



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 Franssen**

The Registrar: **Mr Herman von Hebel**

Date: **25 October 2012**

Original language: **French**

Classification: **Public**

**THE PROSECUTOR**

v.

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

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**DECISION ON THE PROSECUTION REQUEST OF 17 AUGUST 2012 FOR LEAVE TO FILE  
AN AMENDED INDICTMENT**

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**Office of the Prosecutor:**  
Mr Norman Farrell

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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 Prosecution request of 17 August 2012 for leave to file an amended indictment (respectively, the “Request” and the “Amended Indictment”).<sup>1</sup>

2. The Pre-Trial Judge grants the Request subject to the incorporation of certain changes into the Amended Indictment.

## II. Procedural background

3. On 17 January 2011, pursuant to Rule 68 of the Rules of Procedure and Evidence (the “Rules”), the Prosecutor submitted to the Pre-Trial Judge an indictment against Mr Ayyash relating to the attack of 14 February 2005 against Mr Rafic Hariri.<sup>2</sup> On 11 March,<sup>3</sup> 6 May<sup>4</sup> and 10 June 2011,<sup>5</sup> the Prosecutor filed new versions of the indictment to which three new suspects, Mr Badreddine, Mr Oneissi and Mr Sabra, were added.

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<sup>1</sup> 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), 17 August 2012.

<sup>2</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PTJ, Submission of an Indictment for Confirmation (Rule 68); and (1) Motion for an Arrest Warrant and Order for Transfer (Rule 79), (2) Urgent Motion for the Non-Disclosure of the Indictment (Rule 74); and (3) Urgent Motion for an Order for Interim Non-Disclosure of the Identities of Witnesses Pending the Implementation of Appropriate Witness Protection Measures (Rules 77 and 115), confidential and *ex parte*, 17 January 2011. A public redacted version of the combined request (without the annexes) was filed on 5 April 2012 following an order of the Pre-Trial Judge of 8 February 2012.

<sup>3</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PTJ, Submission of an Amended Indictment for Confirmation (Rules 68 and 71) and Motion for Arrest Warrants and Orders for Transfer (Rule 79), confidential and *ex parte*, 11 March 2011. These two documents (without the annexes) were made public in application of the order of the Pre-Trial Judge of 6 December 2011.

<sup>4</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PTJ, Combined Motion of the Prosecutor (1) Submission of an Indictment for Confirmation (Rule 68), (2) Motion for Continuation of Pre-Trial Judge’s Order Dated 19 January 2011 Pursuant to Rule 96 (B), and (3) Motions in the event of Confirmation of the Indictment Pursuant to Rules 74, 77 and 79, confidential and *ex parte*, 6 May 2011. Redacted public versions of the Combined Motion and Annex A were filed on 16 February 2012 in accordance with the order of the Pre-Trial Judge rendered on 8 February 2012. Annex C was made public in accordance with the order of the Pre-Trial Judge rendered on 6 December 2011.

<sup>5</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PTJ, Submission of an Amended Indictment for Confirmation under Rule 71 and in Response to the Order of the Pre-Trial Judge dated 9 June 2011, confidential and *ex parte*, 10 June 2011. This document was made public (except for Annex A) following the order of the Pre-Trial Judge dated 6 December 2011. Annex A was filed confidentially in accordance with the decision of the Pre-Trial Judge rendered on 10 February 2012.

