



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: **Judge Daniel Fransen**

The Registrar: **Mr. Daryl Mundis**

Date: **25 July 2013**

Original language: **English**

Classification: **Public with Confidential and *Ex Parte* Annex**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**DECISION ON PROSECUTION'S APPLICATIONS TO AUTHORISE NECESSARY
REDACTIONS DATED 8 AND 18 MARCH 2013**

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I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on two Prosecution applications to authorise redactions to witnesses statements pursuant to Rule 116 of the Rules of Procedure and Evidence (the “Rules”), filed respectively on 8 and 18 March 2013 (the “Applications of 8 and 18 March 2013”).¹

II. PROCEDURAL BACKGROUND

2. On 20 December 2012, and in response to an application for the non-disclosure of certain witness statements by the Prosecution,² the Pre-Trial Judge rendered a decision in which *inter alia* he ordered the Prosecution either to resubmit its application with proposals for redactions, together with the assessment by the Victims and Witnesses Unit (“VWU”) of the proposed redactions, by 18 February 2013,³ or otherwise to disclose the related statements immediately.⁴

3. On 13 February 2013, the Prosecution filed a confidential notice of disclosure and an application to authorise necessary redactions⁵ in which the Prosecution applied *inter alia* for the authorisation to redact the statements of 14 witnesses pursuant to Rule 116(A), and

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Notice of Disclosure and Application to Authorize Necessary Redactions, with Confidential and *Ex Parte* Annexes A-C, 8 March 2013 (“8 March 2013 Application”); Prosecution’s Notice of Disclosure and Application to Authorize Necessary Redactions, with Confidential and *Ex Parte* Annexes A-C, 18 March 2013 (“18 March 2013 Application”). All further references to filings and decisions relate to this case number unless otherwise stated.

The Pre-Trial Judge notes that in the 8 March 2013 Application (para. 1) and the 18 March 2013 Application (para. 1), the Prosecution notifies him of the disclosure without redactions, to the Defence, of two and four witness statements respectively. The Pre-Trial Judge notes that the 18 March 2013 Application concerned the notice of the disclosure of the statements of four witnesses. The Prosecution had in fact submitted proposed redactions to other statements for two of the witnesses, and the statements that were disclosed without redactions were discrete (18 March 2013 Application, Annex A).

² 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 (“13 November 2012 Application”). On 18 March 2013, the Prosecution filed a public Corrigendum to the 13 November 2012 Application; 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, 18 March 2013 (“Corrigendum”).

³ 20 December 2012 Decision, para. 23.

⁴ 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”), which determined the 13 November 2012 Application. The 13 November 2012 Application was made on the basis that these statements either 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 (20 December 2012 Decision, para. 1). A Public Redacted Version of the 20 December 2012 Decision was filed on 28 May 2013.

⁵ Prosecution’s Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, Confidential with Confidential and *Ex Parte* Annexes A, B, C and D, 13 February 2013 (the “13 February 2013 Application”).

sought an extension of time to submit the applications for the authorisation of redactions for the statements of the remaining Prosecution witnesses for whom protective measures would be sought.⁶

4. On 1 March 2013, Counsel for Mr. Sabra (“Sabra Defence”) filed its response to the 13 February 2013 Application.⁷

5. On 6 March 2013, the Prosecution filed a request for leave to reply to the Sabra Response,⁸ to which the Sabra Defence filed a response on 13 March 2013.⁹

6. On 8 and 18 March 2013, the Prosecution filed two applications in respect of the statements of 111¹⁰ remaining witnesses pursuant to Rule 116(A) of the Rules.¹¹

7. On 21 March 2013, The Pre-Trial Judge rendered a decision with regard to the 13 February 2013 Application in which *inter alia* he authorised the Prosecution’s proposed redactions to the 14 statements in accordance with the confidential and *ex parte* annex thereto and granted the Prosecution’s request for an extension of time in which to submit the 8 and 18 March 2013 Applications (the “21 March 2013 Decision”).¹² Following its request to that end,¹³ the Pre-Trial Judge further considered that it was appropriate and opportune that the Prosecution be afforded the opportunity to make submissions in respect to the Sabra

⁶ 13 February 2013 Application, paras 5-6. The Prosecution’s motivation was “primarily in order to permit the VWU to finalize their assessment”.

⁷ 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”).

⁸ Prosecution Request for Leave to Reply to Consolidated Sabra Defence Response of 1 March 2013, 6 March 2013 (the “Request to Reply”).

⁹ 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”). Referrals to the Sabra Response and the Response to Request to Reply will collectively be referred to as the “Sabra Defence Rule 116 Submissions”.

