

The Pre-Trial Judge



المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

Le Juge de la mise en état

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: **29 March 2012**
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THE PROSECUTOR

v.

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

**DECISION ON THE PROSECUTION'S REQUEST FOR PARTIAL RECONSIDERATION
OF THE PRE-TRIAL JUDGE'S ORDER OF 8 FEBRUARY 2012**

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I. Introduction

1. The Pre-Trial Judge is seized of the “Prosecution Request that the Pre-Trial Judge Reconsider in Part the Order of 8 February 2012” of 27 February 2012 (respectively, the “Prosecution’s Request” and the “Order of 8 February 2012”).¹

2. With the present decision, the Pre-Trial Judge grants the Prosecution leave to file a request for reconsideration but denies the Prosecution’s Request on the merits. In making this ruling, the Pre-Trial Judge takes into account – subject to the conditions indicated in the present decision – the “Registry Submission in Relation to the Pre-Trial Judge’s ‘Order Making Public Certain Prosecutor’s Submissions in the *Ayyash et al.* Case’, pursuant to Rules 48(C), 50(A), (B)(i) and (C)” of 22 February 2012 (the “Registry’s Submission”).²

II. Procedural History

3. On 21 September 2011, the Pre-Trial Judge issued an order stating *inter alia* that the Prosecution’s confidential and *ex parte* submissions relating to the review of the indictments filed since 17 January 2011 should be made public.³ In the same order, the Pre-Trial Judge directed the Prosecution, should it wish to maintain in whole or in part the confidentiality of those submissions, to file such requests with proposed redactions and the reasons for them before the Pre-Trial Judge.⁴

4. On 4 January 2012, the Prosecution requested the Pre-Trial Judge to authorise specific redactions to some of the Prosecution’s submissions in the *Ayyash et al.* case which it was otherwise required to make public.⁵ On 10 January 2012, in response to that request, the Pre-Trial Judge issued an order directing the Prosecution, before filing its requests for redactions, first to consult with the Victims and Witnesses Unit of the Tribunal (the

¹ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request that the Pre-Trial Judge Reconsider in Part the Order of 8 February 2012, 27 February 2012; STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Making Public Certain Prosecutor’s Submissions in the *Ayyash et al.* Case, 8 February 2012.

² STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Registry Submission in Relation to the Pre-Trial Judge’s “Order Making Public Certain Prosecutor’s Submissions in the *Ayyash et al.* Case”, pursuant to Rules 48(C), 50(A), (B)(i) and (C), 22 February 2012.

³ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order to Make Public the Prosecutor’s Submissions Concerning the *Ayyash et al.* Case, 21 September 2011 (“21 September 2011 Order”).

⁴ *Id.*, para. 10.

⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecutor’s Request for the Pre-Trial Judge to Authorise Proposed Redactions and Order the Registry to Prepare these in the Translated Documents pursuant to the Order of the Pre-Trial Judge Dated 6 December 2011, 4 January 2012.

“VWU”).⁶ On 25 January 2012, having so consulted with the VWU, the Prosecution submitted to the Pre-Trial Judge an “Addendum to the Prosecution’s Filing Dated 4 January 2012 Following Consultation with the Victims and Witness (*sic*) Unit” (the “25 January 2012 Addendum”), requesting, *inter alia*, the approval of six additional redactions suggested by the VWU (the “Additional Redactions”).⁷ On 31 January 2012, the Pre-Trial Judge convened a meeting with representatives of the Prosecution, the VWU and the Registry in order to better understand the reasons for the redactions proposed by the Prosecution and the Additional Redactions suggested by the VWU (the “Meeting of 31 January 2012”).

5. On 8 February 2012, the Pre-Trial Judge issued the impugned Order of 8 February 2012, in which he authorised certain redactions requested by the Prosecutor in its 25 January 2012 Addendum, but rejected the Additional Redactions suggested by the VWU.⁸

6. On 22 February 2012, the Registry filed its Submission before the Pre-Trial Judge asking him to reconsider the rejection of the Additional Redactions.⁹

7. On 27 February 2012, the Prosecution seized the Pre-Trial Judge with a request for partial reconsideration of the Order of 8 February 2012.¹⁰ In its Request, the Prosecution endorsed the Registry’s Submissions.¹¹

III. The Registry’s Submission and the Prosecution’s Request

8. In its submission, the Registry relies on Rules 48(C) and 50(A), (B)(i) and (C) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”), arguing that the rejection of the VWU’s Additional Redactions has implications that significantly affect the discharge of VWU’s mandate and, therefore, the Registry’s functions – the VWU being a unit within the Registry.¹² It further maintained that the Additional Redactions are “*strictly* necessary for the effective discharge of the VWU’s mandate”.¹³ More particularly, the Registry submits that the Additional Redactions are necessary to ensure the protection and safety of certain persons

⁶ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, « *Ordonnance portant sur la requête du Procureur aux fins d’expurgation des documents déposés en exécution de l’Ordonnance du 6 décembre 2011* », 10 January 2012.

