



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: **Mr Daniel Fransen**

The Registrar: **Mr Herman von Hebel**

Date: **25 May 2012**

Original language: **French**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION RELATING TO THE PROSECUTION REQUEST SEEKING MEASURES FOR
THE NON-DISSEMINATION OF MATERIAL OF 2 MAY 2012**

Office of the Prosecutor:
Mr Norman Farrell

Victims' Legal Representative:
Mr Peter Haynes

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Mr Eugene O'Sullivan
Mr Emile Aoun

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
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Counsel for Mr Hussein Hassan Oneissi:
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Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux





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1. By way of this Decision, the Pre-Trial Judge rules on the Prosecution request of 2 May 2012 seeking an order aimed at preventing the dissemination of the material filed in support of the indictment in the context of the *Ayyash et al.* case (the “Indictment”) in order to protect the contents thereof. That material was disclosed to counsel for the Defence for Messrs. Ayyash, Badreddine, Oneissi and Sabra (respectively the “Defence” and the “Accused”), in accordance with Rule 110 (A) (i) of the Rules of Procedure and Evidence (the “Rules”).

I. Procedural background

2. The Prosecution filed three main applications for non-disclosure of the material attached in support of the Indictment. The first application, dated 21 December 2011, seeks to protect the identity of several witnesses and other persons mentioned in that material (the “Application of 21 December 2011”).¹ The second application, dated 9 March 2012, concerns the temporary non-disclosure of two audio files and one video file containing the statements of witnesses (the “Application of 9 March 2012”).² The third application, dated 15 March 2012, concerns the interim non-disclosure of the identity of expert witnesses (the “Application of 15 March 2012”).³

3. On 2 May 2012, the Prosecution filed a request seeking an order for non-disclosure of information by the Defence and the public (the “Request of 2 May 2012”).⁴ On 11 May 2012,

¹ 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.

² 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.

³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Second Application for Interim Non-Disclosure of the Identity of Witnesses pursuant to Rules 115 and Witness Protective Measures pursuant to Rule 133, 15 March 2012.

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for an Order of Non-Disclosure, 2 May 2012.



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all the Defence teams (the “Joint Response of the Defence”)⁵ and the Defence Office (the “Observations of the Defence Office”)⁶ replied to it.

4. On 15 May 2012, the Prosecution filed a confidential notice relating to measures for non-disclosure of the identity of witnesses and witness protective measures that had been sought in the Application of 21 December 2011 (the “Notice of 15 May 2012”).⁷

5. On 22 May 2012, the Prosecution requested leave to file a consolidated reply to the Joint Response of the Defence and to the Observations of the Defence Office (the “Reply”).⁸ It also filed the Reply itself.

II. Submissions of the Parties

6. The submissions of the Parties and the Observations of the Defence Office will be discussed as and when the requested measures are being considered.

III. Statement of reasons

A. Preliminary remarks

1. The Request of 2 May 2012 and the Notice of 15 May 2012

7. The Pre-Trial Judge takes note of the fact that, as pointed out in the Request of 2 May 2012, supplemented by the Notice of 15 May 2012, the Prosecution is re-examining the protective measures that it has been seeking until the present time, in particular those mentioned in the Application of 21 December 2011, for the purposes of disclosing to the Defence, without redactions, a larger amount of material than it had originally suggested.

⁵ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Réponse conjointe de la Défense à la « Prosecution Request for an Order of Non-Disclosure » du 2 mai 2012*, 11 May 2012.

⁶ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Observations du Bureau de la Défense en réponse à la Requête du Procureur en date du 2 mai 2012 sollicitant une ordonnance de non-communication*, 11 May 2012.

⁷ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Notice regarding Disclosure and the Prosecution Application for Interim Non-Disclosure of the Identity of Witnesses and Witness Protective Measures, 15 May 2012.

⁸ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Consolidated Reply to the Defence Counsel and Defence Office Responses to the Prosecution Request for an Order of Non-Disclosure, 22 May 2012.



8. Accordingly, the Prosecution seeks general protective measures intended as a framework within which to disclose material to the Defence whilst making certain that it will only be used to ensure the defence of the interests of the Accused and that it cannot be disseminated to the public.

2. The Reply

9. Rule 8 of the Rules requires that the Prosecution obtain leave of the Pre-Trial Judge to file a reply. That being so, the Prosecution cites compelling reasons that justify the filing of the Reply, relating in particular to the clarifications it intends making and on the objectives pursued in the Requests of 2 May 2012.⁹ The Pre-Trial Judge considers that the reasons cited at this advanced stage of the review of the Request of 2 May 2012 do not justify authorising the filing of the Reply.

