

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Herman von Hebel**

Date: **21 March 2013**

Original language: **English**

Classification: **Public**

**THE PROSECUTOR**

v.

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

**DECISION ON PROSECUTION'S NOTICE OF DISCLOSURE, APPLICATION TO  
AUTHORISE REDACTIONS AND REQUEST FOR EXTENSION OF TIME**

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

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

**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. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on the Prosecution's Notice of Disclosure, Application to Authorise Necessary Redactions and Request for Extension of Time (the "Application").<sup>1</sup>

## II. PROCEDURAL BACKGROUND

2. On 20 December 2012, and in response to an application by the Prosecution,<sup>2</sup> the Pre-Trial Judge rendered a decision in which *inter alia* he ordered the Prosecution either to resubmit its application for non-disclosure of certain witness statements, or otherwise to disclose the related statements immediately. Any resubmission was to include proposals for redactions, together with the assessment by the Victims and Witnesses Unit ("VWU") of the proposed redactions, by 18 February 2013.<sup>3</sup>

3. On 13 February 2013, the Prosecution filed the Application.

4. On 15 February 2013, and pursuant to the 20 December 2012 Decision, the Prosecution filed its Notice Regarding Disclosure, in which *inter alia* it provided an update of its disclosure obligations pursuant to Rule 110(A)(ii) of the Rules of Procedure and Evidence (the "Rules"), and notified the Pre-Trial Judge that — but for the materials concerned by the present decision — it has met its disclosure obligations for its present holdings.<sup>4</sup>

5. On 19 February 2013, Counsel for Mr. Ayyash ("Ayyash Defence") filed a response to the Application.<sup>5</sup>

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution's Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, Public with Confidential and *Ex Parte* Annexes A, B, C, D and E, 13 February 2013. On 19 March 2013, and following the Prosecution Notice to Reclassify the Request "Prosecution's Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time - No redaction needed for the Public Version" dated 13 February 2013", dated 18 March 2013, the Tribunal's Court Management Services Section ("CMSS") reclassified the Application from confidential to public.

All further references to filings and decisions relate to this case and case number unless otherwise stated.

<sup>2</sup> Prosecution Application for an Order for Non-Disclosure of Certain Statements of Witnesses Related to Witness Protection, Pursuant to Rule 116, confidential and *ex parte*, 13 November 2012 ("Application of 13 November 2012").

<sup>3</sup> Decision on the Prosecution Application for Non-Disclosure of Certain Statements of Witnesses Pursuant to Rule 116, confidential, 20 December 2012 (the "20 December 2012 Decision").

<sup>4</sup> Prosecution's Notice Regarding Disclosure, confidential, 15 February 2013 (the "Notice Regarding Disclosure") with a public redacted version dated the same day.

<sup>5</sup> Response of the Ayyash Defence to "Prosecution's Notice Of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time", Dated 14 February 2013, confidential, 19 February 2013 ("Ayyash Response").

6. On 1 March 2013, Counsel for Mr. Sabra (“Sabra Defence”) submitted a filing containing *inter alia* its response to the Application.<sup>6</sup>
7. On 6 March 2013, the Prosecution filed a request for leave to reply to the Sabra Response,<sup>7</sup> to which Sabra filed a response on 13 March 2013.<sup>8</sup>
8. On 8 March 2013, the Prosecution filed a further notice of disclosure with an application to authorise redactions, which included an update on the progress made in implementing the 20 December 2012 Decision since the filing of the Application.<sup>9</sup>
9. On 18 March 2013, the Prosecution filed a further notice of disclosure and application to authorise further redactions.<sup>10</sup>

### **III. SUBMISSIONS AND DISCUSSION**

10. The Application raises the following discrete issues: (a) a request for leave to include nine additional witnesses in the disclosure regime established by the 20 December 2012 Decision; (b) a notice regarding the status of statements of 11 witnesses; (c) an application for authorisation to redact the statements of 14 witnesses; and (d) a request for an extension of time in which to file the applications for non-disclosure related to the remaining 114 witnesses. The Sabra Response raises a further discrete issue.
11. This decision will summarise and discuss each discrete issue in turn.

