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

Leidschendam, 23 March 2012

[stamp]

[signature]

---

Daniel Fransen  
Pre-Trial Judge

