



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: **25 October 2012**
Original language: **English**
Classification: **Public**

THE PROSECUTOR

v.

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

**ORDER ON A WORKING PLAN AND ON THE JOINT DEFENCE MOTION
REGARDING TRIAL PREPARATION**

Office of the Prosecutor:
Mr. Norman Farrell

Legal Representative of Victims
Mr. Peter Haynes

Counsel for Mr Salim Jamil Ayyash:
Mr. Eugene O'Sullivan

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. Introduction

1. In this order, the Pre-Trial Judge establishes the working plan indicating, in general terms, the obligations that the Parties are required to meet pursuant to Rule 91 of the Rules of Procedure and Evidence (the “Rules”), and the dates by which these obligations must be fulfilled. The Pre-Trial Judge also rules on the Joint Defence Motion for urgent orders regarding trial preparation.¹

II. Background

2. On 28 June 2011, the Pre-Trial Judge issued his Decision Relating to the Examination of the Indictment of 10 June 2011 (the “Indictment”).²

3. On 19 July 2012, the Pre-Trial Judge set the tentative date for the start of trial proceedings for 25 March 2013, in light of *inter alia* his consultation with the Parties during the Status Conference of 12 June 2012.³ The Pre-Trial Judge reasoned that setting a tentative date for the start of trial proceedings as soon as possible was in the interests of justice, as it would allow all the actors to anticipate future deadlines and to better prepare for trial.⁴

4. Having consulted the Parties,⁵ on 28 August 2012, the Pre-Trial Judge issued an order setting 15 November 2012 as the appropriate deadline for the Prosecution to file its pre-trial brief and associated documents required by Rule 91(G).⁶

5. The Pre-Trial Judge notes that, having consulted the Parties and the Legal Representative of Victims (the “LRV”) during the Rule 91 meeting of 5 September 2012,⁷ it was common cause between the Parties and the LRV that the latter be allowed to file his list of witnesses and exhibits once he had received and had time to review the Prosecution’s pre-

¹ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT, Joint Defence Motion for Urgent Orders Regarding Trial Preparation, 27 September 2012 (the “Defence Motion”).

² STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi & Mr. Assad Hassan Sabra, 28 June 2011.

³ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Setting a Tentative Date for the Start of Trial Proceedings, 19 July 2012, Disposition (“Order Setting Trial Date”).

⁴ *Id.*, para. 19.

⁵ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01, Status Conference before the Pre-Trial Judge, 26 July 2012, Official Public Redacted Transcript, p. 10, ll. 9 *et seq.*

⁶ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Setting a Date for Filing the Prosecution’s Pre-Trial Brief, 28 August 2012 (the “Order of 28 August 2012”), para. 10 and p. 3.

⁷ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01, Confidential Rule 91(D) and (E) Meeting, 5 September 2012 (the “Rule 91(D) and (E) Meeting”), Official Confidential Transcript, pp.43-44.

trial brief.⁸ The Defence teams submitted that they should have the benefit of both the Prosecution's brief and the Victims' lists for the preparation of their own pre-trial briefs.⁹

6. In response to the Pre-Trial Judge's invitation to the Defence to share their views during the same meeting, Counsel for Mr. Badreddine and Mr. Sabra averred that it was premature, at this stage of proceedings, to set the date for the filing of the Defence pre-trial briefs.¹⁰

7. On 27 September 2012, the Defence filed a joint motion requesting the Pre-Trial Judge to issue a series of orders setting a timeline for pre-trial preparations.¹¹

8. During the Status Conference convened on 28 September 2012, Defence for Mr. Sabra requested that the Pre-Trial Judge rule on the suggested timeline expeditiously in light of the urgent and pressing nature of the matters concerned.¹² During the same Status Conference, the Pre-Trial Judge invited the Prosecution and the LRV to file their observations on the Defence Motion by 3 October 2012.¹³

9. On 3 October 2012, the LRV¹⁴ and the Prosecution¹⁵ filed their responses to the Defence Motion. In its response, the Prosecution requested a further delay within which to make a supplementary submission, which the Pre-Trial Judge granted on an exceptional basis.¹⁶ The Prosecution filed its supplemental response on 10 October 2012 providing additional submissions and a more detailed, projected timeframe for fulfilling the Prosecution's disclosure obligations.¹⁷

⁸ Rule 91(D) and (E) Meeting, Official Confidential Transcript, p. 43, ll. 11-18.