⁷ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Addendum to the Prosecution’s Filing Dated 4 January 2012 Following Consultation with the Victims and Witness (*sic*) Unit, 25 January 2012.

⁸ The Order of 8 February 2012.

⁹ Registry’s Submission, para. 60.

¹⁰ Prosecution’s Request.

¹¹ *Id.*, para. 9. See also *infra*, para. 9.

¹² Registry’s Submission, para. 15.

¹³ *Id.*, para. 31.

working for, or cooperating with, the VWU, as well as persons under the Tribunal's care.¹⁴ For those reasons, the Registry requests the Pre-Trial Judge to reconsider the Order of 8 February 2012 and to accept the Additional Redactions.¹⁵

9. In its Request, the Prosecution incorporates by reference the Registry's submission regarding the consequences of the Pre-Trial Judge's rejection of the Additional Redactions.¹⁶ The Prosecution also argues that such rejection would affect its own ability to investigate and prosecute those responsible for the crimes within the Tribunal's jurisdiction.¹⁷ Pursuant to Rule 140 of the Rules, the Prosecution asks the Pre-Trial Judge to (i) grant the Prosecution leave to seek reconsideration of the Order of 8 February 2012; (ii) reconsider the Order of 8 February 2012 in part; and (iii) authorise that the Additional Redactions be incorporated into the relevant filing before it is been made public.¹⁸

IV. The Applicable Law

A. The Registry's Submission

10. Pursuant to Rule 48(C) of the Rules, the Registrar may — in the execution of his functions and with notice to the Prosecutor, the Defence and the Head of Defence Office where appropriate — make oral and written representations to the President of the Tribunal or Chambers on any issue that affects the discharge of his functions. Since the Registry's Submission, which is filed pursuant to Rule 48(C) of the Rules, is addressed to the Pre-Trial Judge, he will respond to it, subject to the conditions indicated in the present decision.

11. Rule 50 of the Rules is also pertinent to the Registry's Submission. This Rule defines the role and functions of the VWU, the unit within the Registry that is responsible for protecting witnesses, victims who participate in the proceedings and other persons who are at risk on account of their interaction with the Tribunal.

B. The Prosecution's Request for Reconsideration

12. Rule 140 of the Rules provides that “[a] Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or

¹⁴ *Id.*, paras 44-45, 49-50, 53.

¹⁵ *Id.*, para. 60.

¹⁶ Prosecution's Request, para. 9.

¹⁷ *Id.*, para. 10.

¹⁸ *Id.*, para. 11.

sentence, if necessary to avoid injustice”. Pursuant to Rule 97 of the Rules, Rule 140 of the Rules applies *mutatis mutandis* to proceedings before the Pre-Trial Judge. Therefore, the Pre-Trial Judge is competent to rule on requests for leave to seek reconsideration as well as on their merits.

13. The Pre-Trial Judge notes that, pursuant to Rule 140 of the Rules, only Parties can seek leave to request reconsideration. A Party is defined in Rule 2 of the Rules as “[t]he Prosecutor or the Defence”.

V. Discussion

A. The Registry’s Submission

14. As previously noted, the Registry based its submission on Rule 48(C) of the Rules.¹⁹ This Rule provides that the Registrar may make oral and written representations to the President or Chambers on any issue that affects the discharge of his functions. The Pre-Trial Judge is mindful that the Order of 8 February 2012 may have an impact on the protection and safety of victims and witnesses, as well as on the functioning of the VWU. In so far as the VWU is a unit within the Registry, the Pre-Trial Judge therefore agrees with the Registry that the Order of 8 February 2012 may affect the discharge of the Registrar’s functions. However the parameters of the Registrar’s ability to make representations to the Chambers pursuant to Rule 48(C) of the Rules should be defined.