3. The status of the Applications of 21 December 2011 and 9 and 15 March 2012

10. The Pre-Trial Judge notes that the Prosecution points out in the Notice of 15 May 2012 that it has re-examined the requested protective measures in light of two factors: the holding of proceedings *in absentia* and the request for the non-dissemination of information relating to the witnesses in the Request of 2 May 2012.¹⁰ The Prosecution also mentions that, should the measures for non-dissemination sought in the Request of 2 May 2012 be granted, it intends disclosing to the Defence a large part of the supporting materials without requesting redactions.¹¹ Thus, the Prosecution states that it envisages requesting a withdrawal, in part, of the Application of 21 December 2011 without, however, referring either to the Application of 9 March 2012 or the Application of 15 March 2012. As a consequence, the Pre-Trial Judge does not deem it appropriate to rule on those Applications before having considered the Request of 2 May 2012. He considers it necessary however that, following this Decision, the Prosecution shall, as soon as possible: (1) disclose to the Defence the supporting materials that do not require other protective measures than those mentioned in this Decision; (2) re-examine the status of the Application of 21 December 2011, the Application of 9 March 2012

⁹ Reply, para. 4.

¹⁰ Notice of 15 May 2012, para. 3.

¹¹ *Id.*, para. 4.



and the Application of 15 March 2012; and, if appropriate, (3) seize the Pre-Trial Judge of a request for the purposes of protecting the material which may not be disclosed as is to the Defence.

4. The legal basis of the Request of 2 May 2012

11. The Prosecution bases the principal protective measures it seeks on Article 18 (2) of the Statute and on Rules 9 (A), 61 (ii) and (iv), 74, 77 (A), 96 and 115 of the Rules.¹² Furthermore, the Prosecution relies in particular on Rule 133 of the Rules in order to justify the measures designed to ensure the protection of the victims and witnesses mentioned in the three “faulty” files disclosed to the Defence.¹³

12. The Pre-Trial Judge notes that the Request of 2 May 2012 concerns principally measures for the non-dissemination to the public of material disclosed by the Prosecution to the Defence in accordance with Rule 110 (A) (i) of the Rules. It does not therefore concern the interim non-disclosure of the identity of witnesses to the Defence. Yet Rule 115 of the Rules, on which the Prosecution mainly relies, specifically refers to this last eventuality. It is Rule 133 of the Rules alone – and, in particular, paragraph (C) (i) of that provision – that concerns the non-dissemination of information to third parties. That paragraph deals in fact with “measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with [...] (b) non-disclosure to the public of any records identifying the victim or the witness [...]”. Consequently, as was rightly pointed out by the Defence,¹⁴ the measures sought in the Request of 2 May 2012 should have been based on Rule 133 of the Rules. In the interest of justice and the expeditiousness of the proceedings, the Pre-Trial Judge finds therefore that the legal basis of the entire Request of 2 May 2012 should be re-qualified and likewise examined in the light of Rule 133 of the Rules.

¹² Request of 2 May 2012, para. 2.

¹³ *Id.*, para. 9.

¹⁴ Joint Response of the Defence, para. 14.

**B. Review of the measures sought****1. The definition of the notion of “Defence”, “Prosecution”, “media”, “public” and “material” (paragraph 26 (a) of the Request of 2 May 2012)****a. Submissions of the Parties and the Defence Office**

13. For the requirements of the Request of 2 May 2012, the Prosecution proposes the following definitions:¹⁵

- a) the notion of “Defence”: the defence counsel assigned for the purposes of the *in absentia* proceedings, members of their legal team as well as their investigative team, any other person considered a member of the defence team as well as any other person assigned or listed with the Registry as part of their defence team;
- b) the notion of “Prosecution”:¹⁶ the Prosecutor of the Tribunal and his staff;
- c) the notion of “media”: all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives;
- d) the notion of “public”: all persons, third parties, governments, organisations, entities, clients, associations, groups, media and, in the context of *in absentia* proceedings, the Accused; “public” does not include the judges and staff of the Tribunal Chambers and Registry, the Prosecution and the Defence as defined above; “public” specifically includes and without limitation, family, friends and associates of each accused, the media, the accused in other cases or proceedings before the Tribunal and/or before national courts, and defence counsel in other cases or proceedings before the Tribunal and/or national courts; and

¹⁵ Request of 2 May 2012, para. 26 (a).

¹⁶ The term used in the Request of 2 May 2012 is “Prosecution”.



e) the notion of “material”:¹⁷ all information, including statements, documents, videos, photographs, and any other data sources in hard copy or electronic format.

14. The Joint Response of the Defence points out that the term “Defence” must be understood as including counsel for the Defence and the members of their defence teams as listed by the Defence Office and not by the Registry.¹⁸

15. The Defence Office points out, for its part, that the term “public” should not include the Defence Office.¹⁹

b. Statement of reasons

16. The Pre-Trial Judge considers that it is appropriate to refer to the definitions of the terms as used in the prevailing texts of the Tribunal. Indeed, adopting new definitions for the purpose in hand leads to confusion and uncertainty and should not be allowed.

