



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: **9 August 2013**

Original language: **English**

Classification: **Public**

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

**RECONSIDERATION OF THE DECISION ON PROSECUTION'S APPLICATIONS
TO AUTHORISE NECESSARY REDACTIONS DATED 8 AND 18 MARCH 2013, OF
25 JULY 2013**

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I. INTRODUCTION

1. The Pre-Trial Judge hereby reconsiders his decision of 25 July 2013¹ (the “Decision”) *proprio motu* pursuant to Rules 97 and 140 of the Rules of Procedure and Evidence (the “Rules”).

II. PROCEDURAL BACKGROUND

2. On 20 December 2012, and in response to a prior 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, or otherwise to disclose the related statements immediately.³

3. On 13 February 2013, the Prosecution filed a notice of disclosure and an application *inter alia* to authorise necessary redactions to certain witness statements pursuant to Rule 116(A) of the Rules (the “13 February 2013 Application”).⁴

4. On 1 March 2013, Counsel for Mr. Sabra (the “Sabra Defence”) filed its response to the 13 February 2013 Application (the “Sabra Response”).⁵

5. On 6 March 2013, the Prosecution filed a request for leave to reply to the Sabra Response,⁶ to which the Sabra Defence filed a response on 13 March 2013.⁷

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on Prosecution’s Applications to Authorise Necessary Redactions Dated 8 and 18 March 2013, with Confidential and *Ex Parte* Annex, 25 July 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

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 (the “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 (the “Corrigendum”).

³ 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”). A Public Redacted Version of the 20 December 2012 Decision was filed on 28 May 2013.

⁴ Prosecution’s Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, with Confidential and *Ex Parte* Annexes A, B, C and D, 13 February 2013.

⁵ 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.

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

⁷ 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”).

6. On 8 and 18 March 2013, the Prosecution filed two applications in respect of the statements of 111 remaining witnesses pursuant to Rule 116(A) of the Rules (the “Applications of 8 and 18 March 2013”).⁸

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 concerned 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”).⁹ Following the Prosecution’s request to that end,¹⁰ 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 Response, and ordered the Prosecution to file a reply accordingly by 28 March 2013.¹¹

8. On 25 March 2013, Counsel for Mr. Ayyash (the “Ayyash Defence”) filed its “Consolidated Response of the Ayyash Defence to Prosecution Applications to Authorise Necessary Redactions Filed 11 March 2013 and 19 March 2013”, dated 25 March 2013 (the “Ayyash Response”).

9. On 28 March 2013 the Prosecution filed a reply to the Sabra Response (the “Prosecution Reply”).¹²

10. On 25 July 2013, the Pre-Trial Judge issued the Decision.

III. THE DECISION AND SUBMISSIONS

A. The Decision

11. In the Decision, the Pre-Trial Judge decided on the Applications of 8 and 18 March 2013 for authorisation, pursuant to Rule 116(A) of the Rules, to implement redactions to

⁸ 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”), para. 5; 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”), para. 3.

⁹ 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.

¹⁰ Request to Reply.

¹¹ 21 March 2013 Decision, para. 55.

¹² Prosecution Reply to Consolidated Sabra Defence Response of 1 March 2013, 28 March 2013.

certain witness statements following the Prosecution's application of the requirements of the 20 December 2012 Decision.¹³

12. Pursuant to 20 December 2012 Decision, the Applications of 8 and 18 March 2013 included the necessary assessment provided by VWU.¹⁴

13. The Pre-Trial Judge addressed the Prosecution's requests to redact witness statements pursuant to Rule 116(A) in the confidential and *ex parte* annex to the Decision, in which he authorised the Prosecution, pursuant to that Rule and the VWU's assessment, and subject to the conditions elaborated in that annex following his own review, to redact the statements in relation to the remaining witnesses.

14. The Pre-Trial Judge noted that, according to the Prosecution, the 18 March 2013 Application concluded the process of applying for redactions to its witness statements as required by the 20 December 2012 Decision, and decided that — subject to the approved redactions — the witness statements would now be disclosed to the Defence in accordance with the 21 March 2013 Decision and the 25 July 2013 Decision.¹⁵

15. While the Decision took into consideration the Sabra Response¹⁶ and the Prosecution Reply,¹⁷ it omitted to do the same with the Ayyash Response. The reason for this error is that the Ayyash Response referred the “Prosecution Applications to Authorise Necessary Redactions Filed 11 March 2013 and 19 March 2013” when those applications were, in fact, the Applications of 8 and 18 March 2013, leading to an administrative error in the internal procedures of the Pre-Trial Chamber.¹⁸

16. The Pre-Trial Judge considers that, owing to the inadvertent omission of the Ayyash Response from consideration in the Decision, reconsideration of the Decision *proprio motu*

¹³ Annexes B, respectively, to the Applications of 8 and 18 March 2013.

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

¹⁵ Decision, para. 14.

¹⁶ 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.

¹⁷ Prosecution Reply to Consolidated Sabra Defence Response of 1 March 2013, 28 March 2013.

