



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 Frausen**

The Registrar: **Mr Herman von Hebel**

Date: **13 December 2012**

Original language: **French**

Classification: **Public**

**THE PROSECUTOR**

v.

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

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**DECISION ON THE PROSECUTION REQUEST SEEKING INTERIM PROTECTIVE  
MEASURES FOR THE EXPERT WITNESSES**

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**Legal Representative of Victims:**  
Mr Peter Haynes

**Counsel for Mr Mustafa Amine Badreddine:**  
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**Counsel for Mr Hussein Hassan Oneissi:**  
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**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young



## **I. The subject of the decision**

1. By way of this decision, the Pre-Trial Judge rules on the Prosecution's application of 15 March 2012, as amended by the request of 5 June 2012, and by the submissions of 17 July 2012 and 24 September 2012 (collectively, the "Amended Request"). The Prosecution seeks interim protective measures for the experts it used within the context of its investigation, namely, in particular, the interim non-disclosure of their names and identities until 30 days before the presentation of its evidence.

## **II. Procedural background**

2. On 21 December 2011, the Prosecution filed an application seeking the interim non-disclosure of the identity of some witnesses in accordance with Rules 115 and 116 of the Rules of Procedure and Evidence (the "Rules") and for protective measures to be granted in accordance with Rule 133 of the Rules (the "Application of 21 December 2011").<sup>1</sup>

3. On 24 January 2012, the Pre-Trial Judge issued an order<sup>2</sup> in which he highlighted the need to obtain the submissions of counsel for the Defence for Messrs. Ayyash, Badreddine, Oneissi and Sabra (respectively the "Defence" and the "Accused") before ruling on the merits of the Application of 21 December 2011. He also noted the fact that that request relied on a risk assessment of the witnesses concerned which in turn is based on a methodology (the "Methodology")<sup>3</sup> devised by the Prosecution and approved by the Victims and Witnesses Unit (the "VWU").<sup>4</sup> However, the Pre-Trial Judge ordered that, in accordance with the case law of the Appeals Chamber,<sup>5</sup> the VWU examine to what extent the Prosecution had correctly applied the Methodology during the risk assessment for the aforementioned witnesses and that it make known its views on the matter.<sup>6</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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 ("Order of 24 January 2012").

<sup>3</sup> Application of 21 December 2011, Annex B.

<sup>4</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PTJ, Supplementary Filing to the 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, 10 January 2012, Annexes 1 and 2.

<sup>5</sup> STL, *In the matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011, para. 34 (the "Appeals Chamber Order of 7 October 2011").

<sup>6</sup> Order of 24 January 2012, para. 5.

4. On 15 March 2012, pursuant to Rules 115 and 133 of the Rules, the Prosecution filed an application seeking that the Pre-Trial Judge issue an order for the interim non-disclosure of the identity of some expert witnesses and international investigators until 30 days before the presentation of the evidence for the Prosecution (the “Application of 15 March 2012”).<sup>7</sup>

5. On 30 March 2012, the Prosecution filed, in the form of confidential and *ex parte* annexes, supplementary evidence to the Application of 15 March 2012 taking into account the review by the VWU on whether the Methodology had been applied during the risk assessment.<sup>8</sup> Annex A contains an internal memorandum from the Registrar endorsing the findings of the VWU (the “VWU Memorandum”).<sup>9</sup> The VWU stated that it reviewed the risk assessment for the expert witnesses in a general manner, without verifying the information on which the Prosecution relied in order to determine the levels of risk in question.<sup>10</sup> It was of the opinion that the Prosecution’s assessment complied with the Methodology.<sup>11</sup>

6. On 11 April 2012, Counsel for the Defence of Mr Ayyash, Mr Badreddine and Mr Oneissi determined that there was no basis for the Application of 21 December 2011 and the Application of 15 March 2012 (the “Ayyash Response of 11 April 2012”,<sup>12</sup> the “Badreddine Response of 11 April 2012”<sup>13</sup> and the “Oneissi Response of 11 April 2012”).<sup>14</sup>

7. On 2 May 2012, the Prosecution requested that the Defence and the public be prohibited from disseminating material filed in support of the indictment in the context of the *Ayyash et al.* case so as to safeguard its contents (the “Request of 2 May 2012”).<sup>15</sup> The Prosecution stated that

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<sup>7</sup> 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 Rule 115 and Witness Protective Measures Pursuant to Rule 133, 15 March 2012.