17. Hence, the notion of “Defence” is defined in Rule 2 (A) of the Rules and Article 1 of the Directive on the Assignment of Defence Counsel (the “Directive”) in the following terms: “the accused and/or the accused’s counsel”.²⁰ Furthermore, Article 31 (D) of that Directive also includes in the Defence teams “experts and expert consultants, investigators, legal consultants and assistants, case managers and interns”, a list of whom will have been drawn up by the Head of Defence Office. The definition suggested by the Prosecution is unnecessary, those texts alone being relevant.

18. The Prosecution proposes to include the Accused within the definition of the public.²¹ Yet, the notion of the accused is defined by Rule 2 of the Rules as being: “a person against whom one or more counts in an indictment have been confirmed [...]”. The accused cannot under any circumstances be likened to the public. It has little bearing that the proceedings which concern the accused are held in their presence or not. Furthermore, there is no need for them to be included since the principles of professional ethics set out in Article 8 (E) of the

¹⁷ The term used in the Request of 2 May 2012 is “material”.

¹⁸ Joint Response of the Defence, para. 9.

¹⁹ Observations of the Defence Office, paras 12 and 13.

²⁰ The first Article of that same Directive likewise defines the notions of “defence teams”, “lead counsel” and “co-counsel”.

²¹ Request of 2 May 2012, para. 26 (a) (iv).



Code of Professional Conduct for Defence Counsel appearing before the Special Tribunal for Lebanon (the “Code of Conduct for the Defence”) stipulate that the assigned counsel for the defence in the context of proceedings *in absentia* shall not have contact with the accused, and this is the case here.²²

19. Furthermore, with regard to the notion of “material”, the Pre-Trial Judge finds that the material mentioned is that attached to the Indictment in accordance with Rule 68 (E) of the Rules and there is no need to define it differently.

20. Lastly, the Pre-Trial Judge does not consider it necessary to define the terms “public” and “media” for the purpose in hand, but that it is appropriate that these terms be referred to in their commonly accepted sense.

2. The Registry to maintain a list of the Defence teams (paragraph 26 (b) of the Request of 2 May 2012)

a. Submissions of the Parties and the Defence Office

21. The Prosecution requests that the Pre-Trial Judge order the Defence to file with the Registry a complete list of its members within 10 days following the filing of the said order and to notify the Registry of all changes to their respective list within 10 days of such change occurring.²³

22. The Defence and the Defence Office submit that that request goes against the existing provisions, since Article 13 (1) of the Statute and Rules 57 (D) and 59 (B) of the Rules set forth that the list of persons representing the Defence or members thereof shall be drawn up, validated and updated by the Defence Office.²⁴

²² Article 8, paragraph D of the Code of Conduct is worded as follows: “Defence Counsel who is assigned to an *in absentia* accused shall not have contact with the accused. If Defence Counsel is contacted, directly or indirectly, by the *in absentia* accused he shall, due to his awareness of the risk such contact may pose to the accused’s right to a retrial, and without this act amounting to acceptance of Defence Counsel by the *in absentia* accused and (ii) refer the accused to the Head of Defence Office to receive independent legal advice.”

²³ Request of 2 May 2012, para. 26 (b).

²⁴ Observations of the Defence Office, paras 5 to 8; Joint Response of the Defence, paras 7 and 8.

**b. Statement of reasons**

23. The Pre-Trial Judge recalls that, pursuant to Article 13 (1) of the Statute, as well as Rules 57 (D) (i) and 59 (B) of the Rules, the Head of Defence Office shall draw up a list of Defence counsel. According to Article 31 (D) of the Directive, he shall also draw up a list of other competent persons, such as “experts and expert consultants, investigators, legal consultants and assistants, case managers and interns”.

24. As a consequence, the Pre-Trial Judge considers that it is for the Head of Defence Office, and not the Registry, to draw up and update the list of Defence counsel and those persons who are members of their teams, which is, moreover, likely to answer the concerns of the Prosecution.

3. Order prohibiting the disclosure of the identity of witnesses to third parties (paragraph 26 (c) of the Request of 2 May)**a. Submissions of the Parties**

25. The Prosecution requests an order indicating to the Defence that it may not, either directly or indirectly, disseminate to the public the material or information contained therein, including any witness statements and their identities, as well as that of groups of witnesses disclosed by the Prosecution, except as reasonably necessary to allow the Defence to prepare the case, participate in the proceedings and present its defence, or if those materials become public during open session proceedings.²⁵

²⁵ Request of 2 May 2012, para. 26 (c).