#### **A. Request for leave to include nine additional witnesses in the disclosure regime**

##### **1. Submissions**

12. The Prosecution’s original application for the non-disclosure of statements concerned 129 witnesses.<sup>11</sup> In the Application, the Prosecution provides an update on the status of the

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<sup>6</sup> Consolidated Sabra Response to Prosecution Notice of Disclosure, Application to Authorise Necessary Redactions and Request for An Extension of Time and to Prosecution’s Notice Regarding Disclosure, confidential, 1 March 2013 (“Sabra Response”).

<sup>7</sup> Prosecution Request for Leave to Reply to Consolidated Sabra Defence Response of 1 March 2013, 6 March 2013 (the “Request to Reply”).

<sup>8</sup> Sabra Response to Prosecution Request for Leave to Reply to Consolidated Sabra Defence Response of 1 March 2013, confidential, 13 March 2013 (the “Response to Request to Reply”).

<sup>9</sup> Prosecution’s Notice of Disclosure and Application to Authorize Necessary Redactions, public with confidential and *ex parte* Annexes A-C, 8 March 2013 (the “8 March 2013 Notice”), paras 1, 3.

<sup>10</sup> Prosecution’s Notice of Disclosure and Application to Authorize Necessary Redactions, public with confidential and *ex parte* Annexes A-C, 18 March 2013 (the “18 March 2013 Notice”).

<sup>11</sup> Application of 13 November 2012, para. 9. *See also* 20 December 2012 Decision, para. 4.

implementation of the 20 December 2012 Decision regarding the statements, investigator's notes, and audio-recordings of 130 witnesses (as opposed to 129 witnesses), and advises that "an additional 9 witnesses who fall under the same category were inadvertently not included"<sup>12</sup> in the Application of 13 November 2012. Accordingly, the Prosecution seeks leave to treat these further nine witnesses under the same disclosure regime established by the 20 December 2012 Decision, pending which authorisation, the Prosecution has proceeded to include them in the review and assessment process.<sup>13</sup>

13. The Ayyash Defence notes that the Prosecution refers to 130 witnesses, but points out that the 20 December 2012 Decision, citing the Prosecution, refers to only 129 witnesses.<sup>14</sup>

## 2. Discussion

14. As a preliminary matter, the Pre-Trial Judge considers that the Ayyash Defence is correct to point out the discrepancy between the numbers of witnesses of whose statements the Prosecution sought non-disclosure in its Application of 13 November 2012 (129), as opposed to the number it now claims, in the Application, to have addressed (130). Aside from the nine witnesses the Prosecution seeks to add to this category, one witness ("Witness 132") whose name did not appear in either of confidential and *ex parte* annexes A or B to the Application of 13 November 2012 now appears in confidential and *ex parte* annexes A and C to this Application.<sup>15</sup> The Pre-Trial Judge notes the Prosecution's Corrigendum to the Application, dated 18 March 2013, in which it explains that the omission of Witness 132 from Annex B to the Application of 13 November 2012 was an inadvertent error which the Corrigendum corrects. The Prosecution furthermore clarifies that Witness 132's statement (the witness is listed as no. 23 in the Corrigendum) "was provided to the Pre-Trial Judge as one of the statements underlying the Application [of 13 November 2012]"<sup>16</sup> and that the Prosecution has not sought authorisation to redact the identity of Witness 132.<sup>17</sup> Since no redactions are therefore proposed for this witness' statement, the Pre-Trial Judge considers

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<sup>12</sup> Application, para. 3.

<sup>13</sup> Application, paras 2-3.

<sup>14</sup> Ayyash Response, para. 2, referring to the 20 December 2012 Decision, para. 4.

<sup>15</sup> The witness's index number in confidential and *ex parte* annexes A and C to the Application is 132.

<sup>16</sup> Corrigendum to the "Prosecution Application for an Order for Non-Disclosure of Certain Statements of Witnesses Related to Witness Protection, Pursuant to Rule 116" of 13 November 2012, public with confidential and *ex parte* Annex A, 18 March 2013 ("Corrigendum"), para. 2. In the Corrigendum, the Prosecution also includes the witness's name, the ERN of his statement, his risk assessment level and the probative value of his statement in corrected Annex B to the Application of 13 November 2012. For clarification: Annex A to the Application contains corrected Annex B to the Application of 13 November 2012.