4. On 28 June 2011, the Pre-Trial Judge confirmed the counts contained in the indictment of 10 June 2011 and authorised the indictment of the four persons, named therein, (respectively the “Decision of 28 June 2011”, the “Indictment” and the “Accused”).<sup>6</sup>
5. On 1 February 2012, the Trial Chamber decided to initiate *in absentia* proceedings against the Accused, in accordance with Article 22 of the Statute and Rule 106 of the Rules.<sup>7</sup>
6. On 8 February 2012, the Prosecution sought leave of the Pre-Trial Judge to amend the Indictment.<sup>8</sup> On 13 March 2012, by way of a confidential decision, the Pre-Trial Judge rejected that request on procedural grounds.<sup>9</sup>
7. On 25 June 2012, Counsel for the defence of Mr Badreddine, Mr Oneissi and Mr Sabra filed before the Trial Chamber preliminary motions based on defects in the form of the Indictment, pursuant to Rule 90 (A) (ii) of the Rules.<sup>10</sup>
8. On 17 August 2012, the Prosecution filed the Request. On 7 September 2012, Counsel for the defence of the Accused filed a joint reply to it (respectively, the “Defence” and the “Response”)<sup>11</sup>.
9. On 12 September 2012, the Trial Chamber deferred ruling on the Defence motions based on a defect in the form of the Indictment, until such time as the Pre-Trial Judge had ruled on the Prosecution Request seeking leave to amend the Indictment.<sup>12</sup>

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<sup>6</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, 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. That decision confirmed the counts contained in the Indictment with the exception of the attempt to kill 231 other persons which does not come under the constituent elements of the terrorist act but under that of attempted intentional homicide. See para. 53.

<sup>7</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012.

<sup>8</sup> 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), Submission of an Amended Indictment, and Related Prosecution Applications, confidential and *ex parte*, 8 February 2012.

<sup>9</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Prosecution Request of 8 February 2012 for Leave to File an Amended Indictment, confidential, 13 March 2012.

<sup>10</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, The Defence for Hussein Hassan Oneissi Preliminary Motion on Defects in the Form of the Indictment, 25 June 2012; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Sabra’s Preliminary Motion Challenging the Form of the Indictment, 25 June 2012; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Preliminary Motion Submitted by the Defence for Mr Mustafa Amine Badreddine on the Basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence, 25 June 2012.

<sup>11</sup> 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, 7 September 2012.

<sup>12</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Interim Decision on Alleged Defects in the Form of the Indictment, 12 September 2012.

10. On 20 September 2012, the Prosecution replied to the Response after having received authorisation to do so (the “Reply”).<sup>13</sup>

11. On 4 October 2012, the Pre-Trial Judge issued an order to the Prosecution with regard to clarification of certain amendments mentioned in the Request (the “Order of 4 October 2012”).<sup>14</sup>

12. On 15 October 2012, the Prosecution responded to it by filing a submission providing clarification (the “Clarification Submission”).<sup>15</sup>

### III. The arguments of the Parties

#### A. The Request

13. The Prosecution bases the Request on Rule 71 (A) (ii) of the Rules.<sup>16</sup> In essence, it states therein that the proposed amendments:

- a. do not contain any new charges or counts;<sup>17</sup>
- b. clarify the account of the existing charges and certain facts mentioned in the Indictment and thereby allow the Accused to be better informed of the nature of the allegations made against them;<sup>18</sup>
- c. do not result in any improper prejudice to the Accused, notably with regard to the preparation of the case<sup>19</sup> and do not delay the proceedings;<sup>20</sup> and
- d. are supported by sufficient prima facie evidence provided to the Pre-Trial Judge during the confirmation procedure of the Indictment, in addition to new material listed in Annex (D) to the Request.<sup>21</sup>

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<sup>13</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Reply to the “Joint Response to Prosecution Request for Leave to Amend the Indictment”, 20 September 2012.

<sup>14</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order for Clarification of Certain Proposed Amendments in the Prosecution’s Request for Leave to Amend the Indictment of 17 August 2012, 4 October 2012.

<sup>15</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Submissions Pursuant to the “Order for Clarification of Certain Proposed Amendments in the Prosecutor’s Request for Leave to Amend the Indictment of 17 August 2012”, 15 October 2012.

<sup>16</sup> Request, para. 4.

<sup>17</sup> *Id.*, para. 2.

<sup>18</sup> *Id.*, para. 5.

<sup>19</sup> *Id.*, paras 6 and 7.

<sup>20</sup> *Id.*, para. 7.

<sup>21</sup> *Id.*, paras 8 and 9.