<sup>8</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Supplemental Filing to 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, 30 March 2012.

<sup>9</sup> *Id.*, Annex A, Internal Memorandum “OTP’s Confidential and *Ex Parte* Risk Assessment of Expert Witnesses,” Dated 21 March 2012, 30 March 2012.

<sup>10</sup> *Id.*, para. 5.

<sup>11</sup> *Id.*, para. 4.

<sup>12</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Defence for Salim Ayyash Response to Prosecution Application for Interim Non-Disclosure of Identities of Witnesses and Victims, 11 April 2012.

<sup>13</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Réponse de la défense de M. Badreddine aux requêtes du Procureur aux fins de non-communication en vertu des articles 115, 116 et 133 du Règlement*, 11 April 2012.

<sup>14</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Réponse de la défense de Monsieur Hussein Hassan Oneissi à la requête du Procureur du 21 décembre 2011 et observations sur les pièces qui y sont jointes*, 11 April 2012.

<sup>15</sup> 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.

were those measures to be authorised, it planned to request the withdrawal, in part, of the Application of 21 December 2011.<sup>16</sup>

8. On 25 May 2012, the Pre-Trial Judge declared the Request of 2 May 2012 partially founded and authorised several protective measures, including the non-dissemination of material in the proceedings or any information contained therein (the “Decision of 25 May 2012”).<sup>17</sup> He also ordered the Prosecution to re-examine, after the measures were granted, the status of the Application of 21 December 2011 and the Application of 15 March 2012.<sup>18</sup>

9. On 5 June 2012, the Prosecution filed a new request (the “Request of 5 June 2012”)<sup>19</sup> seeking from the Pre-Trial Judge the withdrawal of the Application of 21 December 2011 and the modification of the Application of 15 March 2012 in order to: (i) maintain the request for protective measures for 15 international experts,<sup>20</sup> (ii) add the names of three new international experts who were not mentioned in the Application of 15 March 2012;<sup>21</sup> and (iii) obtain a time limit of 30 working days so as to receive the submissions of States whose representatives might be harmed should their names or identities be disclosed.<sup>22</sup> The Prosecution also requested the Pre-Trial Judge to refrain from ruling on the Request of 5 June 2012 until such time as it had received the responses from the States.<sup>23</sup> Lastly, the Prosecution requested the Pre-Trial Judge to state that the measures set out by way of the Decision of 25 May 2012 apply to all the material disclosed within the context of the *Ayyash et al.* case and not only to the supporting materials.<sup>24</sup>

10. On 14 June 2012, the Pre-Trial Judge granted the request for the withdrawal of the Application of 21 December 2011 and authorised the amendment relating to the witness protection measures of the Application of 15 March 2012, allowing the Prosecution to modify the list of international experts to whom protective measures should be applied (the “Decision of

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<sup>16</sup> *Id.*, para. 4.

<sup>17</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012, Disposition.

<sup>18</sup> *Ibid.*

<sup>19</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Withdraw its Application of 21 December 2011 and Modify its Application of 15 March 2011 (sic) for Protective Measures, 5 June 2012.

<sup>20</sup> *Id.*, para. 13.

<sup>21</sup> *Id.*, paras 13 to 15.

<sup>22</sup> *Id.*, para. 17.

<sup>23</sup> *Id.*, para. 23, point (c).