<sup>17</sup> Corrigendum, para. 3.

that Witness 132 was effectively included within the Application of 13 November 2012, save for the inadvertent omission of his name from Annex B thereto, and the inadvertent exclusion of his number from the actual number of witnesses concerned, the correct number of which is 130 instead of 129.

15. With regard to the Prosecution's request to treat a further nine witnesses under the same disclosure regime established in the 20 December 2012 Decision, in addition to the original 129 witnesses concerned by that decision, the Pre-Trial Judge notes that the Prosecution, on its own initiative, has proceeded to include them in the review and assessment process that has been undertaken in respect of the other witnesses.

16. Aside from its inadvertent failure to include them, the Prosecution provides no reason for the omission of these nine witnesses from the Application of 13 November 2012.<sup>18</sup> This reason is insufficient. The Pre-Trial Judge has frequently had to remind the Prosecution that it is its responsibility to ensure that delays be kept to a minimum in light of the imperative of preparing for a fair and expeditious trial,<sup>19</sup> and that "[t]he Prosecution's dealings must be presented transparently and in such a way as to satisfy the Pre-Trial Judge that it is acting in good faith and with due diligence."<sup>20</sup>

17. Nevertheless, in this instance the Pre-Trial Judge is cognisant of two factors that favour indulging the Prosecution in this aspect of the Application, notwithstanding its failings. First, as the Sabra Defence has pointed out (see paragraph 39 below), the Defence requires these statements to be disclosed. Second, the Prosecution's foresight in including them in the review and assessment process that has been undertaken in respect of the other witnesses minimises effectively the risk of any further delay in respect of these nine witnesses.

18. Accordingly, the Pre-Trial Judge grants the Prosecution's request to include them within the disclosure regime established by the 20 December 2012 Decision.

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<sup>18</sup> Application, para. 3.

<sup>19</sup> Decision on Prosecution Request of 21 December 2012 to Amend the Witness and Exhibit Lists and for Authorisation for Further Disclosure, 27 February 2013 ("27 February 2013 Decision"), para. 37; Decision on Prosecution Request for Extension of Time to Disclose Expert Report and Addendum, confidential, 8 February 2013, para. 12.

<sup>20</sup> 27 February 2013 Decision, para. 40.

## **B. Status of the statements of 11 witnesses**

### **1. Submissions**

19. In the Application, the Prosecution advised the Pre-Trial Judge that the statements of 11 witnesses which — pursuant to the 20 December 2012 Decision were to have been disclosed without redactions by 18 February 2013 — would be disclosed in accordance therewith.<sup>21</sup>

20. The Prosecution has subsequently informed the Pre-Trial Judge that the Prosecution had in fact disclosed all of these witness statements by 15 February 2013.<sup>22</sup>

21. The Ayyash Defence points out that in the 20 December 2012 Decision, the Pre-Trial Judge ordered the Prosecution “to either resubmit its application for non-disclosure pursuant to Rule 116(A) [...] by 18 February 2013, or to disclose the Statements immediately.” As such, the disclosure of the statements of these 11 witnesses by 18 February 2013 comes “nearly two months after the Decision” and is not in accordance with the order to disclose the statements immediately.<sup>23</sup>

22. The Sabra Defence likewise notes that the statements of these 11 witnesses were disclosed in unredacted form and that no extension of time was necessary. Nevertheless, “instead of being disclosed ‘immediately’ as required by the 20 December [2012] Decision, they were disclosed as the last possible moment.”<sup>24</sup>

### **2. Discussion**

23. The Pre-Trial Judge considers that the position of the Ayyash and Sabra Defence could only be sustainable to the extent that at the time of the 20 December 2012 Decision, the Prosecution was in a position to know that the statements of these 11 witnesses would not require redactions. This is a presumption which ignores the possibility that it is only once a witness statement is thoroughly reviewed, according to the applicable methodology, that the need for counterbalancing measures (or lack thereof) may be determined.

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<sup>21</sup> Application, para. 4.

<sup>22</sup> 8 March 2013 Notice, para. 3.

<sup>23</sup> Ayyash Response, para. 3.

<sup>24</sup> Sabra Response, para. 10.

24. While the process of reviewing witness statements according to the applicable methodology may result in the conclusion that counterbalancing measures are not required, it cannot justify withholding material that the Prosecution has already determined will not be the subject of a request for counterbalancing measures. However, there is nothing to suggest that this is what has occurred in this instance.