## B. The Response

14. The Defence submits, in general, that insofar as the proposed amendments are not intended to have an effect on the charges contained in the Indictment, it does not take any position regarding them at this stage of the proceedings.<sup>22</sup> However, should the amendment of the Indictment be authorised, the Defence reserves the right to raise any issue, in accordance with Rules 71 (F) and 90 of the Rules.<sup>23</sup> It submits on this point that Rule 71 (F) of the Rules, which envisages the possibility of filing preliminary motions concerning “new charges”, cannot be interpreted restrictively as preventing it from challenging amendments of another nature.<sup>24</sup> If this were not the case, by filing a request for amendment of the Indictment after a preliminary motion has been filed in accordance with Rule 90 (A) (ii) of the Rules, the Prosecution would deprive the Defence of the fundamental right guaranteed by Article 16 (4) (a) of the Statute to be informed of the charges brought against the accused.<sup>25</sup> The Defence points out that that interpretation is in line with the existing practice in other international tribunals.<sup>26</sup>

15. With this in mind, if the amendments proposed by the Prosecution were authorised, the Defence should be permitted to withdraw the motions relating to defects in the form of the Indictment which are pending before the Trial Chamber in order to file a new one and the Pre-Trial Judge should set additional time for that purpose.<sup>27</sup> Consequently, the Defence is of the opinion that the ruling on those motions by the Trial Chamber should be stayed until such time as the Pre-Trial Judge has ruled on the Amended Indictment.<sup>28</sup> Lastly, the Defence points out that it objects to any amendment of the Indictment unless the aforementioned interpretation is confirmed.<sup>29</sup>

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<sup>22</sup> Response, para. 5.

<sup>23</sup> *Id.*, para. 6.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Id.*, para. 7.

<sup>27</sup> *Id.*, para. 8.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, para. 9.

### C. The Reply

16. The Prosecution submits that the Defence cannot make any subsequent challenges to the proposed amendments in accordance with Rule 71 (F) of the Rules. It states the following principal arguments:

- a. the Defence did not invoke any legal basis that could justify the possibility of reserving such a right;<sup>30</sup>
- b. the Defence should have raised objections to those amendments before the Pre-Trial Judge;<sup>31</sup>
- c. the fact that the Defence opposes, in general, any proposed amendment unless its legal interpretation is confirmed by the Pre-Trial Judge is unacceptable; the Defence is required to identify the amendments that it intends to challenge by specifying, if it exists, the legal basis on which it relies;<sup>32</sup> and
- d. a preliminary motion relating to defects in the form of an indictment can only concern “new charges”, in accordance with Rule 71 (F) of the Rules and the case law of other international criminal tribunals.<sup>33</sup>

17. Furthermore, the Prosecution notes that insofar as the Trial Chamber is currently seized of preliminary motions relating to the defects of form in the Indictment, the question arises of whether or not the Pre-Trial Judge has jurisdiction to rule on the issues raised in the Response.<sup>34</sup>

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<sup>30</sup> Reply, para. 2.

<sup>31</sup> *Id.*, para. 3.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, para. 4.

<sup>34</sup> *Id.*, para. 9.

#### D. The Clarification Submission

18. The Prosecution emphasises in substance the following points:

- a. with regard to information that should be mentioned in an indictment: only the “material facts”<sup>35</sup> should be included therein. Any further information is not necessary insofar as: (i) according to prevailing international case law, it is not required in order to guarantee the right of the Accused to be sufficiently informed of the charges against them; (ii) it will be mentioned in the pre-trial brief of the proceedings; and (iii) its inclusion could create confusion with regard to the material facts which themselves must be pleaded in the Indictment;<sup>36</sup>
- b. with regard to the removal of technical information, the following facts should be distinguished:
  - i. the removal of the references to telephone data, co-location and attribution mentioned in paragraphs 17, 18, 22 (a) and 23 of the Indictment. That information does not constitute material facts underpinning the charges and should not therefore be included in the Indictment. Nevertheless, in answer to the concerns of the Pre-Trial Judge, the Prosecution proposes that the text in paragraph 9 of the Clarification Submission be added to paragraph 14 of the Amended Indictment;<sup>37</sup>
  - ii. the removal of paragraph 32. The information contained in paragraph 32 of the Indictment is found in other parts of it. Its removal simplifies and clarifies it. However, if the Pre-Trial Judge considers it essential in order to define the roles of the Accused and the responsibility of Mr Ayyash in the false claim of responsibility, the Prosecution proposes that the texts in paragraphs 14 and 19 of the Clarification Submission be added to paragraphs 17 and 3 (b) of the Amended Indictment respectively;<sup>38</sup>