26. The Defence objects to that request and recalls that protective measures are exceptional measures which must be justified on an individual basis and according to an assessed risk. In the case at hand, some of the documents disclosed by the Prosecution contain information of a public nature and need not be subjected to such measures. In addition, the Defence considers that request as unnecessary insofar as paragraph 5 of the Code of Professional Conduct for Defence Counsel Appearing before the Tribunal (the “Code for Counsel”) and Article 10 of the Code of Conduct for the Defence already require that the Defence shall protect the confidentiality of the evidence of the proceedings.²⁶

b. Statement of reasons

27. The Pre-Trial Judge recalls that paragraph 5 of the Code for Counsel, which sets forth that counsel shall “protect the confidentiality of evidence and proceedings identified as such by the Tribunal” and that, unless otherwise provided by the relevant Chamber, “Counsel may only disclose confidential evidence to others who are ethically or contractually bound to protect its confidentiality and only when necessary for investigations or case preparation.”

28. Consequently, the Pre-Trial Judge considers that the Prosecution request relating to the obligation of non-dissemination to the public of the material disclosed by the Prosecution to the Defence and the information concerning witnesses provided by the Prosecution is covered by paragraph 5 of the above-mentioned Code for Counsel.

29. The Pre-Trial Judge points out that that obligation applies to the Defence, to the Legal Representative of the victims participating in the proceedings (“VPP”), as to the Prosecution.

²⁶ Joint Response of the Defence, paras 15 and 18.



4. Order prohibiting dissemination to third parties of information concerning the whereabouts of witnesses and potential witnesses identified by the Prosecution and how they should be contacted (paragraph 26 (d) of the Request of 2 May 2012)

a. Submissions of the Parties

30. The Prosecution requests that the Pre-Trial Judge impose three obligations on the Defence relating to the protection of witnesses or potential witnesses identified by it:

- a) that information concerning the whereabouts of witnesses or potential witnesses shall not be disseminated, except as reasonably necessary to allow the Defence to prepare the case, participate in the proceedings and present its defence or should such material become public;²⁷;
- b) that to contact a Prosecution witness or potential witness, the Prosecution must be informed in writing and authorisation must be granted from said witness by way of the Registry's Victim and Witness Unit (the "VWU");²⁸ and
- c) that any member of the Defence contacting a witness or potential witness of the Prosecution must identify him or herself as working for the Defence.²⁹

31. The Defence is of the view that the protective measures mentioned in points (a) and (c) are unnecessary due to the fact that those obligations already exist in the Code for Counsel. In addition, the Defence rejects the obligation that would make it incumbent upon it to inform the Prosecution and obtain authorisation from the witness or potential witness under the circumstances outlined in point (b) above. It considers in fact that that obligation is excessive and that the term "potential witness" has not been defined, which undermines the application of that obligation.³⁰

²⁷ Request of 2 May 2012, para. 26 (d).

²⁸ *Id.*, para. 26 (d).

²⁹ *Id.*, para. 26 (d).

³⁰ Joint Response of the Defence, paras 17, 18, 24 and 25.

**b. Statement of reasons**

32. The Pre-Trial Judge considers that there is no reason to create a distinction between witnesses and potential witnesses at this stage of the proceedings, as any person who could become a witness may appear in court. He recalls and considers that information relating to the whereabouts of witnesses identified by the Prosecution is protected by the non-disclosure obligation mentioned in paragraph 5 of the Code for Counsel. Indeed, that paragraph provides in particular that “Counsel may only disclose confidential evidence to others who are ethically or contractually bound to protect its confidentiality and only when necessary for investigations or case preparation.”

33. With regard to the obligation on the Defence to present itself as such during its contacts with witnesses identified by the Prosecution, the Pre-Trial Judge considers the measure well-founded and in keeping with prevailing case law.³¹

34. Lastly, with regard to the obligation on the Defence to give prior written notice to the Prosecution of its intention to contact a witness identified by the Prosecution and to obtain authorisation from that witness through the VWU, the Pre-Trial Judge considers that it is only justified with regard to witnesses facing a specific risk.³²

35. The Pre-Trial Judge considers that, in order to allow the Defence to discharge its obligations mentioned above, the Prosecution should, at the earliest opportunity, provide them with a witness list indicating those who face a specific risk. In the absence thereof, the Defence cannot be legally informed. That list should be updated on a regular basis.

³¹ International Criminal Tribunal for the former Yugoslavia (“ICTY”), *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 6 June 2005, Disposition para. 7; ICTY, *The Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 30 July 2008, Disposition para. 7.

³² International Criminal Tribunal for Rwanda (“ICTR”), *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Decision on Prosecutor’s Second Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment, 3 September 2010, p. 5, point (vi); ICTR, *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009, pp. 3 and 4, measure (i).