⁹ Rule 91(D) and (E) Meeting, Official Confidential Transcript, p. 44, ll. 8-10.

¹⁰ Rule 91(D) and (E) Meeting, Official Confidential Transcript, pp. 44-45.

¹¹ Defence Motion, para. 3.

¹² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Status Conference before the Pre-Trial Judge, 28 September 2012, Official Public Redacted Transcript, p. 30, ll. 7-13.

¹³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Status Conference before the Pre-Trial Judge, 28 September 2012, Official Public Redacted Transcript, p. 32, ll. 12-16; ll. 24-25.

¹⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Response of the Legal Representative of Victims to the Joint Defence Motion for Urgent Orders Regarding Trial Preparation, 3 October 2012 (the "LRV Response").

¹⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to the "Joint Defence Motion for Urgent Orders Regarding Trial Preparation", 3 October 2012 (the "Prosecution Response").

¹⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Scheduling Directive from the Pre-Trial Judge, 5 October 2012.

¹⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Supplemental Response to the Joint Defence Motion for Urgent Orders Regarding Trial Preparation, 10 October 2012 (the "Prosecution Supplemental Response"), para. 1.

10. On 10 October 2012, the Registrar filed his submission in response to a specific aspect of the Defence Motion.¹⁸

11. As of 25 October 2012, Defence for Mr. Sabra has filed four motions requesting orders for specific disclosure.¹⁹

III. Defence Motion

12. The Defence Motion requests a series of orders setting a timeline for pre-trial preparations, to allow those participating in these proceedings to anticipate future deadlines and better to prepare for trial.²⁰ The obligations generated by this timeline require the completion of “several vital pre-trial steps” with which the Defence Motion is concerned, and more importantly, their completion “well in advance of the tentative date of trial”.²¹ The Defence submits that this will effectively permit the Defence to prepare for the Prosecution’s case,²² and ensure that the rights of the accused, “guaranteed *inter alia* by Article 16 of the Statute”, are respected.²³

IV. Preliminary Observations

13. A preliminary point must be made. The working plan established by the Pre-Trial Judge, as well as the Defence Motion, combine two issues of fundamental importance.

14. First, Article 21(1) of the Statute requires Chambers to take strict measures to prevent any action that may cause unreasonable delay. The Pre-Trial Judge in particular is charged with ensuring that the proceedings are not unduly delayed, and he is required to take any measures necessary to prepare the case for a fair and expeditious trial.²⁴ Second,

¹⁸ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Registrar’s Submission in relation to the Joint Defence Motion for Urgent Orders Regarding Trial Preparation (with confidential and *ex parte* annexes A and B), 11 October 2012 (the “Registrar’s Submission”).

¹⁹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra’s First Motion for an Order for Disclosure — *Phone Numbers Allegedly in Contact with the Number to Attributed Mr Sabra*, 10 October 2012; Sabra’s Second Motion for an Order for Disclosure — *Theoretical Cell Coverage*, 11 October 2012; Sabra’s Third Motion for an Order for Disclosure — *Information Relating to the Telecard, Attributed SIM and Statements of Staff of News Agencies*, 18 October 2012; and Sabra’s Fourth Motion for an Order for Disclosure — *Information Pertaining to Abu Adass*, 19 October 2012.

²⁰ Defence Motion, paras 2, 3.

²¹ *Id.*, para. 4.

²² *Id.*, para. 4.

²³ *Id.*, para. 4.

²⁴ Rule 89(B) STL RPE.

Article 16(4)(b) of the Statute recognises the entitlement of the accused to have adequate time and facilities for the preparation of his or her defence.