25. The Pre-Trial Judge therefore considers that the statements of 11 these witnesses have been validly disclosed.

### **C. Authorisation to redact 14 witnesses statements pursuant to Rule 116(A)**

#### **1. Submissions**

26. The Prosecution seeks authorisation, pursuant to Rule 116(A), to redact the statements in relation to 14 witnesses on its Witness List filed on 15 November 2012.<sup>25</sup> The proposed redactions result from an application of the requirements of the 20 December 2012 Decision, and include the assessment provided by the VWU.<sup>26</sup>

27. The list of the 14 statements for which the Prosecution seeks authorisation to redact is set out in confidential and *ex parte* Annex B to the Application, and the associated statements were provided to the Pre-Trial Judge on a confidential and *ex parte* CD-ROM via CMSS. They are accordingly treated in a confidential and *ex parte* annex to this decision. Further material related to this aspect of the Application is contained in the confidential and *ex parte* Annex E to the Application.

28. The Ayyash Defence notes that the Defence has not received any information regarding this aspect of the Application “including, in even the most general sense, the basis for an application of non-disclosure to Defence.” The Ayyash Defence recalls that the protective measures granted by the Pre-Trial Judge on 25 May 2012 “remain in place and provide sufficient protection to Prosecution disclosure.” As such, the Ayyash Defence asks the Pre-Trial Judge to assess this aspect of the Application critically, and to guard against any prejudice being caused to the Defence.<sup>27</sup>

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<sup>25</sup> Prosecution’s Submission Pursuant to Rule 91, confidential, 15 November 2012, which included its confidential Pre-Trial Brief (Annex A) with a public redacted version of the Submission and Annex A dated the same day.

<sup>26</sup> Application, para. 5.

<sup>27</sup> Ayyash Response, para. 4.

## **2. Discussion**

29. The Pre-Trial Judge has addressed this aspect of the Application in the confidential and *ex parte* annex to this decision, in which he authorises the Prosecution, pursuant to Rule 116(A), to redact the statements in relation to these 14 witnesses, subject to the conditions elaborated in that annex.

### **D. Request for an extension of time**

#### **1. Submissions**

30. In the Application, the Prosecution declared that it would be able to conclude its assessment of the proposed redactions needed for the statements of 114 witnesses by 18 February 2013, in accordance with the Decision of 20 December 2012.

31. The VWU had previously indicated that, as of its receipt of the final proposed redactions to the statements of these witnesses, it would require 20 working days in order to complete a review of the statements.<sup>28</sup>

32. The Prosecution now requests an extension of 23 working days in which to submit — on a rolling basis — applications for the non-disclosure of the statements of the remaining 114 witnesses “primarily in order to permit the VWU to finalize their assessment.”<sup>29</sup>

33. The Prosecution thus “seeks a time extension to allow the VWU to complete their assessment” and undertakes to submit the applications as they are completed, on a rolling basis.<sup>30</sup> The resulting deadline requested for the completion of this aspect of the application is thus 20 March 2013.<sup>31</sup>

34. The Prosecution submits that the implementation of the 20 December 2012 Decision required the redeployment of its internal resources, and the finalisation of the methodology with the VWU, before the final review process could begin. Consequently, the first handover of proposed redactions to the VWU occurred on 30 January 2013.<sup>32</sup> Pending that handover,

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<sup>28</sup> Confidential internal memorandum from the Chief of the VWU to the Prosecution dated 13 February 2013 and entitled “Memorandum in relation to the ongoing VWU Assessment of the Prosecution’s Proposed Redactions pursuant to the Pre-Trial Judge’s Decision of 20 December 2012” (VWU/LEG/2013/002), para. 5, included in confidential and *ex parte* Annex E to the Application.

<sup>29</sup> Application, para. 6. The 114 witnesses are listed in confidential and *ex parte* Annex C to the Application.

<sup>30</sup> Application, para. 8.

<sup>31</sup> *Id.*, para. 14(c).