¹⁰ The Pre-Trial Judge recalls that the total number of witnesses for whose statements the Prosecution sought authorisation to redact varied from 114 to 115 and to 111 for the following reasons.

First, on 18 March 2013, the Prosecution filed the Corrigendum to correct an error in a previous application. In the Corrigendum, the Prosecution acknowledged that although the statement of Witness no. 23 “appeared in a footnote as part of the risk assessment and was therefore provided to the Pre-Trial Judge, [it] was not included in Annex B to the Application and therefore not considered in the final count of witnesses covered by the Application” (para. 3). As a result of the Corrigendum, the missing witness was included on the Prosecution’s list, raising the total number of remaining witnesses to 115.

Second, out of the 115 remaining witnesses’ statements, four were subsequently disclosed without redactions following the Prosecution’s review (Annexes A to the Applications of 8 and 18 March 2013) (*see note. 1 supra*). As such, the correct number of witnesses whose statements are dealt with in the instant decision is 111.

¹¹ 8 March 2013 Application, para. 5; 18 March 2013 Application, para. 3.

¹² Decision on Prosecution’s Notice of Disclosure, Application to Authorise Necessary Redactions and Request for Extension of Time, 21 March 2013; Annex to Decision on Prosecution’s Notice of Disclosure, Application to Authorise Redactions and Request for Extension of Time, *Confidential and Ex Parte*, 21 March 2013.

¹³ Request to Reply.

Response, and ordered the Prosecution to file a reply accordingly by 28 March 2013.¹⁴ The Prosecution filed a reply to the Sabra Response on 28 March 2013 (the “Prosecution Reply”).¹⁵

III. SUBMISSIONS AND DISCUSSION

A. Authorisation to redact 111 witnesses statements pursuant to Rule 116(A)

1. Submission

8. The Prosecution seeks authorisation, pursuant to Rule 116(A) of the Rules, to redact the statements of 111 witnesses that appear on its Witness Lists.¹⁶ The proposed redactions result from the Prosecution’s application of the requirements of the 20 December 2012 Decision, and include the assessment provided by the VWU.¹⁷

9. The lists of the 111 witnesses for whose statements the Prosecution seeks authorisation to redact are set out in confidential and *ex parte* Annexes B to the Applications of 8 and 18 March 2013, and the associated statements were provided to the Pre-Trial Judge on two confidential and *ex parte* CD-ROMs via the Tribunal’s Court Management Services Section. They are accordingly treated in a confidential and *ex parte* annex to this decision.

2. Discussion

10. The Pre-Trial Judge has addressed the Prosecution’s requests to redact witnesses statements pursuant to Rule 116(A) in the confidential and *ex parte* annex to this decision, in which he authorises the Prosecution, pursuant to that Rule, to redact the statements in relation to the 111 remaining witnesses, subject to the conditions elaborated in that annex.

B. The Sabra Defence Rule 116 Submissions

1. Submissions

11. In order to mitigate the effects on trial preparation of granting the relief sought by the Prosecution in the 13 February 2013 Application, and the Applications of 8 and 18 March

¹⁴ 21 March 2013 Decision, para. 55.

¹⁵ Prosecution Reply to Consolidated Sabra Defence Response of 1 March 2013, 28 March 2013.

¹⁶ Annexes B, respectively, to the Applications of 8 and 18 March 2013.

¹⁷ See 13 February 2013 Application, para. 5; see Applications of 8 and 18 March 2013 paras 6 and 4 respectively.

2013, the Sabra Defence proposed a mechanism which consisted of the disclosure of all witness names either in unredacted form where their names were known to the Defence, or by assigning a pseudonym where their identities were protected.¹⁸ This mechanism would have required the Pre-Trial Judge to issue an order for the Prosecution to file, or to re-file, an *inter partes* version of its requests for redactions and 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”.¹⁹

12. According to the Prosecution, the proposal contained in the Sabra Response should be dismissed since “Rule 116 does not contemplate or authorise Defence participation in such request”.²⁰ Paragraphs (A) and (B) of Rule 116 of the Rules expressly provide for the Prosecution’s submissions on counterbalancing measures to be made *ex parte* and considered *in camera*. Consequently, the Prosecution considers that the Defence is only entitled “to receive the witness statements, either with redactions if approved by the Pre-Trial Judge or unredacted if the Pre-Trial Judge does not approve the counterbalancing measures sought”.²¹