15. The combination of these two issues is not new. As the Trial Chamber of the Special Court for Sierra Leone held in the case of *Prosecutor v. Taylor*:

International courts and tribunals routinely emphasise the importance of “adequate time and facilities” for the preparation of a defence.²⁵ [...] The duty of the Trial Chamber is to balance the right of the Accused to have adequate time for preparation of his case and his right to be tried without undue delay.²⁶

16. In issuing this order, the Pre-Trial Judge has weighed these two issues, namely: the right of the Defence to have adequate time and facilities to prepare their own pre-trial briefs ahead of the start of trial on 25 March 2013, and the requirement that proceedings are not unnecessarily delayed.

17. Consequently, the Pre-Trial Judge will, in the next Section, establish the working plan pursuant to Rule 91(A). The working plan, by its nature, addresses several of the requests made in the Defence Motion.

18. Those aspects of the Defence Motion that are not addressed in the working plan, or require further clarification, are treated in Section VI that follows below.

V. Establishment of Working Plan

19. Having heard from the Parties and the LRV on matters to be included in the working plan,²⁷ and taking into consideration the progress made by the Parties toward bringing this case to trial on 25 March 2013, the Pre-Trial Judge considers that establishing a working plan at this stage, one that clearly details the obligations of the Parties, will assist this case to proceed expeditiously to trial.

20. In particular, the Pre-Trial Judge notes that Rule 91(I) requires him to order the Defence teams to file their pre-trial briefs “[a]fter the submission by the Prosecutor of” its own pre-trial brief. Consistent with his duty to prepare the case for a fair and expeditious

²⁵ SCSL, *Prosecutor v. Taylor*, Case No.SCSL-03-1-PT, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence, 23 January 2007, para. 13 (footnote omitted).

²⁶ *Id.*, para. 21 (footnotes omitted).

²⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Status Conference before the Pre-Trial Judge, 26 July 2012, Official Public Redacted Transcript; Rule 91(D) and (E) Meeting; Defence Motion, Prosecution Response, Prosecution Supplemental Response, Registrar’s Submission; LRV Response.

trial, the Pre-Trial Judge considers that setting 9 January 2013 as the date for the filing of the Defence teams' pre-trial briefs, at this stage, will afford the Parties and the LRV the requisite degree of clarity. This determination is made having due regard to other requirements of the Rules and the interests of efficient proceedings.

21. Accordingly, the Pre-Trial Judge orders the establishment of the working plan as follows:

- (1) By **2 November 2012**, the LRV shall either disclose the names of all victims participating in the proceedings, or file motions seeking protective measures in relation thereto.
- (2) By **15 November 2012**, the Prosecution shall file its pre-trial brief, which shall include its list of witnesses and exhibits, as well as the statements of all listed witnesses, all listed exhibits and all expert reports it intends to rely on at trial.
- (3) From **15 November 2012**, the Prosecution shall allow the Defence to inspect the expert reports it does not intend to rely on at trial.
- (4) By **23 November 2012**, the Prosecution shall file a first periodic disclosure report, and subsequent periodic disclosure reports shall be filed thereafter two working days before the following Status Conference or meeting convened pursuant to Rule 91.²⁸
- (5) By **30 November 2012**, the Prosecution shall complete the disclosure of all remaining Rule 110(A)(ii) and Rule 113²⁹ materials, and on that date shall file a notice that it has complied with this order.
- (6) By **17 December 2012**, the LRV shall file the list of witnesses and exhibits he would like to use at trial.
- (7) By **9 January 2013**, the Defence shall file their pre-trial briefs.

²⁸ The periodic disclosure reports must detail the status of the Defence's requests for disclosure, including the date on which specific disclosure is made or intended, consistent with this order. The obligation to file the disclosure update shall not be affected by official judicial recess dates.

²⁹ Such order is without prejudice to the ongoing obligation incumbent on the Prosecution throughout the proceedings to review material in its possession or under its control, and to identify and disclose exculpatory materials immediately.

22. Where the Parties or the LRV consider that they have sufficient grounds to establish that they cannot comply with the dates set out in the working plan above, they remain entitled to seise the Pre-Trial Judge with a request for an alternative date, but shall be required to show good cause explaining the alleged inability to do so.

