

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: **Mr Daniel Fransen**
The Registrar: **Mr Herman von Hebel**
Date: **3 April 2012**
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THE PROSECUTOR

v.

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

**ORDER RELATING TO THE PROSECUTION'S APPLICATION OF 9 MARCH 2012
REGARDING THE DISCLOSURE OF TWO AUDIO FILES AND ONE VIDEO FILE**

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



I. Subject of the Order

1. By way of this Order, the Pre-Trial Judge rules on the Prosecution's Application of 9 March 2012 regarding the temporary non-disclosure of two audio files and one video file comprising witness statements which form part of the evidentiary materials submitted in support of the indictment brought against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra (the "Application", the "Files" and the "Indictment" respectively).¹

II. Background to the proceedings

2. On 21 December 2011, the Prosecution filed an application for interim non-disclosure of the identity of witnesses whose statements form part of the evidentiary materials supporting the Indictment pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence (the "Rules") and for the granting of protective measures pursuant to Rule 133 of the Rules (the "Application of 21 December 2011").²

3. On 24 January 2012, the Pre-Trial Judge decided that, within 10 working days following the appearance of the accused and/or assignment or designation of Defence Counsel, the Prosecution shall disclose to them a redacted version of the Application of 21 December 2011, as well as the evidentiary materials referred to in that Application to which it will have applied the protective measures it seeks (the "Order of 24 January 2012").³

4. On 2 February 2012, at the request of the Pre-Trial Judge in accordance with Rule 105 *bis* (B) of the Rules, the Head of Defence Office proceeded to assign counsel for the proceedings *in absentia* against the Accused.⁴

5. On 7 February 2012, the Pre-Trial Judge stated that the evidentiary materials mentioned in the Prosecution's Application of 21 December 2011 had to be disclosed to the defence counsel for Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra (the "Defence

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution's Application Regarding Disclosure of Two Audio-Files and One Video-File, 9 March 2012.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/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.

³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/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.

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PTJ, Assignment of Counsel for the Proceedings Held In Absentia Pursuant to Rule 106 of the Rules, 2 February 2012.

Counsel”) within 10 working days after “the appearance of the accused and/or defence counsel has been designated or assigned as duty counsel”.⁵

6. On 16 February 2012, the Prosecution filed a notice regarding compliance with the Order of 24 January 2012 (the “Notice of 16 February 2012”).⁶ In that Notice, it stated that it had disclosed to Defence Counsel redacted transcriptions of the Files because the information cannot be redacted from those same Files. It mentioned that the Files will be provided to Defence Counsel at a later date.⁷

7. On 23 February 2012, the Defence for Mr Sabra filed a motion to ensure compliance with the Order of 24 January 2012 in which it considered that the Prosecution was in violation of its obligations, specifically by not disclosing the Files.⁸

8. On 2 March 2012, the Prosecution responded that the transcriptions of these Files were disclosed to the Defence for Mr Sabra in redacted form on 16 February 2012.⁹

9. On 9 March 2012, the Prosecution filed the Application in order to be authorised to: (i) be relieved of the obligation to disclose the Files to Defence Counsel until 30 days before the presentation of the evidence relating to them; and (ii) redact the transcriptions of the Files of any information relating to the identity of persons appearing in them, i.e. the witnesses, investigators, analysts, interpreters and other members of staff concerned.¹⁰

10. On 13 March 2012, the Defence for Mr Sabra contested the Application, stating that the Defence Counsel for Mr Ayyash, Mr Badreddine and Mr Oneissi joined and supported them in their action (the “Response”).¹¹

⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Relating to the Disclosure of the Documents Referred to in Rule 110 (A) of the Rules of Procedure and Evidence, 7 February 2012, para. 6.

⁶ STL, *The Prosecutor v. Ayyash et al.*, 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.

⁷ Notice of 16 February 2012, para. 11.