13. Furthermore, with regard to the Sabra Defence request for an *inter partes* version of the Prosecution’s 13 February 2013 Application, the Prosecution recalls that in compliance with the Pre-Trial Judge’s 21 March 2013 Decision, “the redacted statements related to the 14 witnesses were disclosed to the Defence on 28 March 2013 in disclosure batch 390”. The Prosecution avers that the Sabra Defence request is therefore moot in this regard.²²

2. Discussion

14. At the outset, the Pre-Trial Judge notes that the Prosecution submitted that the 18 March 2013 Application concludes the process of redacting its witness statements as required by the 20 December 2012 Decision.²³

15. With respect to the statements of the 14 witnesses listed in confidential and *ex parte* Annex B to the 13 February 2013 Application, the Pre-Trial Judge recalls that according to the 21 March 2013 Decision, he authorised the redaction of the statements of the 14 witnesses as indicated in the annex to that decision, and he ordered the Prosecution to disclose those

¹⁸ 21 March 2013 Decision, para. 48.

¹⁹ *Id.*, para. 50.

²⁰ Prosecution Reply, para. 6.

²¹ *Id.*, para. 8.

²² *Id.*, para. 7.

²³ 18 March 2013 Application, para. 5.

redacted statements by 2 April 2013.²⁴ He also ordered the Prosecution to inform him of that disclosure by way of a notice detailing the name of each witness together with the date on which each of the statements was disclosed to the Defence.²⁵ On 4 April 2013, the Prosecution filed, in accordance with the 21 March 2013 Decision, a notice on the disclosure of the witness statements which were the subject of the authorised redactions, stating that the statements had been disclosed to the Defence on 28 March 2013 in disclosure batch 390.²⁶ The Sabra Defence request for an *inter partes* version of the Prosecution's 13 February 2013 Application is therefore now moot to the extent that redactions to the statements of witnesses addressed by the 13 February 2013 Application have been authorised.

16. Likewise, and with respect to the statements of the 111 witnesses listed in confidential and *ex parte* Annexes B to the Applications of 8 and 18 March 2013, the Pre-Trial Judge notes that in so far as the redactions of the 111 witnesses' statements have been determined in the present decision and its annex, the statements will now be disclosed to the Defence in accordance herewith. This issue is therefore also moot to the extent that redactions to the statements of witnesses addressed by the Applications of 8 and 18 March 2013 have been authorised.

17. Rule 116 of the Rules, read with Rule 97, provides that:

- (A) Where information in the possession of the Prosecutor is not obtained under or otherwise subject to Rule 118, and its disclosure would ordinarily be required under Rule 110 or 113, but such disclosure (i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties, the Prosecutor may apply *ex parte* to the [Pre-Trial Judge] sitting *in camera* to be relieved in whole or in part of an obligation under the Rules to disclose that material. When making such application the Prosecutor shall provide the [Pre-Trial Judge] with the information that is sought to be kept confidential, together with a statement relating to the proposed counterbalancing measures including, *inter alia*: identification of new, similar information; provision of the information in summarised or redacted form; or stipulation of the relevant facts.
- (B) The [Pre-Trial Judge] shall decide whether the information that is the subject of the application would ordinarily have to be disclosed in the absence of an application under this Rule. If this is the case, the [Pre-Trial Judge] shall consider *ex parte* the Prosecutor's statement relating to proposed counterbalancing measures including, *inter alia*: [...] provision of the information in summarised or redacted form [...].

²⁴ 21 March 2013 Decision, Disposition.

²⁵ *Ibid.*

²⁶ Prosecution Notice on Disclosure of Redacted Witness Statements Pursuant to Pre-Trial Judge's Decision of 21 March 2013, with confidential annex, 4 April 2013; Annex A, List of 16 Statements Disclosed Pursuant to Pre-Trial Judge's Decision of 21 March 2013, confidential, 4 April 2013 ("Annex A").

(C) The [Pre-Trial Judge] may order that appropriate counterbalancing measures be taken. If no such measures are sufficient to protect the accused's right to a fair trial, the Prosecutor shall be given the option of either amending or withdrawing the charges to which the material relates or disclosing the material.²⁷

18. As the Prosecution has pointed out,²⁸ Rule 116 does not provide for the participation of an opposing party²⁹ in its application; in fact, it is expressly excluded. The mechanism proposed by the Sabra Defence is therefore *prima facie* inconsistent with the Rule. In any event, the 21 March 2013 Decision and this decision, together with their respective annexes, determine the redactions proposed to the statements of all 125 witnesses concerned.³⁰ As such, they resolve that issue raised by the Sabra Defence, namely as to whether there should be a provisional and alternative mechanism to “enable the Defence to prepare for trial more meaningfully and effectively”.³¹

19. An application under Rule 116 can only be brought if one of three criteria are met, namely, that information the disclosure of which is otherwise ordinarily required under Rule 110 or 113: (i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties. Where the Prosecution cannot establish one or more of these three criteria, a Rule 116 application must fail, and the information concerned must be disclosed to the Defence.