VI. Requests that require further clarification or are not addressed by the working plan

a. Disclosure

23. Several of the requests in the Defence Motion relate to disclosure.³⁰ In dealing with these requests, the Pre-Trial Judge formulates a general approach to disclosure, and how it must be effected.

i. Disclosure pursuant to Rule 110(B)

24. The Pre-Trial Judge orders that, when the Defence makes specific disclosure requests to the Prosecution pursuant to Rule 110(B), the following regime shall apply henceforth. The Prosecution shall within five working days of the request, either:

- a. respond in writing, disclosing the material being sought;
- b. respond in writing, explaining the Prosecution's reasons as to why the material being sought falls outside the Prosecution's disclosure obligations; or
- c. respond in writing, specifying a date within a further ten working days of that date, on which the request for disclosure will be met.
- d. only where exceptional circumstances justify it, may the Parties seise the Pre-Trial Judge with a request to vary the foregoing time limits, in respect of a specific request for disclosure from the Defence.

25. The Defence is reminded that the Prosecution has disclosed a large amount of materials,³¹ and it is the Defence's duty to exercise due diligence by reviewing those materials before submitting further requests, in order to avoid asking the Prosecution for materials that have already been disclosed. The Pre-Trial Judge continues to encourage

³⁰ The Pre-Trial Judge notes the four motions filed by Counsel for Mr. Sabra requesting orders for specific disclosure (see para. 11 above). These motions will be addressed in a separate order by the Pre-Trial Judge.

³¹ Prosecution Response, para. 5.

cooperation between the Parties, and recalls that the Parties and the LRV must carry out their own duties diligently and in a spirit of good faith.³²

26. With respect to the four motions requesting orders for specific disclosure with which the Pre-Trial Judge is seised, these shall be decided in due course.³³

ii. Disclosure pursuant to Rule 113

27. The timely disclosure of exculpatory material pursuant to Rule 113 is fundamental to the fairness of proceedings before the Tribunal,³⁴ and the importance of rigorously enforcing the rules on disclosure has been characterised as being “as important as the obligation to prosecute.”³⁵ The Rule itself is clear: the Prosecution is obliged to disclose exculpatory material to the Defence “as soon as practicable”, and the obligation remains ongoing throughout the proceedings.³⁶ The Prosecution must actively work to identify Rule 113 material in its evidentiary holding, including by reviewing new materials as they are received.³⁷ When it is identified, the Prosecution must immediately provide Rule 113 material to the Defence.³⁸

28. In the establishment of the working plan in Section V above, the Pre-Trial Judge has determined that the Prosecution will certify its completion of Rule 113 disclosure by 30 November 2012 so that the Defence is in possession of all exculpatory material by this date.

29. It is therefore appropriate to clarify for the Prosecution its obligations to disclose further exculpatory material identified beyond that date, since the failure to disclose

³² ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Decision on Accused’s motion for an order to obtain witness statements and testimony from national courts, 12 January 2011, paras 10-11.

³³ See note 19 *supra*.

³⁴ ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 180; ICTY, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 188.

³⁵ ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95/14/2-A, Judgment, 17 December 2004, para. 242.

³⁶ ICTY, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 8; ICTR, *Prosecutor v. Augustin Ndingiryimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations pursuant to Rule 68, 22 September 2008, para. 33: “The Chamber reiterates that the Prosecution’s disclosure obligation under Rule 68 is a continuous one which subsists throughout the proceedings and even during the appeal stage.”

³⁷ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Decision on Accused’s forty-ninth and fiftieth disclosure violation motions, 30 June 2011, para. 34.

³⁸ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Decision on Accused’s third, fourth, fifth and sixth motions for finding of disclosure violations and for remedial measures, 20 July 2010, para. 25.

exculpatory material in a timely manner could result in unnecessary — and unacceptable — delays to the proceedings.³⁹

30. For all disclosure of exculpatory materials after 30 November 2012 pursuant to Rule 113, the Prosecution shall be required to file with the Pre-Trial Judge a disclosure notice which shall:

- a. detail the circumstances in which the additional Rule 113 material was obtained and identified as exculpatory;
- b. show good cause for why the additional Rule 113 material was not disclosed by this date; and
- c. explain the steps taken, if any, to avert the recurrence of similar delays in the future.⁴⁰

iii. Disclosure pursuant to Rule 118(B)

31. The Defence requests an order instructing the Prosecution, where applicable, to obtain the necessary consent from information-providers to disclose information subject to

³⁹ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Decision on Accused's motion for new trial for disclosure violations, 3 September 2012, para. 14; ICTY, *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgment, 30 June 2006, para. 77: "the Prosecution's approach to its disclosure obligations under [the Rule governing disclosure of exculpatory materials] to be less than diligent. This failure caused repeated and unnecessary delays in the conduct of the trial, and at times exasperated not only the Defence, but the Trial Chamber as well."