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

14 June 2012”).<sup>25</sup> The Pre-Trial Judge also stated that, before making his decision on protective measures, it was appropriate to have the responses of the States concerning the protection requests for their representatives. In this respect, he ordered the Prosecution to seize him upon receipt of the responses of the States and, in any event, by 17 July 2012 at the latest.<sup>26</sup> Lastly, the Pre-Trial Judge confirmed that the measures set out by way of the Decision of 25 May 2012 applied to all the material disclosed by the Parties and by the Legal Representative of Victims (“LRV”) in the context of the ongoing proceedings.<sup>27</sup>

11. On 17 July 2012, the Prosecution filed a notice together with the submissions of certain States relating to the requests for protection for their representatives (the “Notice of 17 July 2012”).<sup>28</sup> It stated however that it was still waiting for the responses of other States<sup>29</sup> and requested an extension of the time limit, until 24 September 2012, in order to disclose the responses in their entirety.<sup>30</sup>

12. On 26 and 27 July 2012 respectively, Counsel for the Defence for Mr Ayyash and for Mr Badreddine replied to the Notice of 17 July 2012 (the “Ayyash Response of 26 July 2012”<sup>31</sup> and the “Badreddine Response of 27 July 2012”).<sup>32</sup> They reiterated their objections to the non-disclosure of the identities of the international experts, without however opposing the extension of the time limit sought by the Prosecution.

13. On 2 August 2012, the Pre-Trial Judge granted the Prosecution the requested extension of the time limit after recalling that it was essential to receive all the responses from the States before considering the substantive matter raised by the Parties (the “Decision of 2 August 2012”).<sup>33</sup>

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<sup>25</sup> STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Decision Authorising the Withdrawal of the Prosecution Application of 21 December 2011 and the Modification of the Application of 15 March 2012 Requesting Protective Measures for Witnesses, 14 June 2012.

<sup>26</sup> *Id.*, para. 8 and Disposition.

<sup>27</sup> *Id.*, para. 9 and Disposition.

<sup>28</sup> STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 14 June 2012 & Request for Interim Protective Measures, confidential and *ex parte*, 17 July 2012, with a public redacted version filed on the same day.

<sup>29</sup> *Id.*, paras 6 and 9.

<sup>30</sup> *Id.*, para. 12, points (b) and (c).

<sup>31</sup> STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Defence for Salim Ayyash Response to Prosecution Request for Interim Protective Measures, 26 July 2012.

<sup>32</sup> STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Réponse de la Défense de M Badreddine à “Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 14 June 2012 & Request for Interim Protective Measures” et adjonction à la Réponse de la Défense de M Ayyash du 16 (sic) juillet 2012*, 27 July 2012.

<sup>33</sup> STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Interim Order Relating to the Prosecution’s Request Concerning Protective Measures of 17 July 2012, 2 August 2012, paras 6 and 7.

14. On 24 September 2012, the Prosecution filed before the Pre-Trial Judge a notice for the purposes of reiterating its request for protective measures for 16 international experts and attached to it, in the form of confidential and *ex parte* annexes, the responses of the States (the “Notice of 24 September 2012”).<sup>34</sup> The Prosecution also stated that the risk assessments were submitted “in cooperation” with the VWU.<sup>35</sup>

15. On 3 and 8 October 2012 respectively, Counsel for the Defence for Mr Ayyash, for Mr Badreddine and for Mr Oneissi opposed the measures sought in the Notice of 24 September 2012, referring in part to their previous arguments on this matter (the “Ayyash Response of 3 October 2012”,<sup>36</sup> the “Badreddine Response of 8 October 2012”<sup>37</sup> and the “Oneissi Response of 8 October 2012”).<sup>38</sup>

16. On 19 October 2012, following the request of the Pre-Trial Judge, the VWU filed its submissions relating to its participation in the risk assessment procedure to which the Prosecution refers in its Notice of 24 September 2012 (the “VWU Submissions”).<sup>39</sup> With reference to the VWU Memorandum, it reiterated that the review of the risk assessment of expert witnesses was generally in keeping with the Methodology. It pointed out however that it did not assess the information and intelligence on which the Prosecution relied in order to make the risk assessment in question.<sup>40</sup> In conclusion, the VWU notes that its involvement in the risk assessment should not be interpreted as a complete and independent assessment.<sup>41</sup>

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<sup>34</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 2 August 2012 & Request for Interim Protective Measures, confidential and *ex parte*, 24 September 2012, with a public redacted version filed the same day.