<sup>32</sup> *Id.*, para. 9.



the Prosecution proceeded in the interim with the tasks of analysing the audio recording of each statement where applicable, transcribing the evidentiary excerpts, analysing the written material (including in relation to previously disclosed statements and proposals for redactions), and conducting a secondary review of both the transcriptions and statements.<sup>33</sup>

35. The Prosecution avers that granting this extension of time will not prejudice the Defence, in particular in light of the Pre-Trial Judge's decision to vacate the tentative start date of the trial.<sup>34</sup> Furthermore, according to the Prosecution, 11 statements were to be provided to the Defence immediately (which has been done, see above), and a further 14 to be provided immediately upon the Pre-Trial Judge's authorisation (which is the subject, in part, of this decision), with the remainder to be submitted to the Pre-Trial Judge on a rolling basis as completed by VWU but in any even no later than 20 March 2013. As such, the Prosecution argues that the Defence would be permitted to continue its work despite the delay of the full and final disclosure of the statements by approximately one month.<sup>35</sup>

36. The Prosecution subsequently informed the Pre-Trial Judge that the Prosecution had in fact finalised its review of all witness statements whose disclosure remains, and has provided them, together with the Prosecution's proposed redactions, to the VWU for its assessment by 18 February 2013.<sup>36</sup> More recently, the Prosecution has filed the 8 March 2013 Notice and the 18 March 2013 Notice, effectively submitting all remaining statements to the Pre-Trial Judge.

37. In response to this aspect of the Application, the Ayyash Defence observes that "the Prosecution has once again presented the Pre-Trial Judge with a *fait accompli*" and that, instead of resubmitting an application for non-disclosure by 18 February 2013, as it was ordered to do in the 20 December 2012 Decision, the Prosecution will not have even submitted the witness statements to the VWU until that date. The Ayyash Defence requests the Pre-Trial Judge to ensure that no prejudice arises as a result of the Prosecution's delay, including the right to have adequate time to prepare a defence.<sup>37</sup>

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<sup>33</sup> *Id.*, paras 10-11.

<sup>34</sup> *Id.*, para. 12. See Decision relating to the Defence Motion to Vacate the Date for the Start of Trial, 21 February 2013 (the "21 February 2013 Decision").

<sup>35</sup> Application, para. 12, p. 5.

<sup>36</sup> 8 March 2013 Notice, para. 3.

<sup>37</sup> Ayyash Response, para. 5.

38. In response to this aspect of the Application, the Sabra Defence details the alleged failings of the Prosecution, and provides reasons for why the relief sought should be denied.<sup>38</sup> While noting that “the Pre-Trial Judge is again placed in a *fait accompli*”,<sup>39</sup> it recognises that the Pre-Trial Judge “may be forced to [grant the motion] simply though [the] Prosecution presenting him again with a *fait accompli*, rather than the strength of the Prosecution’s arguments”.<sup>40</sup>

39. Nevertheless, the Sabra Defence concedes that, notwithstanding the Prosecution’s failings, “the Defence requires these statements to be disclosed [...] well in advance of trial. These statements are from witnesses who are scheduled to testify *viva voce* or whose statement will be submitted under Rules 155 or 158.” The Defence’s ability to conduct its investigations, to prepare for trial, and to take a position on these witnesses and their statements would otherwise be compromised.<sup>41</sup>

## 2. Discussion

40. The Pre-Trial Judge notes that on 8 March 2013, the Prosecution seized him with a request for an order authorising its proposed redactions to the witness statements, investigator’s notes, and/or transcriptions of audio-recordings of 34 of the witnesses.<sup>42</sup> Likewise, on 18 March 2013, the Prosecution seized him with a similar request for a further