⁴⁰ Elements which may help to determine whether exculpatory material has been disclosed "as soon as practicable" include the length of time in which the material has been in the Prosecution's possession (ICTR, *Prosecutor v. Augustin Ndingiryimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations pursuant to Rule 68, 22 September 2008, para. 33: "The Chamber notes that the statement was recorded by Prosecution investigators on 9 June 1999, but only disclosed it to the Defence in 2008. This represents an inordinately long period for the Prosecution to have kept from the Defence a statement that may directly contradict evidence given by a Prosecution witness." And at para. 47: "This recent disclosure, over three years after the trial has started, clearly violates the requirement that the Prosecution must disclose exculpatory material 'as soon as practicable.'") The Prosecution cannot cite as good cause its heavy workload, technical or internal impediments (ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Decision on Accused's motion to Set Deadlines for Disclosure, 1 October 2009, para. 14: "[T]he Chamber is not sympathetic to the Prosecution's late disclosure of items which 'were being processed by other units of the [Office of the Prosecutor] and which the team was not aware of or was not able to disclose for technical reasons'." See also ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on 'Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to Rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved, 30 October 2002, para. 29.)

Rule 118(B),⁴¹ and either to disclose it or, in cases where such consent is not obtained, to notify the Pre-Trial Judge pursuant to Rule 118(C), all by 1 November 2012.⁴²

32. In response, the Prosecution submits that Rule 118 establishes the Prosecution's obligations in this respect.⁴³ The Prosecution avers further that the Defence has failed to provide legal bases for requiring the disclosure of confidential information, for imposing a deadline on the Prosecution in respect of Rule 118(C),⁴⁴ and for ordering any potential information provider to meet an "arbitrary deadline".⁴⁵

33. Rule 118 governs — in detail — the treatment of information never subject to disclosure without consent of the provider. The Pre-Trial Judge no specific material subject to Rule 118 has been brought to his attention. As a general rule, materials that do not fall within the ambit of Rule 118 are governed by Rules 110 and 113, and are therefore subject to the general findings regarding those Rules in this order.

b. Cessation of investigations

34. The Defence requests an order instructing the Prosecution that no further investigations may be conducted without leave, and no additional reports, 'investigators notes', or analysis may be sought or received after the completion of all disclosure on 20 October 2012.⁴⁶ This is unless exceptional circumstances are shown, and the Prosecution is expressly authorised by the Pre-Trial Judge to conduct limited additional investigative measures for incriminating material.⁴⁷

35. The Prosecution responds that this "extraordinary request [...] is unwarranted and unfounded" and, if granted, "would constitute interference with [the Prosecution's] statutory obligations and rights of the Prosecutor."⁴⁸ The Prosecution also submits that the Pre-Trial Judge is not competent to make such an order.⁴⁹

⁴¹ Rule 118(B) concerns exculpatory information which is also never subject to disclosure without the consent of the provider of that information.

⁴² Defence Motion, paras 7(vi), 11(vi).

⁴³ Prosecution Response, para. 22.

⁴⁴ Prosecution Response, para. 22.

⁴⁵ Prosecution Response, para. 23.

⁴⁶ Defence Motion, paras 7(iii), 11(iii).

⁴⁷ Defence Motion, paras 7(ii), 11(ii).

⁴⁸ Prosecution Response, paras 16-18.

⁴⁹ Prosecution Response, para. 18.

36. The Pre-Trial Judge recalls that, pursuant to Article 11 of the Statute, the Prosecutor shall act independently, and is solely responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Tribunal, as established by Article 1 of the Statute. It is generally not for the Pre-Trial Judge to interfere with the Prosecutor's independence and discretion.