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<sup>35</sup> Material facts

<sup>36</sup> Clarification Submission, paras 3 to 6.

<sup>37</sup> *Id.*, paras 7 to 9.

<sup>38</sup> *Id.*, paras 10 to 20.

- c. with regard to the wording used in paragraph 15 (a) and 15 (b) of the Amended Indictment for describing the SMS use: the Prosecution proposes to specify that they are “outgoing” SMS messages;<sup>39</sup>
- d. with regard to the amendments relating to the nature and use of the Blue Network phones: the Prosecution suggests amending paragraph 15 (c) of the Indictment, in accordance with the suggestion made at paragraph 23 of the Clarification Submission, in order to specify in particular that some Blue Network phones were activated after the attack of 14 February 2005 and were, consequently, excluded from the phones listed at paragraph 15 (c) of the Indictment.<sup>40</sup> The Prosecution points out, furthermore, that it is unlikely that that information would affect the statistics included in paragraph 304 of the Communications Report;
- e. with regard to the amendments relating to the nature and use of the Yellow Network phones: the Prosecution states that the lack of reference to a Yellow Network phone is an omission. The Prosecution proposes resolving this by: (i) adding that phone to the table at paragraphs 15 (d) and 16 of the Indictment, as well as to the pictorial representation at paragraph 17 of the Amended Indictment; and (ii) changing paragraph 15 (d) of the Indictment as proposed at paragraph 26 of the Clarification Submission;<sup>41</sup>
- f. with regard to the amendments relating to the registration and activation of Red Network phones: the Prosecution is of the opinion, in particular, that the amendment at paragraph 22 of the Amended Indictment reflects the evidence submitted in support of that allegation and is consistent with the Communications Report;<sup>42</sup>
- g. with regard to the amendments relating to the roles of the Accused Oneissi and Sabra: the Prosecution points out that the material facts mentioned at paragraph 54 of the Indictment which it proposes to remove are found in other parts of the Amended Indictment, notably at paragraph 38;<sup>43</sup>

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<sup>39</sup> *Id.*, paras 21 and 22.

<sup>40</sup> *Id.*, paras 23 to 25.

<sup>41</sup> *Id.*, para. 26.

<sup>42</sup> *Id.*, paras 27 to 30.

<sup>43</sup> *Id.*, paras 31 to 33.



- h. with regard to the reference to Article 201 of the Lebanese Criminal Code: the Prosecution is of the opinion that that provision must be pleaded insofar as it relates to a specific form of attempt which applies to persons who have completed all the constituent elements of the offence, but did not achieve the expected result. In addition, Article 200 of that Code should be pleaded insofar as it provides a general definition of attempt. In this respect, the Prosecution notes, as did the Appeals Chamber, that the distinction between Articles 200 and 201 of the Lebanese Criminal Code only has an effect with regard to the sentence. It is of the view that the inclusion of Article 201 of the Lebanese Criminal Code is beneficial to the Defence which is thus informed that it applies to counts 5 and 9;<sup>44</sup> and
- i. with regard to typographical errors: the Prosecution points out that the names “Baddredine” and “Addass” as mentioned at paragraphs 16 and 3 (d) of the Amended Indictment were incorrectly spelt.<sup>45</sup>

#### IV. Statement of reasons

##### A. Jurisdiction

19. Rule 71 (A) (ii) of the Rules provides that at any time between its confirmation and the assignment of the case to the Trial Chamber, the Prosecutor may only amend an indictment upon authorisation from the Pre-Trial Judge. Insofar as the Indictment was confirmed on 28 June 2011 and the Trial Chamber has not yet been seized of the case in accordance with Rule 95 of the Rules, the Pre-Trial Judge has jurisdiction to rule on the Request.