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<sup>38</sup> The Sabra Defence notes that the deadline for submitting these applications for protective measures to the Pre-Trial Judge, pursuant to the 20 December 2012 Decision, was 18 February 2013. The Sabra Defence avers that save for Rule 140 of the Rules, there is no basis for varying this deadline, and that the Prosecution has failed to demonstrate how the criteria of that Rule are met (Sabra Response, para. 5). Furthermore, the Sabra Defence submits that subsequent to the decision in which the facility was provided, the Parties cannot seek to vary a time limit on showing “good cause” since, to hold otherwise “would undermine judicial certainty by allowing for repeated, and potentially abusive, applications for variation on the relatively lesser standard of good cause.” (Sabra Response, para. 6, citing Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, para. 22). In the alternative, the Sabra Defence argues that the Prosecution has failed to show “good cause” for its request for extension of time (Sabra Response, paras 14-16). The Sabra Defence considers that the Prosecution is in breach of a court order inasmuch as the deadline for filing the resubmitted applications for protective measures under Rule 116(A) has expired, and that the Application — which contains the pertinent request for an extension of time in question — was filed only three working days before the deadline (Sabra Response, para. 8). In respect of the Application generally, but with specific reference to this aspect thereof, the Sabra Defence avers that the Prosecution fails to explain to the Pre-Trial Judge when it undertook various relevant tasks, or why this could not have taken place sooner. The Sabra Defence refers to the Prosecution’s “clear absence of diligence and candour” which is “directly relevant to assessing whether the Prosecution has actually justified a further extension of the applicable deadlines (Sabra Response, paras 11-13).

<sup>39</sup> Sabra Response, para. 20.

<sup>40</sup> *Id.*, para. 35.

<sup>41</sup> *Id.*, para. 17.

<sup>42</sup> 8 March 2013 Notice, para. 1. These 34 witnesses are listed in confidential and *ex parte* Annex B to the 8 March 2013 Notice. At the time of this decision, responses to this request from the Defence were pending.

77 witnesses, which filing completes the Prosecution's implementation of the 20 December 2012 Decision.

41. In the 20 December 2012 Decision, the Prosecution was ordered to resubmit any applications for non-disclosure pursuant to Rule 116(A) (which would include proposals for counterbalancing measures in the form of redactions) by 18 February 2013 at the latest. The Prosecution has failed to do so, and in the Application has instead requested an extension of time. The Pre-Trial Judge notes four factors which motivate his determination of this aspect of the Application.

42. First, the Sabra Defence contends that — notwithstanding the Prosecution's alleged failure to fully implement the 20 December 2012 Decision — the Defence requires these statements to be disclosed in any event.

43. Second, the Ayyash Defence has moved the Pre-Trial Judge to ensure that no prejudice arises as a result of the Prosecution's delay, including the right to have adequate time to prepare a defence.

44. Third, the Pre-Trial Judge notes the 18 March 2013 Notice, in which the Prosecution informs him of the "completion of the implementation of the Pre-Trial Judge's 20 December 2012 Decision on the Prosecution Application for Non-Disclosure of Certain Statements of Witnesses Pursuant to Rule 116",<sup>43</sup> and that — including the redactions proposed thereby — the 18 March 2013 Notice "concludes the redaction process required by the [20 December 2012] Decision."<sup>44</sup>

45. Fourth, the Pre-Trial Judge recalls his recent ruling on a joint Defence motion in which he ordered the adjournment of the tentative date of the start of the trial of 25 March 2013, pending determination of a replacement date.<sup>45</sup>

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<sup>43</sup> 18 March 2013 Notice, para. 1.

<sup>44</sup> *Id.*, para. 5. The Prosecution avers that during the course of the process, it has reviewed the written statements of 139 witnesses and the audio statements when applicable, has disclosed 19 statements without redactions, and requested the Pre-Trial Judge's authorisation of proposed redactions pursuant to Rule 116(A) for the statements of 125 witnesses.

<sup>45</sup> 21 February 2013 Decision. In the same decision, the Pre-Trial Judge ordered the Defence and the Legal Representative of Victims ("LRV") to provide their estimates of the time they need for their preparation for trial, together with a motivated proposal for a new tentative date of the start of the trial. The Prosecution was likewise ordered to file a motivated proposal for a new tentative date of the start of the trial. These submissions were filed on 6 and 8 March 2013 respectively. See Observations of the Legal Representative of Victims Regarding the Preparedness and the Date for the Start of the Trial, 6 March 2013; Prosecution Submissions on a

46. The Pre-Trial Judge does not consider as well-founded the argument that granting extensions of time will not prejudice the Defence in light of the Pre-Trial Judge's decision to vacate the tentative start date of the trial. It is not because there is, for the time being, no tentative date for the start of the trial that no prejudice can arise for the Defence. The Defence may still be prejudiced by any late provision of required materials that has an impact on its preparations for trial, regardless of whether or not there is an established tentative date for the start of trial. The Pre-Trial Judge will take into consideration the consequences – if any – of granting this aspect of the Application when he determines a new tentative date for the start of the trial. But this provision is not a reason for the Prosecution to justify requests for extensions of time. The Pre-Trial Judge recalls that in the 21 February 2013 Decision, he specifically reminded “all the participants in the proceedings that they must meet their obligations in accordance with the Working Plan”<sup>46</sup>; the Parties must respect the deadlines set by the Pre-Trial Judge.