37. Nevertheless, the Pre-Trial Judge is charged with ensuring that the accused's rights to be tried without undue delay, and to have adequate time and facilities for the preparation of their defence, are respected. The Pre-Trial Judge is furthermore required to take any measures necessary to prepare the case for a fair and expeditious trial. To the extent that the conduct of the Prosecution is consistent with these requirements, there is no reason for the Pre-Trial Judge to intervene in the duration of the Prosecution's investigations. Where these requirements risk not being respected, however, the Pre-Trial Judge or Chamber is empowered to determine the admissibility of any materials subsequently revealed by ongoing investigations. In any event, the Prosecution remains obliged to disclose to the Defence information revealed by ongoing investigations in a manner consistent with its obligations and this order.

c. Expert reports

38. The Defence requests an order instructing the Prosecution to identify any potential expert from whom the Prosecution has sought information and whose report has not yet been provided to the Prosecution and/or disclosed to the Defence, and any expert report which has been provided to the Prosecution but is still under review by the Prosecution pending its determination of whether to tender that report at trial, by 10 October 2012.⁵⁰

39. With respect to expert reports generally, the Pre-Trial Judge considers that they are materials subject to disclosure according to Rules 110 and 113. As such, expert reports of this nature are likewise subject to the general principles elaborated in the working plan regarding those Rules and established by in this order.

⁵⁰ Defence Motion, para. 7(viii), 11(viii).

d. Defence experts

40. The Defence requests an order to the Registry to appoint all experts identified and selected by the Defence as of the date of the Defence Motion by 10 October 2012.⁵¹

41. The Prosecution “takes no position” with respect to this Defence request.⁵²

42. The Registrar filed a submission in relation to this specific aspect of the Defence’s request, and confirmed that the Registry “has completed the processing of all contractual and administrative documents for the retention of *all* individual experts and corporate experts requested by the Defence teams.”⁵³

43. In light of the foregoing, the Defence’s request is moot and need not be addressed any further in this decision.

e. Disclosure by the LRV of the names of all participating victims

44. The Defence requests an order to the LRV to disclose the names of all victims participating in the proceedings (the “VPPs”) by 15 October 2012.⁵⁴

45. Regarding this request, the Prosecution refers to its submissions during the Status Conference of 28 September 2012 and defers to the LRV.⁵⁵

46. The LRV responds that “such an order is unnecessary, unjustified and impractical.”⁵⁶ Since designation, the LRV submits, he and his co-representatives have been fully engaged in notifying the VPPs of their status, and assessing the degree of risk they face, expeditiously and in good faith.⁵⁷ Furthermore, the risk assessment process involves referral to the Victims and Witnesses Unit (the “VWU”), which assessments may result in applications for protective measures before the Pre-Trial Judge, and the timing for the disclosure of VPPs’ identities is therefore beyond the control of the LRV.⁵⁸ In any event, the process will not be

⁵¹ *Id.*, paras 7(vii), 11(vii).

⁵² Prosecution Response, para. 24.

⁵³ Registrar’s Submission, para. 7.

⁵⁴ Defence Motion, paras 7(ix), 11(ix).

⁵⁵ Prosecution Response, para. 27. The Pre-Trial Judge also notes the following filing with which he is currently seized: STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission for an Order on Re-Classification of Victims Identities and Applications for Victim Participation Status, as Confidential, 16 October 2012.

⁵⁶ LRV Response, para. 2.

⁵⁷ *Id.*, paras 3, 4.