<sup>35</sup> *Id.*, para. 13: “the Prosecution notes that it has submitted risk assessments in cooperation with the Registry’s Victim and Witnesses Unit (VWU)”.

<sup>36</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Defence for Salim Ayyash Response to Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 2 August 2012 & Request for Interim Protective Measures, 3 October 2012.

<sup>37</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Réponse de la Défense de M Badreddine à “Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 2 August 2012 & Request for Interim Protective Measures” et adjonction à la Réponse de la Défense de M Ayyash du 3 octobre 2012*, 8 October 2012.

<sup>38</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Réponse de la Défense de M. Hussein Hassan Oneissi à la “Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 2 August 2012 & Request for Interim Protective Measures”*, 8 October 2012.

<sup>39</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) of the Rules of Procedure and Evidence in Compliance with the Pre-Trial Judge’s Internal Memorandum of 17 October 2012, confidential and *ex parte*, 19 October 2012, with a public redacted version filed the same day.

<sup>40</sup> *Id.*, paras 4-5.

<sup>41</sup> *Id.*, para. 6.

17. On 7 November 2012, the Prosecution filed, confidentially and *ex parte*, a supplemental revised risk assessment to the Notice of 24 September 2012 (the “Revised Risk Assessment of 7 November 2012”), as well as a report concerning one of the expert witnesses.<sup>42</sup>

### **III. The arguments of the Parties**

#### **A. The Amended Request**

18. In the Notice of 24 September 2012, the Prosecution maintains the requests set out in the Application of 15 March 2012, namely: (i) the interim non-disclosure of the identity of the international experts until 30 days before the presentation of the evidence by the Prosecution; (ii) the redaction of their names; (iii) the use of pseudonyms; and (iv) the non-disclosure to the public and the media of information which could allow them to be identified.<sup>43</sup>

19. The Prosecution is of the opinion that, following the Application of 15 March 2012 and the Request of 5 June 2012, as well as the Notice of 17 July 2012, the Pre-Trial Judge has sufficient evidence establishing that the 16 international experts concerned are in danger or at risk such as to warrant that protective measures be granted in accordance with Rule 115 of the Rules<sup>44</sup> and that they are “appropriate” within the meaning of Rule 133 of the Rules.<sup>45</sup> The Prosecution notes in addition that reference to the experts or to official representatives of a State could likewise have an impact on other officials from that State.<sup>46</sup> Lastly, the Prosecution submits that the redactions sought do not relate to the substance of the reports, but to the identity of their authors and are therefore consistent with the rights of the Accused.<sup>47</sup>

#### **B. The arguments of the Defence**

20. The Defence for Mr Ayyash, Mr Badreddine and Mr Oneissi submit that the Prosecution requests for non-disclosure are without foundation because it could not demonstrate the exceptional circumstances required under Rule 115 of the Rules for each individual witness.<sup>48</sup>

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<sup>42</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission of a Supplemental Risk Assessment Further to the “Prosecution Notice Pursuant to the Pre-Trial Judge’s Decision of 2 August 2012 & Request for Interim Protective Measures” of 24 September 2012, 7 November 2012.

<sup>43</sup> Notice of 24 September 2012, para. 7.

<sup>44</sup> *Id.*, paras 9 to 12.

<sup>45</sup> *Id.*, para. 14.

<sup>46</sup> *Id.*, para. 15.

<sup>47</sup> *Id.*, para. 14.