47. Having considered the foregoing, and notwithstanding the Prosecution's failure to implement the 20 December 2012 Decision, the Pre-Trial Judge grants this aspect of the Application.

#### **E. The Sabra Defence's proposal and the Prosecution's request for leave to reply**

##### **1. Submissions**

48. In order to mitigate the effects on trial preparation of granting the relief sought in the Application, the Sabra Defence proposes a mechanism which, in its view, would expedite proceedings and potentially reduce the work of the VWU. The Sabra Defence suggests providing to the Defence the full list of witnesses in confidential and *ex parte* Annex A to the Application.<sup>47</sup> Included in the proposal is the disclosure of all witness names:

- in unredacted form where their names are known to the Defence; or
- by using a pseudonym where their identities are protected.

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Tentative Date for the Start of Trial, 8 March 2013; Joint Defence Note Regarding Requirements to Prepare for Trial and Observations on Tentative Date for the Start of Trial, confidential, 8 March 2013.

<sup>46</sup> 21 February 2013 Decision, p. 10.

<sup>47</sup> This list includes the statements of 11 witnesses which have already been disclosed to the Defence in unredacted form, 14 witnesses whose names were submitted to the Pre-Trial Judge in confidential and *ex parte* Annex B to the Application, and the list of the remaining 114 witnesses whose names were submitted as confidential and *ex parte* Annex C.

49. This, according to the Sabra Defence, would allow the Defence to assess the relevance and importance of the witnesses to the Defence's preparation, and to determine whether such protective measures need to be opposed. It would furthermore enable the Defence to prepare for trial more meaningfully and effectively.<sup>48</sup>

50. The Sabra Defence furthermore proposes that the Prosecution disclose to the Defence a list of counterbalancing measures requested, "at least with regards to the 14 witnesses whose statements have been reviewed by VWU and have been submitted to the Pre-Trial Judge." Such disclosure could enable the Defence "to take a position and would assist the Defence to know whether to oppose the requests for protective measures in relation to any or all of these witnesses or whether the counterbalancing measures are sufficient to alleviate any prejudice caused by the redactions."<sup>49</sup>

In order to effect this mechanism, the Sabra Defence seeks the following relief:

- With respect to the statements of the 14 witnesses listed in confidential and *ex parte* Annex B to the Application, an order for the Prosecution to re-file an *inter partes* version of the request for redactions (subject to redactions where necessary) together with the Prosecution's related submissions, and the Memorandum from the VWU contained in confidential and *ex parte* Annex E;
- With respect to the statements of the remaining 114 witnesses listed in confidential and *ex parte* Annex C to the Application, an order for the Prosecution to file an *inter partes* version of any future application to the Pre-Trial Judge under Rule 116 of the Rules; and
- An order for the Prosecution to specifically disclose to the Defence the names of the witnesses to which these statements relate, and the counterbalancing measures proposed by the Prosecution in relation to each one.

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<sup>48</sup> Sabra Response, paras 22-23.

<sup>49</sup> *Id*, para. 24.

51. The Prosecution's Request to Reply is based *inter alia* on this aspect of the Sabra Response, which it avers amounts to "seeking affirmative relief of its own" in the form of seeking orders to which the Prosecution has a right to respond in turn.<sup>50</sup>

52. Recognising that "the affirmative relief requested [in the Sabra Response] justifies a reply from the Prosecution", the Sabra Defence does not oppose the Request to Reply insofar as it addresses the relief sought in the Sabra Response.<sup>51</sup>

53. The Sabra Defence furthermore invites the urgent resolution by the Pre-Trial Judge of the Prosecution's alleged failure "to adhere to the terms and spirit of the Disclosure Protocol" with respect to the recent disclosure of Rule 113 material, seen in light of the Sabra Response, and which potentially incurs "the real risk of a further postponement of the trial date."<sup>52</sup>

## 2. Discussion

54. The Parties agree that the Sabra Response raises new issues in the form of relief, to which the Prosecution is entitled to respond. Furthermore, in the Response to Request to Reply, the Sabra Defence solicits the Prosecution's explanation with respect to the recent disclosure of Rule 113 material.