36. The Pre-Trial Judge finds that the measure applies *mutatis mutandis* to the Prosecution and the Legal Representative of the VPP, as appropriate.

5. The Defence remain bound by the obligations listed in paragraphs 26 (c) and (d) of the Request of 2 May 2012 after the conclusion of the proceedings, as does any member of the Defence who leaves (paragraph 26 (i) of the Request of 2 May 2012)

a. Submissions of the Parties

37. The Prosecution requests of the Pre-Trial Judge that the Defence remain bound by the obligations set out in paragraphs 26 (c) and (d) of the Request of 2 May 2012 after the proceedings have ended. He likewise requests that those obligations be applied to any member of the Defence who withdraws or leaves the Defence team of any of the Accused.³³

b. Statement of reasons

38. The Pre-Trial Judge considers that the obligations laid down in paragraph 5 of the above-mentioned Code for Counsel and Rule 60 *bis* (A) (iii) of the Rules relating to contempt and obstruction of justice sufficiently answer the concerns of the Prosecution. In this respect, the Pre-Trial Judge recalls that the provisions of Rule 60 *bis* of the Rules apply to any person, including those who are or were members of a Defence team.

39. The Pre-Trial Judge points out that obligations of the same kind apply to the Prosecution and to the Legal Representative of the VPP.

³³ Request of 2 May 2012, par. 26 (i).



6. Obligations on the Defence relating to the dissemination to third parties to the proceedings of material disclosed by the Prosecution for reasons deemed necessary (paragraph 26 (e) of the Request of 2 May 2012)

a. Submissions of the Parties

40. The Prosecution maintains that, when the Defence wishes, for reasons deemed necessary, to disseminate to third parties to the proceedings material that it has disclosed to it, the Defence must inform those third parties that such material shall not be disseminated or copied and after use shall be returned to the Defence and that in the event of any violation of those rules sanctions shall be applied.³⁴

41. The Defence objects to that measure and does not find it useful in any way since all counsel and their Defence teams already comply with the Code for Counsel and, therefore, are obliged to take the necessary steps to protect the confidentiality of the materials that they may have to disclose to third parties.³⁵

b. Statement of reasons

42. The Pre-Trial Judge notes that the requested measure does not appear in the prevailing texts of the Tribunal. It is however in keeping with the case law of other international courts, in particular that of the ICTY. Indeed, that Tribunal authorised the measure aimed at informing third parties of the obligation not to disseminate material that is disclosed to them, failing which sanctions will apply.³⁶ The Pre-Trial finds that that measure, intended to reinforce the protection of witnesses and the integrity of the proceedings by bringing to the attention of third parties the confidential nature of the material, proves to be well-founded and reasonable. As a consequence, the requested measure is authorised.

³⁴ Request of 2 May 2012, para. 26 (e).

³⁵ Joint Response of the Defence, para. 18.

³⁶ ICTY, *The Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order of Non-Disclosure, 13 March 2003, para. 4; ICTY, *The Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on "Prosecution Motion for Non-Disclosure of Materials Provided Pursuant to Rules 66 (A) (ii) and 68 and for Protective Measures for Witnesses during the Pre-Trial Phase", 11 February 2004, para. 5; ICTY, *The Prosecutor v Ratko Mladić*, Case No. IT-09-92-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 24 June 2011, para. 15 (c).



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43. That obligation shall apply, *mutatis mutandis*, to the dissemination to third parties, by the Prosecution, of material disclosed to it by the Defence and the dissemination, by the Parties, of material disclosed by the Legal Representative of the VPP.

7. The Defence to keep a log indicating the material disseminated, the time it was disseminated and information relating to the recipients (paragraph 26 (f) of the Request of 2 May 2012)

a. Submissions of the Parties and the Defence Office

44. The Prosecutor requests that the Pre-Trial Judge order the Defence to keep a log providing details of the material and information the Defence have disseminated to third parties, their names and addresses and function of those third parties, as well as the date the material was disseminated.³⁷

45. The Defence maintains, as does the case law of the ICTY, that that request would only be an additional burden that would prevent them from conducting their investigations effectively and within the time frame they have been allotted.³⁸

46. The Defence Office notes that, as it is not part of the “public”, that obligation does not concern it and that were the Pre-Trial Judge to agree to that request, the members of the Defence Office should not be mentioned in the said log.³⁹

b. Statement of reasons

47. The Pre-Trial Judge notes that the measure is not provided for by the prevailing texts of the Tribunal. Furthermore, international case law is not consistent on this issue. Although some Chambers of the ICTY have authorised it,⁴⁰ others determined it was inappropriate given the quantity of material concerned.⁴¹

³⁷ Request of 2 May 2012, para. 26 (f).