15. First, Rule 48(C) of the Rules does not empower the Registrar to interfere with Chambers’ discharge of its judicial function. The Registrar’s function, as set out in Rule 48(A) of the Rules, is to “assist the Chambers, the Judges, the Prosecutor and the Head of Defence Office in the performance of their functions.” Therefore, the object and purpose of the Registry’s representations under Rule 48(C) of the Rules is to inform the Chambers in the performance of their functions;²⁰ it does not extend to allowing the Registry to challenge court decisions and orders. In the instant case, the Pre-Trial Judge notes that, following the avenue provided for by Rule 48(C) of the Rules, the Registry has in effect submitted a request for reconsideration of the 8 February 2012 Order.²¹ However, requests for

¹⁹ Cf. para. 8 above.

²⁰ Cf. the French version of the Rules, which provides that “[l]e Greffier peut [...] informer le Président ou les Chambres oralement ou par écrit [...]”

²¹ Registry’s Submission, para. 60: “the Registry respectfully requests that: a) The rejection by the Pre-Trial Judge of the Additional Redactions proposed by the VWU to the 17 January 2011 Indictment be reconsidered”.

reconsideration are regulated by Rule 140 of the Rules, which only entitles the Parties — and not the Registry — to request reconsideration of a decision.

16. Second, while the Pre-Trial Judge considers that the Registry's views may bring to the Chambers' attention elements of information which may be useful in rendering a decision, the Registry should make these submissions when a chamber is seised of a motion, not after it has rendered a decision. In that regard, the Registry's Submission is belated. Moreover, the Pre-Trial Judge notes that the VWU had the opportunity to and did make representations to the Pre-Trial Judge concerning the importance of the Additional Redactions during the Meeting of 31 January 2012, which took place before the Order of 8 February 2012 was issued. In light of the foregoing, the Pre-Trial Judge considers that the Registry's Submission is redundant in that it essentially repeats the arguments that were already raised by VWU's representatives during the Meeting of 31 January 2012.²²

17. Third, the Pre-Trial Judge emphasises that, when a Chamber receives oral or written submissions from the Registry pursuant to Rule 48(C) of the Rules, it is not necessarily obliged either to respond to the Registry's submissions, or to endorse them.

18. Therefore, for the purposes of the present decision, the Pre-Trial Judge will only take the Registry's Submission into account in so far as it is incorporated by reference into the Prosecution's Request.²³

B. The Prosecution's Request for Reconsideration

19. As mentioned above, Rule 140 of the Rules provides that only the Parties can apply for reconsideration. Pursuant to Rule 2 of the Rules, the Prosecution is a Party to the proceedings. Therefore, the Pre-Trial Judge is satisfied that the Prosecution has standing to apply for reconsideration of the Order of 8 February 2012.

²² These arguments are, in sum, that the Additional Redactions are strictly necessary for the effective discharge of the VWU's mandate (Registry's Submission, paras 26-33), as well as to ensure the protection and safety of persons. More particularly, the Registry contends that the rejection of the Additional Redaction risks compromising the security of VWU's personnel, its operations (*Id.*, paras 44-45) and its present and future interlocutors (*Id.*, paras 50-51). See also confidential and *ex parte* minutes of the Meeting of 31 January 2012. The Pre-Trial Judge also notes that at one point the Registry's Submission itself acknowledges that it restates arguments already put forward during the meeting of 31 January 2012. In explaining how the rejection of the Additional Redactions would jeopardise the effectiveness of the VWU methodology, the Submission makes reference to the discussions held during the 31 January 2012 meeting ("as stated during the meeting of 31 January 2012"). Cf. *Id.*, para. 43.

²³ Prosecution's Request, para. 9. See also para. 9 above.

20. In the preliminary observations below (section 1), the Pre-Trial Judge will state the principles of interpretation applicable to Rule 140 of the Rules, and make some observations on his power to reconsider decisions. Subsequently, he will discuss the Prosecution's Request with regard to two issues: (i) the Prosecution's request for leave to seek reconsideration (section 2); and (ii) the merits of the Prosecution's request for reconsideration (section 3).

1. Preliminary Observations

21. Pursuant to Rule 3 of the Rules, the Pre-Trial Judge shall interpret Rule 140 of the Rules in a manner consistent with the spirit of the Statute of the Tribunal (the "Statute") and the principles of interpretation codified in the Vienna Convention on the Law of Treaties.²⁴ These principles require that a provision be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.²⁵ In determining the object and purpose of Rule 140 of the Rules, the Pre-Trial Judge considers that the jurisprudence of other international criminal tribunals, whose case law and rules of procedure and evidence have inspired the Rules, is also of assistance.