55. The Pre-Trial Judge considers that it is appropriate and opportune that the Prosecution be afforded the opportunity to make submissions in respect of both new matters, and orders the Prosecution to file a reply accordingly by 28 March 2013. Such reply must be limited to: (1) the new issues in the form of relief sought by the Sabra Defence in its response; and (2) providing the explanation sought in the Response to Request to Reply.

## IV. CONFIDENTIALITY

56. Having reclassified the Application as public,<sup>53</sup> the Prosecution requests that the Application's annexes remain confidential and *ex parte* until the proposed redactions are applied on the witness statements, since they "contain information concerning confidential

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<sup>50</sup> Request to Reply, paras 1-2, 4, 6. In addition to this aspect, the Prosecution submits that the Sabra Response: (1) re-characterises two distinct Prosecution filings (the Application and the Notice Regarding Disclosure); and (2) proposes treating both filings as requests for reconsideration pursuant to Rule 140 of the Rules.

<sup>51</sup> Response to Request to Reply, para. 1.

<sup>52</sup> *Id.*, paras 2, 4.

<sup>53</sup> See n. 1 *supra*

statements". The Prosecution furthermore requests leave to be heard on varying this classification before the Pre-Trial Judge decides otherwise.<sup>54</sup> The Prosecution submits the same request with respect to the confidential and *ex parte* annexes to the 8 March 2013 Notice.<sup>55</sup>

57. The Ayyash Defence "sees no reason" for the confidentiality of the Application and requests that both the Application and the Ayyash Response be made public.<sup>56</sup>

58. The Pre-Trial Judge notes that the Application contains information related to witness statements that is confidential. The Pre-Trial Judge therefore grants the Prosecution's requests that the Application's annexes – together with the annexes to the 8 March 2013 Notice – remain confidential and *ex parte* until the proposed redactions are applied. Pursuant to the request of the Ayyash Defence, the Ayyash Response should be reclassified as public.

## V. DISPOSITION

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO Rules 77(A) and 116 of the Rules;**

**In relation to the additional nine witnesses listed in confidential and *ex parte* Annex D to the Application:**

**GRANTS** the Prosecution leave to include them within the disclosure regime established by the 20 December 2012 Decision;

**In relation to the 11 witnesses whose statements were disclosed:**

**CONSIDERS** that the statements of these 11 witnesses have been validly disclosed;

**In relation to the 14 witnesses listed in confidential and *ex parte* Annex B to the Application:**

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<sup>54</sup> Application, para. 13.

<sup>55</sup> 8 March 2013 Notice, para. 8.

<sup>56</sup> Ayyash Response, para. 6.

**AUTHORISES** the proposed redactions to their statements in accordance with the confidential and *ex parte* annex to this decision;

**GRANTS** the Prosecution's application for leave to disclose the redacted versions of these statements;

**ORDERS** that these statements be disclosed at the latest within six working days of this decision; and

**ORDERS** the Prosecution to file a notice before the Pre-Trial Judge detailing the name of each witness, together with the date(s) on which their associated statements are disclosed to the Defence;

**In relation to the 114 witnesses listed in confidential and *ex parte* Annex C to the Application:**

**GRANTS** the Prosecution's request for an extension of time in which to submit applications for redactions to their statements; and

**NOTES** that the Prosecution had submitted such applications by 20 March 2013;

**In relation to the remaining matters determined:**

**ORDERS** that the annexes to the Application remain confidential and *ex parte*, until further order;

**ORDERS** that the confidential and *ex parte* annexes to the 8 March 2013 Notice and the 18 March 2013 Notice remain confidential and *ex parte* until further order;

**ORDERS** the Registry to reclassify the Ayyash Response as public;

**ORDERS** the Prosecution to file its reply to the Sabra Response in accordance with this decision by 28 March 2013; and

**RECALLS** once again that all the participants in the proceedings must meet their obligations in accordance with the Rules and the directions of the Pre-Trial Judge;



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

Leidschendam, 21 March 2013



Daniel Fransen  
Pre-Trial Judge

