



THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**
The Pre-Trial Judge: **Judge Daniel Fransen**
The Registrar: **Mr. Daryl Mundis, Acting Registrar**
Date: **28 May 2013**
Original language: **English**
Classification: **Public**

THE PROSECUTOR

v.

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

**PUBLIC REDACTED VERSION OF "DECISION ON THE PROSECUTION
APPLICATION FOR NON-DISCLOSURE OF CERTAIN STATEMENTS OF
WITNESSES PURSUANT TO RULE 116" DATED 20 DECEMBER 2012**

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I. Introduction

1. By way of this decision, the Pre-Trial Judge rules on the Prosecution's application of 13 November 2012 for the non-disclosure of certain statements of witnesses, and any audio-recordings thereof, either because they do not fall within the ambit of Rule 110(A)(ii) or because the Prosecution ought to be relieved of its disclosure obligations pursuant to Rule 116(A) of the Rules of Procedure and Evidence (the "Rules") ("Non-Disclosure Application")¹.

II. Procedural background

2. On 25 May 2012, the Pre-Trial Judge issued a decision, maintaining the confidentiality of material disclosed in the proceedings, or information contained therein, and prohibiting its public dissemination ("Decision of 25 May 2012").²

3. On 13 November 2012, the Prosecution filed the Non-Disclosure Application, confidentially and *ex parte* pursuant to Rule 116.

III. Prosecution Submissions

4. The Prosecution seeks the non-disclosure of witness statements, investigators' notes and audio-recordings in relation [REDACTED] on its witness list (collectively, the "Statements").³ The Statements are listed in Annexes A and B to the Non-Disclosure Application.

5. The Prosecution submits that the Statements "were taken solely for purposes of gathering information as to witness protection concerns" for the Prosecution's Application of 21 December 2011 (the "First Application") and the Prosecution's Application of 15 March 2012 (the "Second Application").⁴ As such, they "relate merely to the personal circumstances and possible risks faced by these witnesses, and are otherwise irrelevant to the substantive matters charged in the Indictment"⁵ in the *Ayyash et al.* case (the "Indictment"). The

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

² 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.

³ Non-Disclosure Application, paras 1, 13, 15.

⁴ *Id.*, para. 1 and footnotes thereto.

⁵ *Ibid.*

Prosecution therefore argues that the Statements do not fall within the purpose of disclosure under Rule 110(A)(ii), especially since the information they contain should have been collected by the Victims and Witnesses Unit (“VWU”) instead of by the Office of the Prosecutor (“OTP”).⁶

6. Alternatively, if the Pre-Trial Judge finds that the Statements fall within the ambit of Rule 110(A)(ii), the Prosecution submits that withholding their disclosure is justified pursuant to Rule 116(A).⁷ The Prosecution maintains that disclosing witness protection statements, which include specific risks identified by the witnesses in question, “may generally increase the risk to the security of these witnesses.”⁸ In addition, the Prosecution considers it contrary to public interest to disclose information which is the basis for a request for protective measures.⁹ Finally, the Prosecution believes that disclosure would hinder the proper administration of justice because the Statements relate to the Tribunal’s witness protection regime.¹⁰

IV. Discussion

A. Legal characterisation of the documents

7. The Pre-Trial Judge notes that Annex A to the Non-Disclosure Application contains [REDACTED] OTP witness statements and [REDACTED] OTP investigators’ notes¹¹ and Annex B contains [REDACTED] OTP expert witness statements¹² and [REDACTED] OTP investigators’ notes which record interviews with expert witnesses. The Pre-Trial Judge will evaluate these categories of documents to determine their legal characterisation.

8. The Pre-Trial Judge recalls that, as stated by the Appeals Chamber, the classification of document requires “an assessment not just of the document’s title, but also of its actual content, function, purpose and source.”¹³ After having perused the 100 documents labelled

⁶ *Id.*, paras 2, 11.

⁷ *Id.*, paras 2, 3.

⁸ *Id.*, para. 12.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Annex A to Non-Disclosure Application, documents listed at rows 4, 14, 19, 38, 47, 59, 60, 64, 83.

¹² Annex B to Non-Disclosure Application, documents listed at rows 10, 13.

¹³ STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011, para. 73 (“Appeals Chamber 19 July 2011 Decision”).

“witness statements” in Annexes A and B, which are signed by the witnesses in question, the Pre-Trial Judge finds that their title is the appropriate legal characterisation.

9. The Pre-Trial Judge will now evaluate the legal characterisation of the documents labelled as investigators’ notes in Annexes A and B. In the *El Sayed* matter, the Appeals Chamber endorsed a broad definition of “witness statement”, which includes “radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given”.¹⁴ The Pre-Trial Judge notes that the investigators’ notes listed in Annex B consist of a sequential and methodical record of questions put to expert witnesses and the answers they gave. The legal characterisation on these investigators’ notes is therefore that of witness statement, despite the fact that the expert witnesses’ words are recorded in indirect speech.¹⁵ Moreover, some of them include a Witness Acknowledgment form attached to the notes, whereby the experts in question orally confirmed the veracity of the information they provided during the audio-recorded interview.¹⁶

10. The investigators’ notes in Annex A are OTP reports relating to interviews with witnesses. Although they do not systematically and chronologically recount the questions and answers of the interview, they nevertheless contain statement components. With the exception of three of the investigators’ notes which relate to failed attempts to interview a witness,¹⁷ the notes include components of indirect speech or summaries of comments or declarations made by the witnesses. The legal characterisation of these components is that of witness statement.