22. The Pre-Trial Judge notes that the object and purpose of Rule 140 of the Rules is to give Chambers a discretionary power to reconsider decisions in order to avoid an injustice. This is consistent with the requirement of fairness of the proceedings, which is one of the overarching principles of both the Statute and the Rules.²⁶

23. A Chamber's power to reconsider its decisions is, however, subject to strict limitations. Indeed, recourse to reconsideration should be limited in order to ensure the certainty and finality of the Tribunal's judicial decisions. The jurisprudence of other international courts and tribunals has clearly stated that "reconsideration is an exceptional measure that is available only in particular circumstances".²⁷ Furthermore, a request for

²⁴ Done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

²⁵ Vienna Convention on the Law of Treaties, Art. 31(2)-(3).

²⁶ Arts 16 and 21 of the Statute.

²⁷ International Criminal Tribunal for Rwanda ("ICTR"), *The Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92bis Decision of 22 September 2011, 25 November 2011, para. 13 ("*Ngirabatware* Decision of 25 November 2011"); ICTR, *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73bis(E)", 14 July 2004, para. 7. See also International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Prlić et al.*, Case No. IT-04-74-Ar73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the *Decision On Prlić Defence Motion for*

reconsideration is not a mechanism to be used systematically to redress imperfections in the Parties' motions or to challenge a decision of a chamber by circumventing the rules of procedure and evidence.²⁸

24. Therefore, the Pre-Trial Judge considers that reconsideration must not be used as an ordinary judicial remedy to which the Parties resort in order to seek redress for the unfavourable consequences of a judicial ruling, nor to circumvent the provisions of the Rules on appeals. Rather, it is an exceptional measure resorted to when necessary to avoid injustice.

2. Leave to Seek Reconsideration

a. The applicable legal standard

25. Rule 140 of the Rules provides that a Party seeking to have a Chamber's decision reconsidered shall first ask leave from the Presiding Judge to move for reconsideration. Failure to do so will result in the rejection of the application.²⁹ However, the Rule is silent on the criteria that the Presiding Judge shall take into account when deciding whether to grant the leave sought.

26. The Prosecution submits that the test for granting leave to seek reconsideration is the same as that required for reconsidering a decision on the merits, namely "whether reconsideration is necessary to avoid an injustice".³⁰

27. The Pre-Trial Judge finds that the object and purpose of requiring a Party to seek leave to request reconsideration from the Presiding Judge is to streamline the proceedings and limit the number of such requests. The Presiding Judge is tasked with screening the motions before a Chamber is seised of them. This procedure serves to prevent the filing of abusive or manifestly unfounded applications, or applications that do not comply with the procedural requirements set for in Rule 140 of the Rules, before the Chamber. Streamlining the proceedings in this manner serves the interests of judicial efficiency and economy – core

Reconsideration of the Decision on Admission of Documentary Evidence, Appeals Chamber, 3 November 2009, para. 6 ("Prlić Decision of 3 November 2009").

²⁸ ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, at 3.

²⁹ STL, *In the matter of El Sayed*, Case No. CH/PRES/2010/10, Order on Filing of 9 November 2010 by Mr. El Sayed, 11 November 2010, at 3.

³⁰ Prosecution's Request, para. 8.

principles which are laid down in the Statute and the Rules – so that the Chamber is not overburdened with requests for reconsideration which are unworthy of consideration.³¹

28. The foregoing interpretation is consistent with the jurisprudence of other international criminal tribunals. The Pre-Trial Judge considers that, although leave to seek reconsideration is not required at the other international criminal tribunals, their jurisprudence can nonetheless be of assistance in determining the applicable standard for granting such leave.

29. For instance, the case law of the ICTY has spelled out that requests for reconsideration must be duly reasoned. In particular, the requesting party must show *inter alia* how the grounds adduced in support of a request for reconsideration justify that the Chamber should reconsider its previous decision.³² It is insufficient for a party to argue merely that new facts or circumstances justifying reconsideration have arisen. Parties must also show how these new facts or circumstances warrant reconsideration of a decision.

30. In light of the above, the Pre-Trial Judge finds that, when deciding on requests for leave to seek reconsideration, the Presiding Judge³³ is not required to determine whether reconsideration is necessary to avoid an injustice, which is the test for granting reconsideration on the merits. Rather, the Presiding Judge should confine his review to an analysis of whether the request for reconsideration is manifestly unfounded. A request is not manifestly unfounded if (i) the application is duly reasoned, and (ii) the reasons adduced by the submitting Party show, *prima facie*, that failure to reconsider a decision may result in an injustice.