⁸ STL, *The Prosecutor v. Ayyash et al.*, 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.

⁹ STL, *The Prosecutor v. Ayyash et al.*, 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, para. 19.

¹⁰ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Application Regarding Disclosure of Two Audio-Files and One Video-File, 9 March 2012, para. 16.

¹¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Response to Prosecution’s Out of Time Application for Non-Disclosure and Regarding Prosecution Non-Compliance with Court Order, 13 March 2012.

11. On 23 March 2012, the Pre-Trial Judge ruled on the motion by the Defence for Mr Sabra of 23 February 2012, stating (1) that the Prosecution has complied with its disclosure obligations pursuant to the Order of 24 January 2012, (2) noting the statements made by the Prosecution in the Notice of 16 February 2012 and particularly the fact that it had disclosed to the Defence, in redacted form, the transcriptions of the two audio files and of the video and, (3) stating that the matter will be dealt with in a separate Order.¹² The Pre-Trial Judge also invited Defence Counsel to present any observations with regard to the Application of 21 December 2011 and the documents annexed thereto, by 11 April 2012 at the latest.¹³

III. Submissions of the parties

12. In the Application, the Prosecution states that in the Application of 21 December 2011 it sought protective measures for the witnesses mentioned in the Files but that, for technical reasons, additional protective measures are required.¹⁴ Indeed, it submits the fact that modification of the images or voices of the persons concerned by the Files is a complex operation that requires time and technical skills which it does not have available at present.¹⁵ These difficulties are exacerbated by the size of the Files and by the fact that they include the use of several languages.¹⁶

13. The Prosecution points out that on 16 February 2012, when the materials mentioned in the Application of 21 December 2011 were disclosed to Defence Counsel, without waiting to be authorised to do so beforehand, it disclosed to them transcriptions of the Files, redacted of any information that, according to the Prosecution, should be protected.¹⁷ Indeed it considers that these redactions are necessary to ensure the protection of the aforementioned persons, in accordance with Rules 96 (B), 115, 116 and 133 of the Rules.¹⁸ In addition, the Prosecution states that it also disclosed to Defence Counsel supporting material related to the

¹² STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Ordonnance relative à la requête de la Défense de M. Sabra aux fins de garantir le respect de l'Ordonnance du Juge de la mise en état du 24 janvier 2012 et portant fixation d'un délai pour faire valoir des observations à propos de la Requête du Procureur du 21 décembre 2011*, 23 March 2012.

¹³ *Id.*, Disposition.

¹⁴ Application, paras 6 and 7.

¹⁵ *Id.*, para. 11.

¹⁶ *Ibid.*

¹⁷ *Id.*, para. 10.

¹⁸ *Id.*, para. 6.

Files.¹⁹ Finally, it invokes case law from the International Criminal Court (the “ICC”) in which transcriptions of video and audio recordings were disclosed to the counsel for the Defence in place of actual recordings until appropriate protective measures had been taken.²⁰

14. In the Response, the Defence for Mr Sabra submits the following main arguments:

- the Prosecution has violated the terms of the Order of 24 January 2012²¹ which gave it 10 working days from the assignment of Defence Counsel to file any application relating to non-disclosure of evidentiary material;²²
- the Prosecution has provided no possible justification for not complying with the deadlines set forth in the Order of 24 January 2012;²³
- the case law of the ICC referred to by the Prosecution is not applicable to the case at hand to the extent that it particularly regarded witnesses and not third parties;²⁴
- the Prosecution has not demonstrated that the recommended protective measures were justified, necessary and proportionate;²⁵
- the Prosecution has had ample time (three years) and the necessary means to modify the voices and images contained in the Files;²⁶
- the Prosecution does not indicate whether the Victims and Witnesses Unit (the “VWU”) shares its view that the Files cannot be disclosed;²⁷ and
- Defence Counsel must know the identity of the persons referred to in the Files in order to be able to assess their credibility.²⁸

¹⁹ *Id.*, para. 12.