B. Disclosure pursuant to Rule 110(A)(ii)

11. The Pre-Trial Judge cannot find in favour of the Prosecution’s submission that the Statements need not be disclosed within the ambit of Rule 110(A)(ii) because they are irrelevant to the substantive matters charged in the Indictment.¹⁸ The relevance of the witness

¹⁴ Appeals Chamber 19 July 2011 Decision, para. 89, citing SCSL, *Prosecutor v. Norman*, Case No. SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, paras 8-10.

¹⁵ Appeals Chamber 19 July 2011 Decision, para. 109, stating that the words of a witness remain the product of the witness.

¹⁶ E.g. Annex B to Non-Disclosure Application, documents listed at rows 5 and 7, respectively: ERN 60251913-60251920, p.8; ERN 60251923-60251929, p. 7.

¹⁷ Annex A to Non-Disclosure Application, documents listed at rows 4, 14, 64, respectively: ERN 60240155-60240156; ERN 60240923-60240923; ERN 60240925-60240925.

¹⁸ Non-Disclosure Application, para. 1.

statements listed in Annex A is manifest since the witnesses refer *inter alia* to the evidence they intend to give at trial,¹⁹ their eventual testimonies,²⁰ and their formal statements.²¹

12. With respect to investigators' notes, the Pre-Trial Judge recalls that although preparing these notes involves effort on behalf of the investigator, the witness' words recorded in the resulting statement remain "the product of the witness",²² and must therefore be disclosed. However, the Pre-Trial Judge underscores that disclosure obligations do not extend to any additional comments or analyses by the investigator or OTP contained in the same document.²³

13. As to the relevance of the investigators' notes enumerated in Annexes A and B, the Pre-Trial Judge acknowledges that they mostly relate to the personal circumstances and possible risks faced by the witnesses. Nevertheless, some of the witness statement components found in the investigators' notes listed in Annex A include references to a witness' involvement in the case²⁴ or formal statement.²⁵ Meanwhile, the investigators' notes listed in Annex B, which record interviews with expert witnesses, include information about the experts' professional backgrounds and their involvement in investigating the attack that killed Rafiq Hariri.

14. Furthermore, the Pre-Trial Judge emphasises that disclosable statements are not limited to the final, official and signed version of a witness statement. The Appeals Chamber found "all stages of the preparation of a witness's formal statement can be important, whether to exhibit consistency or the reverse."²⁶ Therefore, preliminary examination reports, screening notes and other documents taken during the early stages of an investigation still need to be disclosed as "[b]oth the Trial Chamber and the opposing party are entitled to know how the witness's version has evolved."²⁷

¹⁹ *E.g.* Annex A to Non-Disclosure Application, document listed at row 6: ERN 60239213-60239218, para. 21.

²⁰ *E.g.* Annex A to Non-Disclosure Application, document listed at row 1: ERN 60238350-60238356, para. 24.

²¹ *E.g.* Annex A to Non-Disclosure Application, documents listed at rows 1, 3, 8, respectively: ERN 60238350-60238356, para. 14; ERN 60238492-60238497, para. 17; ERN 60239166-60239171, paras 22-23.

²² Appeals Chamber 19 July 2011 Decision, para. 109 (emphasis omitted).

²³ *Ibid.*

²⁴ *E.g.* Annex A to Non-Disclosure Application, document listed at row 47: ERN 60240928-60240930, para. 3j.

²⁵ *E.g.* Annex A to Non-Disclosure Application, document listed at row 60: ERN 60238885-60238887, para. 12.

²⁶ Appeals Chamber 19 July 2011 Decision, para. 85.

²⁷ *Id.* para. 87 (emphasis omitted).

15. Hence, despite having been collected during pre-interview stages in order to assess the security and safety of witnesses,²⁸ the Pre-Trial Judge finds that the Statements are nonetheless subject to disclosure pursuant to Rule 110(A)(ii). Additionally, some of them may contain information which bears on the credibility of witnesses “and thus be doubly in contention for disclosure, under Rule 113 as well.”²⁹

16. In summary, for the witnesses who will be called to testify at trial, Rule 110(A)(ii) requires disclosure of all statements, *in the possession of the Prosecution*, regardless of their form and source.³⁰ In response to the Prosecution’s submission that the witness protection information contained in the Statements would presumably not be disclosable had the VWU collected it,³¹ the Pre-Trial Judge notes that, had the VWU collected the Statements, they would not be in the possession of the Prosecution. Furthermore, in such a case, the Prosecution would have been in the same position as the Defence by having no knowledge of the information contained in the VWU documents.