31. Consequently, the Pre-Trial Judge finds that leave to seek reconsideration may only be granted if the application is not manifestly unfounded, frivolous or aims at circumventing the Rules.

b. Application in the present case

32. The Pre-Trial Judge notes that, notwithstanding the fact that the Prosecution did not plead the correct test for granting leave to seek reconsideration, the Prosecution's Request, on

³¹ See, e.g., Art. 21(1) of the Statute.

³² *Prlić* Decision of 3 November 2009, paras 18 and 19, with further references (“an applicant must demonstrate how any new facts or arguments submitted in a request for reconsideration justify reconsideration. [...] It was well within the exercise of the Trial Chamber's discretion to refuse reconsideration in circumstances where in submitting new information the appellant patently failed to demonstrate that it was of such a nature that it constituted a new circumstance warranting the Trial Chamber's reconsideration”).

³³ Or the Pre-Trial Judge, pursuant to Rule 97 of the Rules.

the face of it, is not manifestly unfounded. Therefore, the Pre-Trial Judge finds that the Prosecution meets the legal standard for leave to seek reconsideration and grants it with respect to its request for reconsideration of the Order of 8 February 2012.

3. The merits of the Prosecution's request

a. The legal standard for reconsidering a decision on the merits

33. According to the practice of other international criminal tribunals, a Chamber has the inherent discretionary power to reconsider its previous decisions in exceptional cases if the requesting party satisfies the Chamber that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, or if particular circumstances exist justifying the reconsideration of such decision in order to prevent an injustice. New facts or a material change in circumstances that arise after the issuance of the impugned decision may constitute circumstances justifying reconsideration.³⁴

34. Before the Tribunal, the Pre-Trial Judge notes that the only factor articulated in Rule 140 of the Rules as relevant to a Chamber's decision on reconsideration is whether such reconsideration is warranted to avoid injustice.

35. In light of the foregoing, the Pre-Trial Judge concludes that, in order to meet the standard required for reconsideration on the merits, a Party must satisfy the Chamber that reconsideration is necessary to avoid injustice, as expressly required by Rule 140 of the Rules. In addition, the applicant must show the existence of particular grounds justifying reconsideration. In line with the practice of other tribunals, these grounds include errors of reasoning in the Chamber's decision, or new facts or a change in circumstance which have arisen after that decision.

b. Application in the present case

36. As regards the merits of the Prosecution's Request, the Pre-Trial Judge reiterates his previous observation that the arguments presented in the Registry's Submission and incorporated by reference into the Prosecution's Request had already been raised during the

³⁴ *Ngirabatware* Decision of 25 November 2011, para. 14; *Prlić* Decision of 3 November 2009, para. 18; Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Taylor*, Decision on Public with Annex A Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and Its Investigators, Case No. SCSL-03-1-T, 3 December 2010, at 3.

Meeting of 31 January 2012.³⁵ In that respect, no new facts have been discovered, nor has a material change in circumstances occurred, since the Order of 8 February 2012. Moreover, the Prosecution has not pleaded a clear error of reasoning in the Order of 8 February 2012.

37. Furthermore, the Pre-Trial Judge reiterates that the information which the Prosecution wishes to withdraw from public access via the Additional Redactions is so general and abstract that no conclusion can be drawn as to (i) the identity of any witness or other person related to the Tribunal; (ii) the identification of States which may cooperate with the Tribunal; (iii) the existence of requests for assistance directed by the Tribunal to one or more States; and (iv) the *modus operandi* of the VWU. Therefore, the Pre-Trial Judge finds that the rejection of the Additional Redaction does not compromise the discharge of the VWU's functions, nor does it jeopardise the security and safety of any person.

38. Consequently, the Prosecution has failed to show the existence of particular circumstances justifying reconsideration, as well as how the rejection of the Additional Redactions by the Pre-Trial Judge would cause injustice.

³⁵ Cf. *supra*, para. 16.

VI. Disposition

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 97 and 140 of the Rules,

GRANTS the Prosecution leave to seek reconsideration of the Order of 8 February 2012;

DENIES the Prosecution's Request for reconsideration; and

ORDERS the Prosecution to take the necessary measures to implement the Order of 8 February 2012 by 5 April 2012 at the latest.

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

Leidschendam, 29 March 2012



Daniel Fransen
Pre-Trial Judge