²⁰ *Id.*, para. 9.

²¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/1/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.

²² Response, paras 10 to 13.

²³ *Id.*, para. 12.

²⁴ *Id.*, para. 16.

²⁵ *Ibid*

²⁶ *Id.*, para. 19.

²⁷ *Ibid*

²⁸ *Ibid*.

15. The Defence for Mr Sabra states nevertheless that it has not revealed its position as to the merit of the proposed redactions.²⁹

IV. Statement of reasons

16. The Pre-Trial Judge recalls that, according to the Order of 24 January 2012 – issued following the Application of 21 December 2011, the Prosecution was obliged to:

within ten working days following the appearance of the accused and/or defence counsel has been designated or assigned as duty counsel, [...] 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 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.³⁰

17. The Order of 24 January 2012 referred then to all of the statements and other documents relating to the witnesses mentioned in the Application of 21 December 2011, including those mentioned in the Files. Those were moreover mentioned in the confidential and *ex parte* Annex D to that application. In addition, the witnesses concerned by the Files are the subject of the risk assessment contained in Annex B of that application.³¹

18. Nevertheless, the Pre-Trial Judge notes that in the Application of 21 December 2011, the Prosecution did not explicitly request the non-disclosure of those Files. As a consequence, the measures sought in the Application are supplementary protective measures.

19. However, even if the Prosecution was authorised to make requests for protection of information other than those made in the Application of 21 December 2011, the Pre-Trial Judge deems that it should have filed them within the time period set by the Decision of 24 January 2012, i.e. within 10 days after assignment of counsel, that is on 16 February 2012 at the latest.

20. The Pre-Trial Judge notes that as at 16 February 2012, the Prosecution had not sought supplementary protective measures. However, on that same date, it filed a notice informing that it could not redact the Files and that, as a consequence, it was disclosing a redacted

²⁹ *Id.*, para. 7.

³⁰ Order of 24 January 2012, Disposition.

³¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/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, Annex B.

version of their transcription in place of the Files which would be disclosed later to the Defence. The Pre-Trial Judge considers that nothing prevented the Prosecution from seeking new protective measures before 16 February 2012 and that it should have done so in the interests of proper administration of justice.

21. Nevertheless, the Pre-Trial Judge notes the practical difficulties with which the Prosecution states it is confronted to modify, in the Files, the voices or images of the persons it wishes to protect. He considers that disclosing to Defence Counsel, at this stage in the proceedings, a redacted version of the transcription of the Files can be an appropriate measure to compensate for these difficulties and risks, without prejudice to any decision that is issued after the Application of 21 December 2011 has been examined.

22. In this regard, the Pre-Trial Judge notes that the redacted version of the transcription of the Files forms part of the materials that are the subject of these proceedings and that Defence Counsel is therefore authorised to submit its observations in that respect by 11 April 2012 at the latest, including those relating to the minimum time period for receipt of the Files that would be necessary to appropriately prepare the Defence of the Accused.³²

³² Order of 23 March 2012, Disposition.

V. Disposition**FOR THESE REASONS,**

Pursuant to Rules 77, 96 (B), 110 (A) (i), 115 (A) and 116 (A) (i) of the Rules,

THE PRE-TRIAL JUDGE,

AUTORISES the Prosecution to not disclose, at this stage in the proceedings, the Files to Defence Counsel;

NOTES the fact that on 16 February 2012, the Prosecution disclosed to Defence Counsel the version of the transcription of the Files that had been redacted of all the information which, according to the Prosecution, should remain confidential; and

REMINDS Defence Counsel that they are authorised to submit, by 11 April 2012 at the latest, their observations relating to the redacted version of the transcription of the Files, including those relating to the minimum time period for receipt of the Files that would be necessary to appropriately prepare the Defence of the Accused.

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

Leidschendam, 3 April 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