³⁸ Joint Response of the Defence, paras 27 to 29.

³⁹ Observations of the Defence Office, para. 15.

⁴⁰ ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 24 June 2011, para. 15 (c).

⁴¹ ICTY, *The Prosecutor v. Dragoljub Ojdanić*, Case No. IT-99-37-PT, Decision on Prosecution’s Motion for Order of Non-Disclosure to Public of Supporting Material Disclosed Pursuant to Rule 66 (A) (i), 7 June 2002, para. 9.



48. The Pre-Trial Judge considers it legitimate that both the Parties and the Legal Representative of the VPP should be able to decide to whom the material should be disseminated. That measure forms part of the proper administration of justice. It can, in particular, prove to be useful in the case of disagreement relating to the non-authorised dissemination of that material. It is appropriate therefore that the Parties and the Legal Representative of the VPP set up an internal system for recording to whom any material was disseminated. In this respect, keeping a log recording the material, the identity of the third party and the date on which it was disclosed, would appear to be the most appropriate system.⁴²

49. On the other hand, it would not be possible to impose such an obligation relating to “information”, which does not exist in a material form, without the risk of adding excessively to the workload of the Parties and the Legal Representative of the VPP.

8. Order prohibiting third parties from disseminating protected information, unless such material or information becomes public (paragraph 26 (g) of the Request of 2 May 2012)

a. Submissions of the Parties

50. The Prosecution requests that the Pre-Trial Judge order that the public, and the media in particular, be prohibited from disseminating any material and information contained therein of which it has knowledge, and which is subject to protection, unless that material or information were to become public during open session proceedings.⁴³

51. The Defence agrees with that request and asks the Pre-Trial Judge to grant it, provided that the definitions of “public” and the “Defence” are understood as proposed in paragraphs 1 (ii)⁴⁴ and 9 of the Joint Response of the Defence.⁴⁵

⁴² Such a log should only be produced upon the decision of a Judge.

⁴³ Request of 2 May 2012, para. 26 (g).

⁴⁴ The Defence erroneously refers to paragraph 3 (ii) in the Joint Response of the Defence.

⁴⁵ Joint Response of the Defence, para. 45; *Id.*, para. 1 (ii): “[TRANSLATION] the ‘public’ includes all persons, third parties, governments, organisations, entities, clients, associations, groups, media, and accused, with the exception of the Defence”; *Id.*, para. 9: “[TRANSLATION] the ‘Defence’ must be understood as including counsel



b. Statement of reasons

52. The Pre-Trial Judge notes that the measure is not provided for by the prevailing texts of the Tribunal. However, that measure, designed to enhance the status of information recognised as deserving of special protection, proves to be well-founded and reasonable. It is, furthermore, in keeping with prevailing international case law.⁴⁶ As a consequence, the requested measure is authorised.

53. That measure shall apply *mutatis mutandis* to all participants in the proceedings in relation to the evidentiary material in support of the Indictment and the material which shall be disclosed by the Defence and the Legal Representative of the VPP.

9. The obligation on the Defence to return to the Registry all material disclosed by the Prosecution after the conclusion of the proceedings, as well as the obligation on any member of the Defence to return upon departure the material in his/her possession to the Lead counsel (paragraph 26 (h) of the Request of 2 May 2012)

a. Submissions of the Parties and the Defence Office

54. The Prosecution requests that after the conclusion of the ongoing proceedings, the Defence return to the Registry, for destruction, all of the material disclosed or provided to them, together with any copies. Furthermore, any member of the Defence leaving before the conclusion of the ongoing proceedings shall return all material and information in his/her possession or copies thereof to the Lead counsel.⁴⁷

for the Defence and the members of their Defence team [...] as listed by the Defence Office and not by the Registry as requested by the Prosecution”.

⁴⁶ ICTY, *The Prosecutor v. Ljube Bošković, Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on “Prosecution Motion Seeking Further Protective Measures for Victims and Witnesses with Confidential Annexes A and B”, 17 August 2005, Disposition para. 1; ICTY, *The Prosecutor v. Ljube Bošković, Johan Tarčulovski*, Case No. IT-04-82-A, Order Issuing a Public Redacted Version of the “Decision on Bošković Motion for Urgent Orders Regarding Disclosure of Confidential Material” of 22 December 2009, 14 May 2010, para. 21.

⁴⁷ Request of 2 May 2012, para. 26 (h).