¹⁸ The Pre-Trial Judge notes that the “Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon” has since been amended (14 June 2013 – STL/PD/2010/01,Rev.2), and, while steps have been taken within the Pre-Trial Chamber to guard against a repeat of this occurrence, the Parties are reminded that, pursuant to the Practice Direction now in force, they are to refer to the correct dates of filings in their future submissions (as opposed to the date on which a filing is distributed). See Practice Direction, art. 2, par. 7.

pursuant to Rule 140 of the Rules¹⁹ is necessary to avoid injustice. He issues the instant decision accordingly, reconsidering the Decision in light of the Ayyash Response.

B. The Ayyash Defence Submissions

17. The Ayyash Defence opposes the Applications of 8 and 18 March 2013, and requests that they be rejected and that the Prosecution be ordered to disclose the material in question.²⁰ It submits that the Prosecution fails to substantiate the Applications of 8 and 18 March 2013, and that it simply asserts that the proposed redactions are in conformity with the 20 December 2012 Decision.²¹

18. The Ayyash Defence notes that while the 8 March 2013 Application specifies that the redactions requested were not applied to “any content deemed to be evidentiary in nature”, the 18 March Application merely notes that the proposed redactions “were applied in accordance with the methodology explained in the confidential and *ex parte* Annex E to the [13 February 2013 Application]”.²² The Ayyash Defence raises concerns with the apparent inconsistency in the process the Prosecution followed in requesting the redactions, and in particular, poses the following questions:

- a) Why are the Applications of 8 and 18 March 2013 apparently inconsistent?²³
- b) Are the proposed redactions in the 18 March 2013 Application applied to content that is evidentiary in nature?²⁴
- c) Are the proposed redactions in the 8 March 2013 Application not applied in accordance with the methodology as explained in Annex E to the 13 February 2013 Application?²⁵

19. The Ayyash Defence adds that its concerns are:

compounded by the fact that the [Prosecution’s] submissions in the [13 February 2013 Application] were filed *ex parte*, the [21 March 2013 Decision] was rendered in an *ex parte*

¹⁹ According to Rule 97 STL RPE, Rule 140 STL RPE applies *mutatis mutandis* in proceedings before the Pre-Trial Judge.

²⁰ Ayyash Response, paras 1, 14.

²¹ *Id.*, paras 9, 13.

²² *Id.*, para. 9, citing respectively: the 8 March 2013 Application, para. 6; and the 18 March 2013 Application, para. 4.

²³ *Id.*, para. 10.

²⁴ *Ibid.*

²⁵ *Ibid.*

annex, and the [Applications of 8 and 18 March 2013] contain only bare-bones submissions amounting to little more than an assertion that protective measures are necessary.²⁶

20. Rather than permitting “generic assertions” of the need for protective measures, the Ayyash Defence avers that the jurisprudence of other Tribunals requires more “than simply noting that the disclosure of a *type* of information could possibly threaten the safety of witnesses” and that “there must be specific evidence of an identifiable risk to the security or safety of a particular witness or his family.”²⁷

21. For the Ayyash Defence, the decision of the Pre-Trial Judge of 25 May 2012 (the “25 May 2012 Decision”)²⁸ suffices to protect the Prosecution’s disclosed materials²⁹ and the Applications of 8 and 18 March 2013 are accordingly unnecessary.³⁰

IV. DISCUSSION

22. The process of Prosecution requests for authorisation — pursuant to Rule 116 of the Rules — began with the Prosecution’s 13 November 2012 Application. In the 20 December 2012 Decision, the Pre-Trial Judge rejected the 13 November 2012 Application while simultaneously detailing what would be required by way of counterbalancing measures in order for such applications to be successful in the future.³¹ In particular, he invited the Prosecution 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.³²

23. The VWU thereafter generated a redaction methodology for the implementation of the 20 December 2012 Decision, which was filed as Confidential and *Ex Parte* Annex E to the 13 February 2013 Application (the “Guidelines”).³³

²⁶ *Ibid.*

²⁷ *Id.*, para. 11.

²⁸ Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012, referring in particular to the disposition (p. 22) which recalled: “paragraph 5 of the Code for Counsel which sets forth that counsel shall protect the confidentiality of evidence in the proceedings, as well as information relating to witnesses and their whereabouts during and at the conclusion of the proceedings”.

²⁹ Ayyash Response, para. 12.

³⁰ *Id.*, para. 13.

³¹ 20 December 2012 Decision, paras 17-22.

³² *Id.*, para. 23.

³³ Annex E Submissions of the Prosecution, Guidelines and Memorandums in Relation to the Application for Redactions to the Statements of 14 Witnesses, Confidential and *Ex Parte*, 13 February 2013.

24. The Applications of 8 and 18 March 2013 — together with the 13 February 2013 Application that preceded them — collectively constitute the Prosecution’s response to that invitation: applications for non-disclosure, this time including proposals for counterbalancing measures (in the form of redactions) together with an independent assessment provided by the VWU, in respect of each application.³⁴

25. Rule 116 of the Rules, which the Pre-Trial Judge is mandated to implement, states that “the Prosecutor may apply *ex parte* to the [Pre-Trial Judge³⁵] sitting *in camera* to be relieved in whole or in part of an obligation under the Rules to disclose that material.” In filing its applications in the way it did, the Prosecution was thus acting in conformity with the Rules, as was the Pre-Trial Judge when he issued the relevant decisions with confidential and *ex parte* annexes.