<sup>48</sup> Badreddine Response of 11 April 2012, paras 30-31; Ayyash Response of 11 April 2012, para. 29; Oneissi Response of 8 October 2012, paras 1, 14.

21. Referring to the information it has in its possession and the circumstances regarding the belated disclosure of the reports of the international experts, it considers “[TRANSLATION] absolutely unjustified and inappropriate”<sup>49</sup> the non-disclosure of the names and identities of the international experts to Counsel for the Defence.<sup>50</sup>

22. The Defence for Mr Ayyash, Mr Badreddine and Mr Oneissi argue that the non-disclosure of the identity of the experts does not allow them to verify their qualifications which “[TRANSLATION] considerably compromises their right to examine the evidence”<sup>51</sup> guaranteed by Article 16 (4) (f) of the Statute of the Tribunal.<sup>52</sup> The time limit of 30 days proposed by the Prosecution – whether it is 30 days before the start of the trial or 30 days before the testimony of the experts in question<sup>53</sup> – is not sufficient so as to allow the Defence to prepare effectively.<sup>54</sup> That time limit should therefore be denied so as to respect the rights of the Accused and avoid a suspension of the proceedings.<sup>55</sup>

23. Furthermore, the Defence for Mr Ayyash, Mr Badreddine and Mr Oneissi draw a distinction between *inter partes* disclosure and disclosure to the public. They are of the opinion that although it might be understandable that, for security reasons, the experts do not wish their identities to be disclosed to the public, the Prosecution failed to demonstrate that the confidential disclosure of that information to the Defence might constitute a danger,<sup>56</sup> all the more so as the proceedings in question are taking place *in absentia*.<sup>57</sup>

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<sup>49</sup> Badreddine Response of 8 October 2012, para. 1.

<sup>50</sup> *Ibid*; Ayyash Response of 11 April 2012, paras 48-49; Oneissi Response of 8 October 2012, paras 16-18

<sup>51</sup> Badreddine Response of 11 April 2012, para. 35.

<sup>52</sup> Ayyash Response of 11 April 2012, para. 26.

<sup>53</sup> *Id.*, paras 34, 48-49.

<sup>54</sup> Badreddine Response of 11 April 2012, paras 39-42; Ayyash Response of 3 October 2012, para. 8; Oneissi Response of 11 April 2012, para. 50; Oneissi Response of 8 October 2012, para. 22.

<sup>55</sup> Badreddine Response of 11 April 2012, paras 39-42; Ayyash Response of 3 October 2012, para. 9.

<sup>56</sup> Badreddine Response of 11 April 2012, paras 24, 37; Ayyash Response of 11 April 2012, paras 26-27; Oneissi Response of 11 April 2012, paras 24-25.

<sup>57</sup> Ayyash Response of 11 April 2012, para. 25; Oneissi Response of 11 April 2012, paras 20-23.



#### **IV. Review of the Amended Request**

##### **1. General principles**

24. The Amended Request falls into the general category of measures intended to ensure the protection of victims and witnesses set forth in Rule 133 of the Rules. That provision provides for the possibility of ordering any measures that are appropriate to safeguard the privacy and security of victims and witnesses, provided that those measures are consistent with the rights of the Accused. They are derogatory measures to those rights, that constitute an exception – albeit temporarily – to the general principle of disclosure between the parties. They must, therefore, be duly justified.<sup>58</sup> It is not a matter of determining whether the Accused would be prejudiced as a result of the measure, in the case at hand the non-disclosure of the identity of certain witnesses, but whether “the interests of justice require that denial of those rights of the accused”<sup>59</sup> and, where appropriate, of finding a balance between the interests involved.

25. The specific protective measure sought by the Prosecution is that provided for by Rule 115 (A) of the Rules. That provision states that the Prosecution may apply to the Pre-Trial Judge to order, in exceptional circumstances, the interim non-disclosure of the identity of a witness that might be in danger or at risk. That measure must be lifted in sufficient time prior to the opening of the trial in order to allow adequate time for preparation of the defence.