20. Although it is not explicitly repeated in subsequent applications, the Prosecution, initially embarked on this process of seeking authorisation to redact these witness statements on the basis that disclosing materials to the Defence, pursuant to Rules 110 and 113, which include specific risks identified by the witnesses in question, may generally increase the risk to their security.³² In the Applications of 8 and 18 March 2013, whose late filings were sought in the 13 November 2012 Application and advance this process to completion, the Prosecution therefore alleges that the second requirement of Rule 116(A) is met.

21. Conversely, where one or more of these three criteria are made out, a Rule 116 application may be entertained, but in support of the application the Prosecution is

²⁷ Rule 116(C) STL RPE read with Rule 97 STL RPE.

²⁸ Prosecution Reply, para. 2.

²⁹ Rule 116(E) STL RPE provides that provisions of the Rule “shall also apply *mutatis mutandis* to the Defence and victims participating in the proceedings”.

³⁰ 18 March 2013 Application, para. 5.

³¹ 21 March 2013 Decision, para. 49.

³² 13 November 2012 Application, para. 12.

furthermore required to provide a statement relating to the proposed counterbalancing measures, which the Pre-Trial Judge must consider *ex parte*. The Pre-Trial Judge may in any event order that appropriate counterbalancing measures be taken, and provision is made for cases in which no such measures are sufficient to protect the accused's right to a fair trial.³³

22. The Pre-Trial Judge has previously held that redactions may be "appropriate counterbalancing measures" when weighed against the non-disclosure of the materials that would ordinarily have to be disclosed.³⁴ Indeed, in enumerating examples of counterbalancing measures proposed by the Prosecution, paragraphs (A) and (B) of Rule 116 include "provision of the information in summarised or redacted form". It is pursuant to these considerations that the Pre-Trial Judge has conducted the analysis in the annex to this decision.³⁵

IV. CONFIDENTIALITY

23. Having classified the Applications of 8 and 18 March 2013 as public, the Prosecution requests that the annexes of the Applications of 8 and 18 March 2013 remain confidential and *ex parte* until the proposed redactions are applied on the witness statements, since they "contain information concerning confidential Statements".³⁶

24. The Pre-Trial Judge notes that the Applications of 8 and 18 March 2013 contain information related to witness statements that is confidential. The Pre-Trial Judge therefore grants the Prosecution's requests that the annexes to the Applications of 8 and 18 March 2013 remain confidential and *ex parte* until the proposed redactions are applied.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77(A), 97 and 116 of the Rules;

³³ Rule 116(C) STL RPE read with Rule 97 STL RPE.

³⁴ 20 December 2012 Decision, para. 22 (internal reference omitted).

³⁵ In the 13 February 2013 Application, the Prosecution refers to the 20 December 2012 Decision and how it required the Prosecution to include "proposals for counterbalancing measures in the form of redactions" (para. 1). Neither the 8 March 2013 Application nor the 18 March 2013 Application expressly refer to "counterbalancing measures".

³⁶ See Applications of 8 and 18 March 2013, paras 8 and 7 respectively.

GRANTS the Prosecution's application for leave to disclose the statements of the 111 witnesses listed in confidential and *ex parte* Annexes B to the Applications of 8 and 18 March 2013, redacted in accordance with the confidential and *ex parte* annex to this decision;

ORDERS that these redacted statements be disclosed within 20 working days of this decision at the latest;

ORDERS the Prosecution, with respect to witness whose statement is analysed in Part III.49 of the annex, either to disclose the statement to the Defence absent the proposed redaction concerned, or to file a request for appropriate redactions paragraph pursuant to Rule 116(A), substantiating the reasons for the measures requested and including a statement related to the proposed counterbalancing measures, within five working days of this Decision;

ORDERS that the confidential and *ex parte* annexes to the Applications of 8 and 18 March 2013, as well as the annex to this decision, shall remain confidential and *ex parte*;

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 redacted form within 20 working days of this decision at the latest; and

DISMISSES the Sabra Defence requests for access to the Rule 116 applications.

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

Leidschendam, 25 July 2013.



Daniel Fransen
Pre-Trial Judge