##### B. Applicable law

20. Rule 71 (B) of the Rules provides that an indictment may only be amended if there is “prima facie evidence to support the proposed amendment” and if “the amendment would not result in improper prejudice to the accused.”

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<sup>44</sup> *Id.*, paras 34 to 37.

<sup>45</sup> *Id.*, para. 38.

21. That Rule can be interpreted in the light of the case law of the other international criminal Tribunals whose Rules contain similar provisions.<sup>46</sup> According to that case law, whilst the Pre-Trial Judge has a wide discretion,<sup>47</sup> he must, first and foremost, take account of the effect of an amendment on the rights of the accused, notably in adequately preparing his defence or to be tried without delay.<sup>48</sup> In this respect, the Special Court for Sierra Leone distinguishes three categories: substantive amendments, such as those concerning new charges or new allegations within existing charges, changes aimed at providing more detail or precision to existing allegations and formal or semantic changes.<sup>49</sup> As a rule, changes belonging to the first two categories require an in-depth analysis of their effect on the rights of the accused, whereas those in the third category do not warrant a detailed review.<sup>50</sup>

22. In any event, all appropriate measures should be taken to ensure that the rights of the accused are respected in full. Also, when it is substantive, an amendment must be based on prima facie evidence. If an amendment is aimed at providing clarification, it must be ensured that it does indeed make the indictment more precise and therefore clarify the contents of the case and allow the accused to better understand.<sup>51</sup> They will be able therefore to adapt and prepare their defence in accordance with the clarifications received.<sup>52</sup> With this in mind, the Appeals Chamber of the ICTR decided that two factors had to be put into perspective: on the one

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<sup>46</sup> Rule 50 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

<sup>47</sup> ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Decision on Amendment of Indictment, 27 May 2011 (“*Mladić Decision*”), para. 13; ICTY, *The Prosecutor v. Milo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009, para. 11.

<sup>48</sup> ICTR, *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera, André Rwamakuba*, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 15 (“*Karemera Decision*”); ICTY, *The Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“*Halilović Decision*”), para. 23; *Mladić Decision* para. 16.

<sup>49</sup> SCSL, *The Prosecutor v. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005 (“*CDF Case Decision*”), para. 79 cited in SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 2006 (“*RUF Case Decision*”), para. 23. See also ICTY, *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-I, Decision on Prosecution Motion for Leave to Amend the Indictment, 19 July 2011, paras 48, 50, 51.

<sup>50</sup> *CDF Case Decision*, paras 80-81.

<sup>51</sup> ICTY, *The Prosecutor v. Ljube Bošković, Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief, 26 May 2006, para. 11; ICTR, *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicomumpaka, Prosper Mugiraneza*, Case No. ICTR-99-50-AR50, Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19: “Although the Prosecution may seek leave to expand its theory of the Accused’s liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted.”

<sup>52</sup> *Karemera Decision*, para. 15.

hand, the delay to the proceedings that might result from the amendment of an indictment and, on the other, the benefit the accused and the judges might derive from it.<sup>53</sup> Thus, the amendment of an indictment must not take place belatedly, bearing in mind its effect on the progress of the proceedings as a whole, as well as on the rights of the Accused to be tried without excessive delay and to prepare their defence effectively. That effect will often be lessened when the case is still at the pre-trial stage.<sup>54</sup>

### **C. The review of the arguments of the Parties**

23. The Pre-Trial Judge will examine successively the merits of the amendments proposed by the Prosecution in the Request (1) and the arguments of the Defence and the Prosecution concerning the preliminary motions relating to a defect in the form of the Indictment (2).