26. Furthermore, it is now established that when the Prosecution applies for relief under Rule 116(A), it is required to conduct its assessment of the relevant materials pursuant to a methodology concluded “in conjunction with the VWU and the [VWU’s] assessment on the proposed redactions must be included in the application.”³⁶

27. When the Pre-Trial Judge thereafter ruled on a Rule 116 application in the 21 March 2013 Decision, the Pre-Trial Judge took note in particular of the submission of the Ayyash Defence at that time:

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.³⁷

28. While the Pre-Trial Judge was entitled by Rule 116(A) to address this aspect *in camera* and in the confidential and *ex parte* annex to the 21 March 2013 Decision, he nevertheless undertook to guard against any prejudice being caused to the Defence at that time,³⁸ as well as in the subsequent Decision, which was issued on 25 July 2013.³⁹ Indeed, the

³⁴ 13 February 2013 Application, para. 1; 8 March 2013 Application, paras 5-6; 18 March 2013 Application, para. 4.

³⁵ Pursuant to Rule 97 STL RPE, Rule 116 STL RPE applies *mutatis mutandis* in proceedings before the Pre-Trial Judge.

³⁶ 20 December 2012 Decision, para. 23.

³⁷ 21 March 2013 Decision, para. 28.

³⁸ *Id.*, para. 29.

annexes to both the 21 March 2013 Decision and the Decision state that the Pre-Trial Judge has carefully reviewed all of the redactions proposed,⁴⁰ that he “has conducted his own analysis of the proposed redactions, together with the proposals advanced by the Prosecution and reviewed by the VWU” before deciding on the validity of each proposed redaction.⁴¹ The Prosecution has not failed to substantiate its applications, and the Pre-Trial Judge has carefully examined each of them in detail to ensure that the proposed redactions are in conformity with Rule 116 of the Rules and with the 20 December 2012 Decision, all the while ensuring that no prejudice is caused to the Defence.

29. It is not therefore the case — as the Ayyash Defence has advanced — that the Prosecution has failed to substantiate the Applications of 8 and 18 March 2013, which were in fact a continuation of a process begun in November 2012.

30. With respect to the apparent inconsistency in the Applications of 8 and 18 March 2013,⁴² while the Prosecution’s pleadings may appear to provide the Ayyash Defence with grounds for concern that these are mere “bare-bones submissions” amounting to “little more than an assertion that protective measures are necessary”,⁴³ the Pre-Trial Judge emphasises that the Prosecution’s submissions have consistently adhered to the 20 December 2012 Decision, and that his review of the relevant materials notably with the best interest of the Defence in mind has been consistent and rigorous.

31. In particular, the Pre-Trial Judge recalls that the Guidelines specifically provide that “anything [...] which can be deemed to be evidentiary in nature will be disclosed”,⁴⁴ subject of course to the alternatives provided to the Prosecution pursuant to Rule 116(C).⁴⁵ The Pre-Trial Judge is therefore satisfied that none of the proposed redactions to the 18 March 2013 Application relate to content that is evidentiary in nature. Indeed, the Pre-Trial Judge’s review of the materials resulted in his refusal of the proposed redaction of a particular paragraph in a witness statement for this very reason.⁴⁶

³⁹ Decision, para. 10.

⁴⁰ Annex to 21 March 2013 Decision, paras 9-12; Annex to Decision, paras 8-12.

⁴¹ Annex to 21 March 2013 Decision, para. 13; Annex to Decision, para. 11.

⁴² See para. 18 *supra*.

⁴³ Ayyash Response, para. 10.

⁴⁴ Guidelines, para. 8.

⁴⁵ Rule 116(C) STL RPE: “The Trial Chamber 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.”

⁴⁶ Annex to Decision, para. 10(49)(c).

32. The Pre-Trial Judge recalls the 25 May 2012 Decision, and the protections established therein, which provide a degree of protection for the Prosecution's disclosed materials. That decision cannot however be read as depriving the Prosecution of other facilities that the Rules provide, such as Rule 116. Where the Prosecution meets the requirements of that Rule, as was the case in the Applications of 8 and 18 March 2013, they cannot be considered "unnecessary" as the Ayyash Defence submits; rather, such motions fall to be duly considered pursuant to the applicable Rules and decisions.

33. The Pre-Trial Judge, having reconsidered the Decision in light of the Ayyash Response pursuant to Rule 140 of the Rules, concludes that there is no reason to depart from his findings in the Decision.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 97 and 140 of the Rules,

RECONSIDERS the Decision in light of the Ayyash Response; and

DECIDES that there is no reason to depart from his findings in the Decision.

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

Leidschendam, 9 August 2013.



Daniel Fransen
Pre-Trial Judge