C. Grounds for Non-Disclosure pursuant to Rule 116

17. Having established that disclosure of the Statements is required pursuant to Rule 110(A)(ii), the Pre-Trial Judge will consider whether the Prosecution can be relieved, in whole or in part, of its disclosure obligations pursuant to Rule 116(A)(ii) and (iii). These sub-sections of the rule apply to cases where disclosure may either cause grave risk to the security of a witness or his family, or may be contrary to public interest for any other reason.

18. The Pre-Trial Judge does not consider that disclosure would “hinder the proper administration of justice to the extent that such statements relate to the confidential and internal functioning of the Tribunal’s witness protection regime”, as submitted by the Prosecution.³² First, the single Special Court for Sierra Leone case cited in support of this submission concerns information relating to the relocation of witnesses and is therefore not applicable to the present matter. Second, the Tribunal’s witness protection regime is managed by the VWU and the Statements, taken by the OTP, do not fall within “the confidential and

²⁸ Non-Disclosure Application, para. 2.

²⁹ Appeals Chamber 19 July 2011 Decision, para. 85.

³⁰ SCSL, *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes pursuant to Rules 66 and/or 68, 4 May 2005, para. 16, referring to Rules 66 and 70(A) of the SCSL Rules of Procedure and Evidence, which are the equivalents of the Rules 110 and 111 of the Rules, respectively (emphasis added).

³¹ Non-Disclosure Application, para. 2.

³² *Id.*, para. 12.

internal functioning” of this regime. For the reasons stated earlier, the Prosecution cannot substitute the collection of information by the VWU by its own investigations.

19. The Pre-Trial Judge also disagrees with the submission that disclosure would be contrary to public interest, and notes that many of the Statements include stipulations notifying witnesses that the Statements may be used in legal proceedings. For instance, the witness statements listed in Annex A include the following affirmation: “I am aware that my statement may be used in legal proceedings before the Special Tribunal for Lebanon (STL) and that I may be called to give evidence in such legal proceedings.”³³ Similarly, for the investigators’ notes listed in Annex B that contain a Witness Acknowledgment, it contains the following assertion: “I have given this *recording* voluntarily and am aware that it may be used in legal proceedings before the Special Tribunal for Lebanon”.³⁴

20. Where the Statements do not explicitly acknowledge the possibility that the information they contain may be subject to disclosure, the Pre-Trial Judge nonetheless considers that the Defence must have access to the portions which contain the statements of witnesses, albeit through indirect speech. In the few cases where investigators’ notes include product of the interviewee, such as the investigator’s personal comments or analyses,³⁵ these portions may be redacted.³⁶

21. In addition, the Pre-Trial Judge allows the Prosecution to withhold or redact information that would threaten the safety of witnesses, [REDACTED]. The Pre-Trial Judge finds that such redactions respond to the Prosecution’s concerns that disclosure may increase the risk to the security of witnesses.³⁷

22. Indeed, the Pre-Trial Judge notes that Rule 116(A) specifies that an application to be relieved of disclosure obligations under this rule requires that the Prosecution provide “counterbalancing measures” with respect to the information that is sought to be kept confidential. In the Non-Disclosure Application, the Prosecution has failed to provide such measures, stating merely that the Statements are “solely related to witness protection.”³⁸ The

³³ See witness statements listed in Annex A to Non-Disclosure Application, para. 5, 6 or 7, depending on the witness statement.

³⁴ See e.g. Annex B to Non-Disclosure Application, documents listed at rows 5 and 7, respectively: ERN 60251913-60251920, p.8, para. 2; ERN 60251923-60251929, p. 7, para. 2 (emphasis in original).

³⁵ E.g. Annex A to Non-Disclosure Application, document listed at row 59: ERN 60237738-60237739, para. 7.

³⁶ Appeals Chamber 19 July 2011 Decision, para. 109.

³⁷ Non-Disclosure Application, para. 12.

³⁸ Non-Disclosure Application, para. 12.

Pre-Trial Judge considers that the aforementioned redactions are appropriate counterbalancing measures.

23. Should the Prosecution deem such redactions as being necessary, the Pre-Trial Judge invites it to resubmit an application for non-disclosure pursuant to Rule 116(A) which includes proposals for counterbalancing measures in the form of redactions to the Statements. The redaction methodology must be conducted in conjunction with the VWU and the latter's assessment on the proposed redactions must be included in the application.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 110(A)(ii) and 116(A)

REJECTS the Non-Disclosure Application;

DECLARES that the Statements are disclosable; and

ORDERS the Prosecution to either resubmit an application for non-disclosure pursuant to Rule 116(A) which includes proposals for counterbalancing measures in the form of redactions and the VWU's assessment of the proposed redactions, the whole by 18 February 2013 at the latest, or to disclose the Statements immediately.

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

Leidschendam, 28 May 2013




Daniel Fransen
Pre-Trial Judge