#### **1. The amendments**

24. The Pre-Trial Judge analysed the amendments proposed by the Prosecution in the Request in the light of the legal considerations recalled at paragraphs 20 to 22 of this decision and, in particular, their effect on the rights of the Accused to prepare adequately their defence and to be tried without excessive delay. He notes that, aside from the amendment relating to the list of the victims appearing in an Annex to the Indictment (a), all the proposed changes are aimed at either providing more detail or precision to existing allegations or correcting formal errors (b).

##### **a. The list of victims**

25. The Prosecution amendments relating to the victims concern the attachment (B) (Schedule B) to the Indictment and are aimed at: (i) removing seven persons whose names appear twice or for whom evidence demonstrates that they were not victims; and (ii) adding two new persons, one of whom had not previously been identified as a victim and the second who had been unintentionally omitted.

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<sup>53</sup> *Karemera* Décision, para. 13; *Halilović* Decision, para. 23.

<sup>54</sup> *Halilović* Decision, paras 23-24.

26. The Pre-Trial Judge notes that the addition or removal of some persons on the list of victims appearing in Annex (B) to the Request<sup>55</sup> does not, in the case at hand, have any effect on the counts concerned by those amendments, namely count nos. 1, 5 and 9. Indeed, among the constituent elements of those counts, the existence of at least one victim is necessary but sufficient. However, during the confirmation procedure of the Indictment, the Prosecution submitted evidence attesting to the prima facie existence of prejudice caused to at least one victim for each aforementioned count and who was not affected by the Prosecution's request for removal.

27. In this context, the Pre-Trial Judge authorises the Prosecution to correct attachment (B) (Schedule B) to the Indictment by removing the names of seven victims and adding to it the names of the two victims it suggests.

**b. Formal clarifications and changes**

28. The Pre-Trial Judge notes that the proposed amendments, aside from those concerning victims, are essentially aimed at correcting formal errors or providing more details on existing allegations.

**i. Amendments not requiring clarification**

29. Most of the proposed amendments in the Amended Indictment do not require further explanation on the part of the Prosecution. The Pre-Trial Judge considers that those amendments meet the criteria set forth in Rule 71 (B) of the Rules and that it is appropriate, therefore, to authorise them.

30. In fact, some amendments are aimed at adding more details concerning the nature and use of the phones belonging to the different networks, as well as the exact dates and places of the location of the Accused.<sup>56</sup> Other changes are intended to avoid repetitions and simplify the Indictment.<sup>57</sup>

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<sup>55</sup> Request, Annex B, p. 2.

<sup>56</sup> See, for example: paras 20 (a) and 31 of the Amended Indictment.

<sup>57</sup> See, for example: paras 62 and 68 (i) of the Indictment, deleted in the Amended Indictment.

31. Furthermore, the amendment of paragraph 70 (h) of the Indictment clarifies the count of terrorism by deleting the reference to the attempt to cause the death of 231 other persons. It is moreover in accordance with the Decision of 28 July 2011, in which the Pre-Trial Judge had stated that that attempt did not fall under the constituent elements of the act of terrorism.<sup>58</sup>

32. Lastly, the changes to count nos. 3, 4, 5 and 9 of the Amended Indictment provide details of the constituent elements of intentional homicide.<sup>59</sup> They likewise take into consideration the observations contained in the Decision of 28 June 2011.<sup>60</sup>

ii. Amendments requiring clarification

33. Among the amendments proposed in the Amended Indictment, some required that the Pre-Trial Judge had available further information. To that end, he issued to the Prosecution the Order of 4 October 2012 for the purposes of clarification to which the latter replied by way of the Clarification Submission.

34. In light of the explanations and suggestions provided by the Prosecution, the Pre-Trial Judge is satisfied that the proposed amendments meet the criteria set forth in Rule 71 (B) of the Rules as long as they incorporate the proposals made in the Clarification Submission.