26. When invoking that Rule, the Prosecution must provide evidence of: (a) the existence of exceptional circumstances; (b) the risk that the Prosecution witnesses could be pressurised or intimidated, once their identity is made known; (c) the contribution that protective orders could make not only to the protection of the victims and witnesses concerned, but also for the Prosecution to fulfill its mission, which involves being able to summon other persons before the Tribunal; and (d) the time limit duly sufficient, prior to the start of trial, within which the identity of the victims and witnesses must be disclosed to the Defence.<sup>60</sup>

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<sup>58</sup> International Criminal Court (“ICC”), *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008 (“Katanga Decision”), para. 70.

<sup>59</sup> International Criminal Tribunal for the Former Yugoslavia (“ICTY”), *The Prosecutor v. Radoslav Brđanin & Momir Talic*, Case No. IT-99-36-T, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 (“Brđanin Decision”), para. 31.

<sup>60</sup> ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 (“Milošević Decision”), para. 26.

27. In this respect, whether exceptional circumstances exist must be considered on a case by case basis and individually for each witness.<sup>61</sup> The balance between respect for the rights of the Accused on the one hand, and respect for the interests of the witnesses on the other, depends on the circumstances of each case<sup>62</sup> and of each individual.

28. The danger or risks that the witnesses might face must, in themselves, have some objective foundation and be based on the likelihood of risks, which goes beyond the fears expressed by the witnesses themselves.<sup>63</sup>

29. Furthermore, if the non-disclosure of the identity proves to be an appropriate protective measure for a specific witness, it should be determined whether it applies with regard to the participants in the proceedings, the public or to both of those bodies.<sup>64</sup> As such, the ICTY found that:

what would usually be sufficient to show that a witness may be in danger or at risk if that witness's identity is directly disclosed *to the public* would not usually be sufficient to show that the witness may also be in danger or at risk if that witness's identity is disclosed only to the accused and the defence team – where obligations are also imposed upon the accused and the defence team in relation to further disclosure by them.<sup>65</sup>

30. Lastly, reference should also be made to Rule 161 of the Rules, which deals with the testimony of expert witnesses. That provision provides for the disclosure of the statement of expert witnesses to the opposing party. That party has a time limit of 30 days<sup>66</sup> in which to challenge both the statement and its relevance and the qualifications of the expert as a witness, presupposing therefore that the identity of the latter is known to it.

## 2. The role of the VWU

31. The Pre-Trial Judge recalls that, at the time of seeking protective measures, the Prosecution must be able to demonstrate that the VWU “is happy with the methodology adopted

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<sup>61</sup> Milošević Decision, para. 17.

<sup>62</sup> *Id.*, para. 18.

<sup>63</sup> Brđanin Decision, para. 19; Katanga Decision, para. 71, point (a).

<sup>64</sup> Katanga Decision, para. 71, point (b).

<sup>65</sup> Brđanin Decision, para. 18 (footnote omitted).

<sup>66</sup> Or a further time limit set by the Pre-Trial Judge or the Trial Chamber, Rule 161 (B) (iii).

in making the risk assessment; or that in any event the VWU agrees with the Prosecutor's assessment.<sup>67</sup>

32. The Pre-Trial Judge also notes that, during the Status Conference of 26 July 2012, he stipulated that any request for protective measures, whether for victims or for witnesses, must be accompanied by a VWU assessment, including its opinion of the measures sought.<sup>68</sup> However, it does not appear from the material filed by the Prosecution that the VWU gave such an opinion.<sup>69</sup> The Amended Request is therefore incomplete in that respect.

### **3. Application of the general principles**

33. Notwithstanding the absence of the VWU's opinion, and for the purposes of ensuring the expeditiousness of the proceedings, the Pre-Trial Judge considers that he is able to rule on the merits of the Amended Request.