55. The Defence submits that those two requests should be rejected on account of the disregard of the Prosecution of the existing provisions that are already being applied to those two eventualities:

- a) Article 18 (C) of the Directive provides in fact that the lead counsel is under an obligation to keep a complete and accurate case file for five years after the conclusion of the proceedings; and
- b) in the event a member of his/her team withdraws or for any other eventuality relating to the supervision of members of the Defence, the lead counsel is responsible for his/her team which, in turn, is under an obligation to respect, amongst others, paragraph 7 of the Code for Counsel, Article 6 (B) of the Code of Conduct for the Defence and Article 22 (B) and (D) of the Directive.⁴⁸

56. The Defence and the Defence Office also recall that in referring to the “conclusion of the proceedings”, the possibility of holding a new trial pursuant to Rule 109 of the Rules should be taken into account, together with all the subsequent appeals within the context of proceedings held *in absentia*.⁴⁹

b. Statement of reasons

57. The Pre-Trial Judge notes, as did the Defence, that Article 18 (C) of the Directive sets forth that the lead counsel is under an obligation to keep a complete and accurate case file of the proceedings for a period of five years after the conclusion of the proceedings. Therefore it is appropriate to apply that provision, which might answer the concerns of the Prosecution.

58. Nevertheless, the Directive does not cover the situation of a person leaving his/her job in a Defence team. The Pre-Trial Judge considers that returning all the documents relating to the case to the lead counsel is reasonable and falls under the measure mentioned in the previous paragraph. That measure is likely to contribute to the protection of confidential

⁴⁸ Joint Response of the Defence, paras 10 to 12.

⁴⁹ Observations of the Defence Office, paras 9 to 11; Joint Response of the Defence, paras 10 and 11.



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material in the proceedings. It is, moreover, in keeping with prevailing case law in other international tribunals.⁵⁰ Consequently, the requested measure is authorised.

59. That measure shall apply, *mutatis mutandis*, to any employee of the Prosecution and to any member of the team of the Legal Representative of the VPP who relinquishes his/her post.

10. The three “faulty” files (paragraph 26 (j) and (k) of the Request of 2 May 2012)

a. Submissions of the Parties

60. The Prosecution requests an order prohibiting the Defence from disseminating the three faulty files, calling for the said files to be destroyed and the said Defence to confirm to the Pre-Trial Judge and the Prosecution that they have fully complied with these two obligations. Furthermore, the Prosecution also requests that the Pre-Trial Judge order the Registry to remove the three faulty files from the Legal Workflow system.⁵¹

61. The Defence is of the opinion that the Prosecution request is groundless with regard to two of the three documents. On the one hand, the Prosecution fails to justify the application of the provisions it cites, or whether the criteria that they set forth have been satisfied. On the other hand, the names of the witnesses contained in those two files appear on the new versions of the files whereas the very objective of those new files was to replace those faulty files as they might have made it possible to identify the witnesses in question. With regard to the third faulty file, the Defence submits that it was incumbent upon the Prosecution to address the Pre-Trial Judge to request such a protective measure before 16 February 2012.⁵²

⁵⁰ ICTY, *The Prosecutor v. Ivan Čermak, Mladen Markač*, Case No. IT-03-73-PT, Decision and Order on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 1 April 2004, Disposition para. 5; ICTY, *The Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution Motion for Non-disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, 14 July 2006, Disposition para. 6.

⁵¹ Request of 2 May 2012, paras 26 (j) and 26 (k).

⁵² Joint Response of the Defence, paras 34 to 41.

**b. Statement of reasons**

62. The Pre-Trial Judge takes note of the fact that the Prosecution inadvertently disclosed the three files in question. Under these circumstances, he considers that the Defence is under an obligation not to use or disseminate the confidential information contained in those three files. He considers, furthermore, that it is appropriate to order the Defence to destroy those files which have been replaced by others, under the disclosure obligations of the Prosecution. Lastly, the Pre-Trial Judge considers that it is not appropriate to order the Registry to destroy the “faulty” files, but that it is justified to ensure that they be made inaccessible in the Legal Workflow system.

11. The application of Rule 60 bis of the Rules in the event of violation of the order for non-dissemination (paragraph 26 (n) of the Request of 2 May 2012)**a. Submissions of the Parties**

63. The Prosecution demands that any breach of the obligations imposed in the Request for non-dissemination shall be sanctioned pursuant to, in particular, Rule 60 bis of the Rules relating to contempt and obstruction of justice.⁵³

64. The Defence objects to this request on the ground that Rule 60 bis of the Rules relates to contempt of the Tribunal, whereas the measures sought by the Prosecution deal with professional and ethical obligations of counsel for the Defence. As such, only Rule 60 of the Rules and Article 17 of the Code of Conduct for the Defence should apply in the case at hand.⁵⁴

b. Statement of reasons

65. The Pre-Trial Judge notes that Rule 60 bis of the Rules dealing with contempt and obstruction of justice may be generally applied and concerns “those who knowingly and wilfully interfere with its administration of justice”. That interpretation is in keeping with

⁵³ Request of 2 May 2012, para. 26 (n).

