



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: **19 December 2012**

Original language: **French**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION RELATING TO THE REQUESTS FOR CERTIFICATION OF THE DECISIONS OF 25 OCTOBER 2012 AND 15 NOVEMBER 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. Subject of the decision

1. By way of the present Decision, the Pre-Trial Judge rules on the motion from Defence Counsel for Messrs. Ayyash, Badreddine, Oneissi and Sabra (the “Defence”) of 6 November 2012 for certification of the appeal of the Decision of the Pre-Trial Judge of 25 October 2012 establishing a working plan (respectively the “Request for certification”¹ and the “Decision of 25 October 2012”²). He also rules on the motion filed by Counsel for Mr Ayyash of 20 November 2012 for certification of the appeal of the Decision of the Pre-Trial Judge of 15 November 2012 (respectively the “Second Request for certification”³ and the “Decision of 15 November 2012”⁴).

II. Background to the proceedings

2. On 25 October 2012, the Pre-Trial Judge established a working plan in which he, in particular, ordered the Prosecution to file, by 15 November 2012, its pre-trial brief, including a list of witnesses and exhibits, all the statements of listed witnesses and the listed exhibits, as well as all the expert reports it intends to rely on at trial.

3. On 6 November 2012, the Defence requested the certification of the appeal of the Decision of 25 October 2012. That appeal is limited to the part of the Decision relating to the filing, before the Pre-Trial Judge, of the aforementioned exhibits, witness statements and expert reports (the “Documents”).

4. By memorandum of 12 November 2012, the Pre-Trial Judge confirmed that the Documents should be transmitted to him through the “Legal Workflow System”. He undertook, however, not to access them until the issue referred to in the Request for certification has been resolved (the “Memorandum of 12 November 2012”).⁵

¹ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Joint Defence Motion Seeking Certification of the “Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation”, 6 November 2012.

² STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012.

³ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Defence Motion Seeking Certification of the “Decision on Urgent Motion for Injunctive Relief” and Request to Join Appeals Together, 20 November 2012.

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Decision on Urgent Motion for Injunctive Relief, 15 November 2012.

⁵ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Internal Memorandum, Undertaking not to access Rule 91 Materials subject to litigation, confidential, 12 November 2012.

5. On 13 November 2012, the Prosecution opposed the Request for certification (the “Response”).⁶

6. On 14 November 2012, Defence Counsel for Mr Ayyash requested the Pre-Trial Judge to take a decision revoking his access to certain documents that the Prosecution had allegedly disclosed to him, whereas they were within the scope of Rule 110 (A) (ii) of the Rules of Procedure and Evidence (the “Rules”) (the “Motion of 14 November 2012”).⁷

7. On 14 November 2012, the Prosecution responded that the documents in question had been transmitted to the Pre-Trial Judge in accordance with the Decision of 25 October 2012 and with the Memorandum of 12 November 2012.⁸

8. On 15 November 2012, on the basis of that information provided by the Prosecution, the Pre-Trial Judge dismissed the Motion of 14 November 2012, stating that the documents referred to are not, as such, Rule 110 (A) (ii) materials but Rule 91 (G) materials, in accordance with the Decision of 25 October 2012.

9. On 20 November 2012, Defence Counsel for Mr Ayyash filed the Second Request for certification.

10. On 29 November 2012, the Prosecution opposed the Second Request for certification (the “Response of 29 November 2012”).⁹

III. Arguments of the Parties

11. In support of the Request for certification, the Defence invokes the following main arguments:

⁶ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Prosecution Response to Joint Defence Motion Seeking Certification of the “Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation”, 13 November 2012.

⁷ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Urgent Motion on behalf of Mr. Ayyash for Injunctive Relief, 14 November 2012 (the “Motion of 14 November 2012”).

⁸ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Prosecution Response to the Urgent Motion on behalf of Mr. Ayyash for Injunctive Relief, 14 November 2012.

⁹ STL, *The Prosecutor v. Ayyash et al.*, Case no. STL-11-01/PT/PTJ, Prosecution Response to Ayyash “Defence Motion Seeking Certification of the ‘Decision on Urgent Motion for Injunctive Relief’ and Request to Join Appeals Together” and Further Submissions Pursuant to the Pre-Trial Judge’s Scheduling Directive of 21 November 2012, 29 November 2012.