34. As mentioned above, a differentiation should be made between the two possible scenarios: the non-disclosure of the identity of the experts to the public on the one hand and to Counsel for the Defence and to the LRV on the other.

#### **a. The non-disclosure of the identity of the experts to the public**

35. It should be noted that in the Decision of 25 May 2012 and the Decision of 14 June 2012, the Pre-Trial Judge already ruled in favour of the non-disclosure of the identity of the expert witnesses to the public.<sup>70</sup> Indeed, those decisions provide general protective measures intended to establish a framework within which to disclose materials to the Defence by making certain that they would only be used to ensure the defence of the interests of the Accused and that they could not be disseminated to the public.<sup>71</sup> Those obligations and measures, which apply in particular to the materials and documents relating to the identity of the 16 expert witnesses mentioned in the Amended Request, consist, among others, in informing the third parties to whom the materials are disclosed that they are prohibited from disseminating them, or risk

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<sup>67</sup> Appeals Chamber Order of 7 October 2011, para. 34.

<sup>68</sup> STL, *The Prosecutor v. Ayyash et al*, Official Transcript of the Status Conference of 26 July 2012, p. 31.

<sup>69</sup> Cf. Submissions of the VWU, para. 6.

<sup>70</sup> Decision of 25 May 2012 and Decision of 14 June 2012.

<sup>71</sup> Decision of 25 May 2012, paras 8, 12. Those decisions also apply to the LRV.

facing sanctions.<sup>72</sup> In addition, they prohibit the public and in particular the media from disseminating any material or information contained therein of which they have knowledge, and which are subject to protection, unless that material or information were to become public during open session proceedings.<sup>73</sup> Those measures are intended to enhance the protection afforded to witnesses, the integrity of the proceedings, and the status of the information which has been recognised as worthy of particular protection.

**b. The non-disclosure of the identity of the experts to Counsel for the Defence and to the LRV**

36. The Pre-Trial Judge examined the Amended Request, as well as all the materials and written submissions pertaining to it, including the risk assessment for the 16 expert witnesses concerned who are mentioned in the Revised Risk Assessment of 7 November 2012 and the *notes verbales* submitted by the States from where the experts originate.<sup>74</sup>

37. The Pre-Trial Judge notes that the evidence put forward by the Prosecution does not rely on the assessment of specific dangers or risks for each expert mentioned, but refers to general considerations of security.<sup>75</sup> In this respect, he recalls that a general security situation, such as that prevailing in Lebanon, cannot, in itself, justify granting protective measures for particular individuals.<sup>76</sup>

38. More specifically, the risk assessments relating to seven expert witnesses do not contain any personal information pertaining to them.<sup>77</sup> In fact, the Prosecution only relies on a general analysis of the risks and conditions resulting from hypothetical acts of a State or a group

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<sup>72</sup> Decision of 25 May 2012, paras 42-43. That measure applies, *mutatis mutandis*, to the dissemination to third parties, by the Prosecution, of materials disclosed by it to the Defence and the dissemination, by the Parties, of material disclosed by the LRV.

<sup>73</sup> Decision of 25 May 2012, paras 52-53. That measure applies, *mutatis mutandis* to all the participants in the proceedings with regard to the evidentiary material in support of the Indictment and material disclosed by the Defence to the LRV.

<sup>74</sup> Annexes B and C to the Notice of 24 September 2012, confidential and *ex parte*; Annexes A and B to the Notice of 17 July 2012, confidential and *ex parte*.

<sup>75</sup> Annexes B and C to the Notice of 24 September 2012; Annexes A and B to the Notice of 17 July 2012. See, in particular, Annex C to the Notice of 24 September 2012, p. 2.

<sup>76</sup> Milošević Decision, para. 18: "Furthermore, that Chamber did not accept the proposition that the prevailing circumstances in the former Yugoslavia in general, and Bosnia and Herzegovina in particular, would justify blanket redactions of the sort requested by the Prosecution" (footnote omitted).