⁵⁸ *Id.*, para. 5.

completed by 15 October 2012 and imposing such a deadline would, consequently, be futile.⁵⁹ The LRV has undertaken to continue to use his best endeavours to “address the issue of disclosure of all victims’ identities as expeditiously as possible.”⁶⁰

47. On 3 October 2012, pursuant to a decision by the Pre-Trial Judge,⁶¹ the LRV filed his notice of disclosure to the Parties of the identities of several VPPs.⁶² In that decision, the Pre-Trial Judge authorised the LRV to reclassify as public, on an ongoing basis, the identities of other VPPs who meet the conditions stated without the need for further authorisation from the Pre-Trial Judge.⁶³ Subsequently, the LRV filed a second notice of disclosure to the Parties of the identities of several VPPs.⁶⁴

48. The Pre-Trial Judge has previously noted the importance of protecting the interests of the VPPs, as well as those who have applied for that status, pending an assessment of the risks to which they may be subject.⁶⁵ Since the process of assessing those risks is already under way, evidenced by the LRV’s notices of disclosure and his assurances that it is being done as expeditiously as possible, the Pre-Trial Judge considers that the LRV should be in a position either to disclose the names of all victims participating in the proceedings, or to file motions seeking protective measures in relation thereto, by 2 November 2012,

f. French Translations

49. The Defence requests an order to the Registry to provide French translations of all documents that the Prosecution intends to use at trial, as well as all Rule 110(A)(ii) material, by 10 January 2013.⁶⁶

⁵⁹ *Id.*, para. 6.

⁶⁰ *Id.*, para. 8.

⁶¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Victims’ Legal Representative’s Request for Reclassification as Public of Identities of Seven Victims Participating in Proceedings, 21 September 2012 (the “Decision of 21 September 2012”).

⁶² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims of Disclosure of the Identity of Thirteen Victims Participating in the Proceedings, 3 October 2012.

⁶³ Decision of 21 September 2012, para. 9; Disposition.

⁶⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Second Notice of the Legal Representative of Victims of Disclosure of the Identity of Nine Victims Participating in the Proceedings, 15 October 2012.

⁶⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11/01/PT, Decision on Victims’ Participation in the Proceedings, 8 May 2012; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11/01/PT, Decision on Defence Motion of 17 February 2012 for an Order to the Victims’ Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, 5 April 2012.

⁶⁶ Defence Motion, paras 7(x), 11(x).

50. The Pre-Trial Judge has already determined that — save for materials governed by Rule 91(G)(iii) — Rule 91(G) materials must be available in the three official languages of the Tribunal.⁶⁷

51. With respect to the requested French translations of Rule 110(A)(ii) material, this comprises materials subject to disclosure by the Prosecution.⁶⁸ In the Decision on Languages, the Pre-Trial Judge determined that “the Prosecutor must disclose all the material supporting the Indictment and other material subject to disclosure: in the original language; and in English and Arabic in any event.”⁶⁹ Regarding the disclosure of materials in French in particular, the Pre-Trial Judge decided the following:

In order to anticipate the eventuality that Defence Counsel for one or more accused is Francophone (and not Anglophone), the following measures should be taken as a minimum. Materials of fundamental importance shall either be submitted for translation into French in their entirety, or summaries thereof shall be prepared and submitted for translation into French. It is for the Pre-Trial Judge or Trial Chamber, *proprio motu* or at the request of a Party or Victims’ Representative, to identify such materials of fundamental importance and order either their translation, or the translation of their summaries.⁷⁰

52. As a general matter, the Decision on Languages recognised the entitlement of the Parties and the LRV “at any time to move the Pre-Trial Judge or relevant Chamber, either to order the translation of specific documents by the Registry, or to order the preparation of summaries of specific documents by the relevant Party for translation. Such order shall only be granted when the moving Party shows good cause.”⁷¹

53. However, in light of the foregoing, the Pre-Trial Judge considers that part of the Defence’s request is already met by the Decision on Languages, and the Prosecution’s adherence thereto. For the remainder, the Pre-Trial Judge refers to the various elements elaborated in that decision with respect to language competencies required of counsel, and finds that the Defence has failed to show good cause, as required, for requiring the French translations by the date requested.

⁶⁷ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PTJ, Decision on Languages in the Case of *Ayyash et al.*, 16 September 2011 (the “Decision on Languages”), para. 48.

⁶⁸ Rule 110(A)(ii) relates to “(a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial; (b) all statements, depositions, or transcripts taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158; and (c) copies of the statements of additional prosecution witnesses”.

⁶⁹ Decision on Languages, para. 56.

⁷⁰ *Id.*, para. 57.

