



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: **Mr Daniel Fransen**

The Registrar: **Mr Herman von Hebel**

Date: **14 September 2012**

Original language: **French**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON THE CLASSIFICATION OF THE PROSECUTION REQUEST FOR
AMENDMENT OF 17 AUGUST 2012, ON THE PROSECUTION MOTION TO
RECLASSIFY THE JOINT DEFENCE RESPONSE OF 10 SEPTEMBER 2012 AND ON
THE JOINT DEFENCE RESPONSE OF 11 SEPTEMBER 2012**

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:
Mr Antoine Korkmaz

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse

Counsel for Mr Assad Hassan Sabra:
Mr David Young



I. The subject of the decision

1. By way of this decision, the Pre-Trial Judge rules on the urgent Prosecution motion of 10 September 2012 (the “Motion”)¹ to reclassify from “public” to “confidential” the joint Defence response to the Prosecution request for leave to amend the indictment of 17 August 2012 (the Request for Amendment”).² He also rules on the counter-claim of the Defence, submitted in the response of 11 September 2012 to the Prosecution Motion (the “Response”),³ to order the Prosecution to file publicly the Motion and the Request for Amendment, or at least a redacted version thereof. Furthermore, the Pre-Trial Judge examines the Prosecution request made in the Request for Amendment seeking authorisation for the Request and its Annexes to remain confidential.

II. Procedural background

2. On 17 August 2012, the Prosecution filed confidentially the Request for Amendment in which it seeks to maintain temporarily the confidentiality of that filing and sets out its reasons.⁴

3. On 7 September 2012, the Defence for the four accused in the *Ayyash et al.* case responded publicly to the Request for Amendment, setting out the reasons why that response should be public (the “Response to the Request for Amendment”).⁵

4. On 10 September 2012, the Prosecution sought confidentially that the classification of the Response to the Request for Amendment be changed from “public” to “confidential”.

5. On 11 September 2012, the Defence responded to the Prosecution Motion and issued a counter-claim aimed at ordering the Prosecution to file publicly the Motion and the Request for Amendment, or at least a redacted version thereof.

¹ Special Tribunal for Lebanon (the “STL”), *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Urgent Prosecution Motion to Reclassify the Joint Defence Response to Prosecution Request for Leave to Amend the Indictment, Confidential, 10 September 2012.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A)(ii), Confidential, 17 August 2012

³ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Response to Prosecution’s Motion for Confidentiality Order, Public, 11 September 2012.

⁴ Request for Amendment, paras 10-13.

⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Response to Prosecution Request for Leave to Amend the Indictment, Public, 7 September 2012.

III. The arguments of the Parties

A. The Motion

6. The Prosecution sought confidentially that the classification of the Defence's Response to the Request for Amendment be changed from "public" to "confidential" on the ground that, at the time of its filing, it had requested that the Request for Amendment remain confidential until such time as the Pre-Trial Judge had ruled on the merits thereof.⁶ The Prosecution objected to the fact that the Defence had unilaterally made public the existence of the confidential Request for Amendment before the Pre-Trial Judge had ruled on that matter, even though the written submissions from the Defence did not contain confidential names or specific details.⁷

7. The Prosecution recalls that, even if the principle of the proceedings being public is the norm, some exceptions are warranted. It notes that Article 7 (6) of the Practice Direction on the Filing of Documents before the Special Tribunal for Lebanon (the "Practice Direction") authorises the Pre-Trial Judge to order a change in the classification of a document.⁸

B. The Response

8. The Defence recalls that, pursuant to Article 16 (2) of the Statute, the accused have a fundamental right that their case be heard publicly.⁹ It refers to the case law of the Appeals Chamber of the International Criminal Tribunal for Rwanda (the "ICTR"), according to which one party cannot unilaterally decide to file its written submissions as confidential without good cause.¹⁰ It concludes that the Prosecution failed to identify in the Response to the Request for Amendment any information which would justify that it could not be filed publicly.¹¹

9. Consequently, the Defence requests that the Pre-Trial Judge dismiss the Motion and order the Prosecution to file a public version of the Motion and the Request for Amendment given that they do not reveal confidential information. The Defence also states that, if need be, the Prosecution could seek to file a public redacted version of the Request for Amendment.¹²

⁶ Motion, para. 1.

⁷ Id., para. 2.

⁸ Id., para. 3.

⁹ Response, para. 6.

¹⁰ Id., para. 8 citing the ICTR case, *The Prosecutor v Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 4.

¹¹ Id., para. 9.

¹² Id., para. 11.

IV. Statement of reasons

1. Applicable law

10. In accordance with Article 6 of the Practice Direction, Participants to the proceedings are responsible for classifying the documents they file to the Registry into one of the following categories: “Public”, “Confidential”, “Confidential and *Ex Parte*” or “Under Seal and *Ex Parte*”. Paragraph 2 of that Article sets forth that when a Participant files a document as “Confidential”, “he/she shall indicate [...] the factual and legal basis for the chosen classification.” Furthermore, Article 7 (3) of the Practice Direction sets forth that “a public redacted version shall be filed by the Participant who submitted the confidential version as soon as possible”, unless an exception is authorised by the judge.