<sup>77</sup> Annex A to the Revised Risk Assessment of 7 November 2012, pp. 74-83, 90-93, confidential and *ex parte*.

described as terrorist.<sup>78</sup> In both cases, it also refers to the specific circumstances of one State in particular.<sup>79</sup>

39. By contrast, the risk assessments for the nine other expert witnesses describe some aspects of their personal circumstances.<sup>80</sup> However, those references do not constitute, in themselves, exceptional circumstances that might justify the requested protective measures. Indeed, they are often confined to reporting the personal perceptions or fears of the said expert witnesses.<sup>81</sup> No objective and individual assessment is provided in support of the risks that they might effectively face.

40. Furthermore, the Pre-Trial Judge notes that the risk assessment also refers to 19 other expert witnesses for whom the Prosecution does not seek any protective measure whereas, for 10 of them,<sup>82</sup> the risk level established by the Prosecution is identical to that of the 16 experts concerned by the Notice of 24 September 2012, namely a “medium” risk. The Prosecution failed to provide any justification, other than the existence of the *notes verbales* of the States, for the distinction made between the 16 experts for whom it seeks protective measures and the 10 for whom it does not.

41. Lastly, arguments cannot be based on the fact that the disclosure of the identities of the expert witnesses to the Defence and to the LRV might possibly lead to their being disclosed to the public. In fact, the Pre-Trial Judge recalls that pursuant to the Decision of 25 May 2012, neither the Defence nor the LRV are authorised to disclose the identity of the expert witnesses to the public and to the media until such time as the Chamber decides otherwise.

42. In conclusion, in the light of the criteria mentioned in paragraphs 24 to 30 above and the preceding review, the Pre-Trial Judge considers that the Prosecution has failed to provide sufficient proof of the existence of the risks or dangers that the 16 experts concerned might face should their identities be disclosed to Counsel for the Defence and to the LRV. Consequently, the restriction to the rights of the Accused that would result from the requested protective measures is not justified and cannot therefore be granted.

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<sup>78</sup> *Id.*, pp. 74-83.

<sup>79</sup> *Id.*, pp. 90-93.

<sup>80</sup> *Id.*, pp. 28, 32-33, 38, 40, 42.

<sup>81</sup> *Id.*, pp. 28-29, 31, 38, 44.

<sup>82</sup> *Id.*, pp. 22-26, 48-63.

**V. Interim measures**

43. The Pre-Trial Judge considers that it is appropriate to allow the Prosecution to inform, if it deems it useful, the States and the expert witnesses concerned of its obligation to disclose in confidentiality the identity of the latter to the Defence and to the LRV, prior to that disclosure.

44. In this respect, a time limit of one month should enable the Prosecution to undertake that process and, if so required, take any measures necessary with regard to the expert witnesses concerned.

**FOR THESE REASONS,**

Pursuant to Rules 115 and 133 of the Rules

**THE PRE-TRIAL JUDGE,**

**DECLARES** the Request admissible and without foundation;

**ORDERS** the Prosecution to disclose to Counsel for the Defence and to the LRV the identity of the expert witnesses mentioned in the Amended Request, by 15 January 2013 at the latest;

**RECALLS** that the obligations of confidentiality and the protective measures set out by way of the Decision of 25 May 2012 and the Decision of 14 June 2012 apply to any material disclosed in the context of the *Ayyash et al.* case and that, consequently, the identity of the Prosecution expert witnesses cannot be disclosed to the public and to the media at this stage of the proceedings; and

**RECALLS** that Rule 60 *bis* of the Rules applies in particular to any violation of the obligations imposed by way of the Decision of 25 May 2012 and the Decision of 14 June 2012.

Done in English, Arabic and French, the French text being authoritative.  
Leidschendam, 13 December 2012.

[stamp]

[signature]

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Daniel Fransen  
Pre-Trial Judge