⁵⁴ Joint Response of the Defence, paras 42 to 44.



prevailing case law.⁵⁵ Consequently, the Pre-Trial Judge considers that it is appropriate to recall the existence of that Rule, which applies to all participants in the proceedings, as well as to third parties to them.

12. The counter-claim of the Defence relating to the obligations listed in this Decision (paragraphs 30 and 46 of the Response of the Defence)

a. Submissions of the Parties

66. The Defence submits that, should the Pre-Trial Judge agree, in whole or in part, to the requests of the Prosecution, the obligations relating to the protection of the material disclosed to the Defence should apply *mutatis mutandis* to the Prosecution.⁵⁶

b. Statement of reasons

67. The Pre-Trial Judge recalls that he authorised that request of the Defence on a case by case basis and that he ordered the requested protective measures to apply *mutatis mutandis* to the Prosecution.

68. Therefore, those obligations likewise apply *mutatis mutandis* to the Legal Representative of the VPP.

13. Final observations

69. The Pre-Trial Judge recalls that the authorised measures are not intended to — and cannot under any circumstances interfere with — the work of the Defence or its liberty to conduct investigations for the purposes of adequately preparing the defence of the interests of the Accused.

70. Nevertheless, the Pre-Trial Judge, wishing to be clear and informative, in particular regarding third parties to the proceedings, considers it right to issue a decision restating and

⁵⁵ ICTY, *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 6 June 2005, para. 28; ICTY, *The Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution's Motions for Protective Measures for Victims and Witnesses, 30 July 2008, Disposition, p. 7.

⁵⁶ Joint Response of the Defence, paras 30 and 46.



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recalling essentially the obligations of the parties with regard to the confidentiality of the evidence in the proceedings of which they have knowledge and which are, for the most part, to be found throughout the various texts and rules that apply to proceedings before the Tribunal.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

Pursuant to Rules 74 (A), 77 (A) and 133 of the Rules,

DECLARES the Request of 2 May 2012 partially founded;

STATES that there is no reason to authorise the filing of the Prosecution Reply;

RECALLS Article 8 (E) of the Code of Conduct for the Defence which sets forth that defence counsel assigned within the context of *in absentia* proceedings shall not have any contact with the accused;

ORDERS the Head of Defence Office to draw up and maintain the list of counsel for the Defence and of those persons who are members of their teams;

RECALLS paragraph 5 of the Code for Counsel which sets forth that counsel shall protect the confidentiality of evidence in the proceedings, as well as information relating to witnesses and their whereabouts during and at the conclusion of the proceedings;

ORDERS the Defence to present itself as such during its contacts with witnesses identified by the Prosecution;

ORDERS the Defence, if it wishes to make contact with one of the witnesses at risk identified by the Prosecution, to give prior notice to the latter and the VPU, which will arrange the contact after having ensured that the witness is agreeable to this;



ORDERS the Prosecution to provide the Defence, at the earliest opportunity, with a list of witnesses, indicating those who are at risk, and which must be updated on a regular basis;

ORDERS the Defence, when it discloses material in the proceedings, to inform all third parties to the proceedings of the obligation not to disseminate or copy that material, to return it to the Defence after use, and of the sanctions to be applied in the event of a violation of those rules;

ORDERS the Defence to draw up and update a log of material in the proceedings that has been disseminated to third parties, describing the material, the identity of the third party and the date on which it was transmitted;

ORDERS all third parties to the proceedings not to disseminate material in the proceedings of which they may have knowledge or any information contained therein, which may be subject to a protective measure, unless that material or information becomes public during open session proceedings;

ORDERS any person who withdraws from his/her post within the Defence to return to the lead counsel all material relating to the case;

ORDERS the Defence to destroy the three “faulty” files and to refrain from using or disseminating the confidential information contained therein;

ORDERS the Registry to ensure that the three “faulty” files be made inaccessible in the Legal Workflow system;

DECLARES well-founded the counter-claim of the Defence;

STATES that the protective measures authorised apply *mutatis mutandis* to the Prosecution and to the Legal Representative of the VPP;



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ORDERS the Prosecution, by 5 June 2012 at the latest, to: (1) disclose to the Defence the evidentiary materials that do not require other protective measures than those mentioned in this Decision; (2) re-examine the status of the Application of 21 December 2011, the Application of 9 March 2012 and the Application of 15 March 2012; and, where appropriate, (3) seize the Pre-Trial Judge of a request for protection of the material that cannot be disclosed to the Defence as is; and,

RECALLS that Rule 60 *bis* of the Rules applies, in particular, to any violation of the obligations laid down in this Decision.

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

Leidschendam, 25 May 2012

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