35. Consequently, the Pre-Trial Judge authorises the Prosecution to make the changes mentioned in Annex (B) to the Request, subject to the addition:

- a. at paragraph 3(b) of the Amended Indictment: of the underlined text in paragraph 19 of the Clarification Submission;
- b. at paragraph 14 of the Amended Indictment: of the underlined text in paragraph 9 of the Clarification Submission;
- c. at paragraph 15 (a) and (b) of the Amended Indictment: of the reference to the fact that it is an “outgoing” SMS message;

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<sup>58</sup> Decision of 28 June 2011, para. 53.

<sup>59</sup> See para. 52 (c) and (e) (ii), para. 54 (h), para. 56 (g) and (j) and para. 64 (e) of the Amended Indictment.

<sup>60</sup> Decision of 28 June 2011, paras 57, 62, 65, 81.

- d. at paragraph 15 (c) of the Amended Indictment: of the phrase in quotation marks in paragraph 23 of the Clarification Submission;
  - e. at paragraph 15 (d) of the Amended Indictment: of the changes underlined in the text entitled “Yellow Network” in paragraph 26 of the Clarification Submission;
  - f. to the tables in paragraphs 15 (d) and 16 of the Amended Indictment: of the reference to the phone from the Yellow Network which was inadvertently omitted from the Amended Indictment;
  - g. to the pictorial representation at paragraph 17 of the Amended Indictment: of the reference to the phone belonging to the Yellow Network which was inadvertently omitted from the Amended Indictment; and
  - h. at paragraph 17 of the Amended Indictment: of the underlined text in paragraph 14 of the Clarification Submission.
36. Furthermore, the Prosecution is invited to correct the spelling of the names “Baddredine” and “Addas” mentioned in paragraphs 16 and 3 (d) of the Amended Indictment, respectively.

## **2. Preliminary motions**

37. The Pre-Trial Judge notes that the Trial Chamber is currently seized of a request from the Defence raising preliminary motions relating to defects in the form of the Indictment.<sup>61</sup> Furthermore, although the Defence has had the opportunity to submit observations on the subject of the Request, it decided against doing so, preferring to reserve the right to act at a later stage should the proposed amendments be admitted.<sup>62</sup>

38. In these circumstances, the Pre-Trial Judge considers that he does not have jurisdiction to rule on the matter of the interpretation of the terms of Rule 71 (F) of the Rules. Indeed, it is for the Trial Chamber to rule on preliminary motions relating to defects in the form of the Indictment, in accordance with Rule 90 (A) of the Rules. Were he to rule on that matter, the Pre-Trial Judge would be encroaching on the powers of the Trial Chamber.

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<sup>61</sup> C.f. footnote page 10 above.

<sup>62</sup> Response, para. 6.

39. The Pre-Trial Judge therefore does not have jurisdiction likewise to consider the request of the Defence to withdraw, where appropriate, its motion relating to defects in the form of the Indictment in order to file a new one, nor to set an additional time limit for that purpose. Indeed, were he to act in that way, the Pre-Trial Judge would be interfering with a procedure pending before the Trial Chamber.

### **3. Conclusion**

40. The Pre-Trial Judge considers that, as they are not intended to add new charges but to provide more detail to existing allegations or to correct formal errors, the amendments proposed by the Prosecution do not have a significant effect on the Defence's preparation of the case or on the progress of the proceedings. By clarifying some elements, they are likely to support the rights of the Defence.

41. As a consequence, the Pre-Trial Judge grants the Request, subject to the changes to be made to the Amended Indictment set forth at paragraphs 35 and 36 above.

**V. The disposition**

**FOR THESE REASONS,**

Pursuant to Rule 71 (A) (ii) and (B) of the Rules,

**THE PRE-TRIAL JUDGE,**

**DECLARES** the Request admissible and well-founded subject to the changes of the Amended Indictment set forth at paragraphs 35 and 36 of this decision;

**INVITES** the Prosecution to file a new indictment incorporating the changes set forth at paragraphs 35 and 36 of this decision; and

**DECLARES THAT HE DOES NOT HAVE JURISDICTION** to hear and determine the requests submitted by the Defence in the Response.

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

Leidschendam, 25 October 2012.

[stamp]

[signature]

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Daniel Fransen  
Pre-Trial Judge