⁷¹ *Id.*, para. 80.

g. The Prosecution's pre-trial brief

54. The Defence requests an order instructing the Prosecution to include in its pre-trial brief — to be filed on 15 November 2012 — a clear and detailed description of the material relied upon with respect to each allegation material to its case.⁷²

55. The Prosecution responds that Rule 91(G)(i) “clearly states what is required in the pre-trial brief”. The Prosecution submits further that it will fulfil its obligations pursuant to the Rules and the Order of 28 August 2012, and that the additional obligations that the Defence seeks to have imposed on the Prosecution “distract from other required duties, and do not have a legal basis.”⁷³

56. Rule 91(G)(i) requires the Prosecution to include within its pre-trial brief “for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused.” The Defence’s request seeks significantly to extend this requirement. While there is some precedent for clarifying or supplementing the requirements for the pre-trial brief,⁷⁴ the Pre-Trial Judge is not persuaded, at this stage of proceedings, that the constructive interpretation of the Rules suggested by the Defence is appropriate.

57. Nevertheless, in order to facilitate a resolution that is amenable to both Parties, the Pre-Trial Judge invites the Parties to raise this matter with him *inter partes* at the next meeting convened under Rule 91.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 89(B) and 91 (A), (G), (H) and (I);

ORDERS the Parties and the LRV to comply with the following working plan:

⁷² Defence Motion, paras 6, 11(xiv).

⁷³ Prosecution Response, para. 34.

⁷⁴ For instance, at the ICTY, the Prosecution has been required to indicate — in addition to the requirements of the applicable Rule — the exhibits which will be referred to in the course of the evidence of each witness, and *vice-versa*, ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95/5-18-PT, Order following on status conference and appended work plan, 6 April 2009, para. 7(3).

- (1) By **2 November 2012**, the LRV shall either disclose the names of all victims participating in the proceedings, or file motions seeking protective measures in relation thereto.
- (2) By **15 November 2012**, the Prosecution shall file its pre-trial brief, which shall include its list of witnesses and exhibits, as well as the statements of all listed witnesses, all listed exhibits and all expert reports it intends to rely on at trial.
- (3) From **15 November 2012**, the Prosecution shall allow the Defence to inspect the expert reports it does not intend to rely on at trial.
- (4) By **23 November 2012**, the Prosecution shall file a first periodic disclosure report, and subsequent periodic disclosure reports shall be filed thereafter two working days before the following Status Conference or meeting convened pursuant to Rule 91.
- (5) By **30 November 2012**, the Prosecution shall complete the disclosure of all remaining Rule 110(A)(ii) and Rule 113 materials, and on that date shall file a notice that it has complied with this order.
- (6) By **17 December 2012**, the LRV shall file the list of witnesses and exhibits he would like to use at trial.
- (7) By **9 January 2013**, the Defence shall file their pre-trial briefs.

ORDERS the Prosecution, when in receipt of a Defence request for disclosure of Rule 110(B) materials, within five working days of the request, either to:

- a. respond in writing, disclosing the material being sought;
- b. respond in writing, explaining the Prosecution's reasons as to why the material being sought falls outside the Prosecution's disclosure obligations; or
- c. respond in writing, specifying a date within a further ten working days of that date, on which the request for disclosure will be met.

- d. Only where exceptional circumstances justify it, may a Party seize the Pre-Trial Judge with a request to vary the foregoing time limits, in respect of a specific request for disclosure from the Defence.

ORDERS the Prosecution, in respect of Rule 113 materials to be disclosed subsequent to 30 November 2012, to file with the Pre-Trial Judge a disclosure notice which shall:

- a. detail the circumstances in which the additional Rule 113 material was obtained and identified as exculpatory;
- b. show good cause for why the additional Rule 113 material was not disclosed by this date; and
- c. explain the steps taken, if any, to avert the recurrence of similar delays in the future.

INVITES the Parties, and the LRV to raise the matter of the nature of the Prosecution's pre-trial brief with him *inter partes* at the next meeting convened under Rule 91.

DISMISSES the remaining requests in the Defence Motion.

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

Leidschendam, 25 October 2012



Daniel Fransen
Pre-Trial Judge