11. The principle that the proceedings shall be public and transparent is enshrined in Articles 16 (2) and 20 (4) of the Statute. Exceptions are only permitted in specific and limited circumstances since, as the Appeals Chamber pointed out, “confidential submissions and decisions – although sometimes necessary – by their very nature conflict with this policy of openness”.¹³ The Appeals Chamber also recalled that, in accordance with the case law of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the “ICTY”), the power to lift confidentiality of filings or decisions belongs to the judges. It further stated that the Appeals Chamber of the ICTY considered “that a Judge or Chamber is permitted to make reference to the existence of confidential decisions and to specific parts of such decisions that do not require confidentiality *per se*, unless their very existence needs to be kept confidential.”¹⁴

¹³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL 11-01/PT/AC, Corrected version of Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68 (G), 29 March 2012, para. 12 (“Appeals Chamber Decision of 29 March 2012”).

¹⁴ Appeals Chamber Decision of 29 March 2012, para. 13 citing ICTY, *The Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, footnote number 65 and ICTY, *The Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, paras 52, 67.

2. The Request

12. In the case at hand, the Pre-Trial Judge notes that the Prosecution requested that the Request for Amendment remain confidential until such time as the decision ruling on the merits thereof was issued. Although it did not expressly request not to file a public redacted version of the Request for Amendment, the Prosecution stated that the dissemination thereof could create “unnecessary public expectations”¹⁵ and compromise the ongoing investigations. Furthermore, it stated that the Request for Amendment contained information which should remain confidential in order to ensure the protection and safety of the persons concerned.¹⁶

13. The Pre-Trial Judge notes that by giving the Response to the Request for Amendment a public character, the Defence, without having been authorised to do so, made public the existence of the Request for Amendment, which was classified as confidential by the Prosecution. The Defence could not do this and, consequently, has exceeded its rights.

14. If it wished to challenge the confidentiality of the Request for Amendment, the Defence should have submitted, confidentially, its observations to the Pre-Trial Judge who, seized of that matter, is the only one to have jurisdiction to rule on the confidential character of that request and any associated written submissions that have been filed.

3. The counter-claim of the Defence

15. The Pre-Trial Judge examines the Defence’s request to lift the confidentiality of the Request for Amendment and the Motion by considering their contents and the arguments of the Parties. In so doing, the Pre-Trial Judge also rules on the Prosecution’s request for the Request for Amendment and its Annexes to remain confidential temporarily.

16. In this respect, insofar as the Request for Amendment clearly states that the proposed amendments do not contain either new charges or counts but clarify the existing charges, the fact of filing a public version, redacted if need be, would not cause prejudice to the ongoing investigation or create “unnecessary public expectations”. Therefore, in accordance with the aforementioned principle of the proceedings being public,¹⁷ it is appropriate that a public version of the Request for Amendment, with redactions where required, be filed.

¹⁵ Request for Amendment, para. 11 “unnecessary public expectations”.

¹⁶ Ibid.

¹⁷ Cf para. 11 of this decision.

17. However, temporarily maintaining the confidentiality of the Annexes to the Request for Amendment is justified insofar as they contain, *inter alia*, supporting materials and the Pre-Trial Judge has still not ruled in respect of this.

18. As a consequence, the Pre-Trial Judge orders the Prosecution to file a public version of the Request for Amendment as soon as possible, with redactions where required to the information it considers confidential, with the exception of the Annexes, which shall remain confidential.

19. With regard to the Response to the Request for Amendment, following on from the foregoing and for the same reasons, given that it does not contain confidential information, there is no justification for it to be filed confidentially. The same applies to the Prosecution's Motion as well as to the Response. Consequently, the Pre-Trial Judge authorises the Defence to file publicly the Response to the Request for Amendment, as well as the Response, and changes the classification of the Motion from "confidential" to "public".

V. The disposition

FOR THESE REASONS,

Pursuant to Rule 77 (A) of the Rules and Article 7 (6) of the Practice Direction,

THE PRE-TRIAL JUDGE,

DECLARES the Prosecution's Motion partially founded insofar as the Defence were not authorised to classify as "public" the Response to the Request for Amendment without having previously sought and obtained the authorisation of the Pre-Trial Judge;

DECLARES the Prosecution's Motion unfounded in all other respects;

DECLARES the Defence's counter-claim partially founded;

ORDERS the Prosecution to file, as soon as possible, a public version, with redactions where required, of the Request for Amendment, with the exception of the Annexes;

AUTHORISES the Defence to classify as “public” the Response to the Request for Amendment and the Response;

CHANGES the classification of the Motion from “confidential” to “public”;

DECLARES the Request for Amendment founded in that it seeks temporarily to maintain the confidentiality of its Annexes;

AUTHORISES that the Annexes to the Request for Amendment remain confidential until further notice; and

RESERVES the right to rule on the Request for Amendment in all other respects.

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

Leidschendam, 14 September 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