- the cumulative criteria required by Rule 126 (C) of the Rules to certify appeal are satisfied;
- the Impugned Decision involves an issue that would significantly affect the fairness and expeditiousness of the proceedings because: i) by accessing all the Documents, the judges of the Trial Chamber will have a biased view of the case, based only on the point of view expressed by the Prosecution, and their neutral and impartial role will thereby be affected; ii) even if it may also file a pre-trial brief together with the materials on which that brief relies, the Defence has been unable to prepare itself effectively for trial insofar as it is confronted with difficulties concerning, in particular, the disclosure of the Prosecution documents and the non-cooperation of the Lebanese authorities; and iii) in light of those difficulties, the Defence may only be able to file a cursory pre-trial brief;
- immediate resolution by the Appeals Chamber of the issues in question could materially advance the proceedings as, were the Prosecution to be wrongly permitted to submit the Documents in accordance with the Decision of 25 October 2012, irreparable prejudice would be caused to the Defence;
- Rule 91 (G) of the Rules does not provide for disclosure of the Documents to the Pre-Trial Judge;
- the provisions of the Rules are adversarial in nature in that the proceedings are driven by the Parties: in that context, the pre-trial brief should be likened to a management tool whose sole purpose is to allow the Pre-Trial Judge and the Trial Chamber to be informed of the Prosecution strategy;
- the Prosecution did not gather its evidence in the presence of an investigating judge or the Defence: it has not been possible therefore to test its credibility and accuracy *inter partes* and its disclosure under these conditions would be contrary to the provisions for a fair trial set forth in Article 16 of the Statute;
- according to Rule 112 of the Rules, the Defence is not expected to disclose its evidence before the incriminating evidence has been presented;

- the Pre-Trial Judge did not give reasons for his Decision as the case law, in particular of the European Court of Human Rights, requires him to do; and
- the Prosecution's obligation to disclose the Documents is contrary to the rights of the accused and is in violation of the provisions of the Statute and of the Rules.

12. In response, the Prosecution submits that the Request for certification does not satisfy the conditions set forth in Rule 126 (C) of the Rules. It invokes the following main arguments:

- a professional judge is not biased by having access to the evidence prior to its admission;
- according to Rule 91 (G) of the Rules, the Prosecution must file a pre-trial brief including, in particular, "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 list of witnesses accompanied in particular by "a summary of the facts on which each witness is expected to testify", "the points in the indictment as to which each witness is expected to testify, including specific references to counts and relevant paragraphs in the indictment" and "the list of exhibits the Prosecutor intends to offer";
- according to Rule 95 of the Rules, the pre-trial brief, the list of witnesses, the list of exhibits and all other relevant documents – including the evidentiary material submitted in support of confirmation of the indictment – shall be submitted by the Pre-Trial Judge to the Trial Chamber; the Chamber will have therefore had access to the Prosecution evidence by receiving the court file; and
- according to Rule 91 (I) of the Rules, the Defence must file a pre-trial brief addressing in particular the "matters which the accused disputes in the Prosecutor's pre-trial brief".

13. In support of the Second Request for certification, Defence Counsel for Mr Ayyash invokes the following main arguments:

- the cumulative criteria required by Rule 126 (C) of the Rules to certify appeal are satisfied;
- the Impugned Decision involves an issue that would significantly affect the fairness and expeditiousness of the proceedings because by permitting the Pre-Trial Judge, and then the Trial Chamber, to have access to the statements of all the witnesses gathered by the Prosecution – including, therefore, of those it does not intend to call at trial – they will be seized of documents with no relevance to the ongoing proceedings; this is contrary to the adversarial proceedings provided for by the Rules in that it allows the Pre-Trial Judge and the Trial Chamber to have access to materials which have not been assessed *inter partes* and which the judges should apprise themselves of only if they are filed as evidence;
- immediate resolution by the Appeals Chamber of the issues in question could materially advance the proceedings as, were the Prosecution to be permitted to submit the materials it does not intend to use at trial, irreparable prejudice would be caused to the Defence; and
- the Pre-Trial Judge did not give reasons for his Decision as he is, in principle, obliged to do.

14. In the Response of 29 November 2012, the Prosecution invites the Pre-Trial Judge to dismiss the Second Request for certification on the grounds that it does not satisfy the conditions set forth in Rule 126 (C) of the Rules. It specifies, however, that it has filed 15 disclosure batches in accordance with Rule 110 (A) (ii) of the Rules and 33 disclosure batches in accordance with Rule 91 (G) (iii) of the Rules.

IV. Applicable Law

15. In accordance with Rule 126 (C) of the Rules, certification to appeal is subject to two cumulative criteria: first, the concerned Decision must involve an issue that would significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial and; second, an immediate resolution by the Appeals Chamber must be able to materially advance the proceedings. In this regard, the Appeals Chamber laid emphasis on two terms of that provision which confirm its restrictive nature. It paid particular attention to the fact that, to justify certification, on the one hand the fair and expeditious conduct of the proceedings has to be

significantly affected and, on the other, the resolution of the issue in question has to be *immediate*.¹⁰

V. Statement of reasons

16. The Pre-Trial Judge will rule in turn on the Request for certification and on the Second Request for certification. First, he notes that those requests for certification were filed within the time limits required by Rule 8 of the Rules. They are thus admissible.

17. As a consequence, it should be examined whether the two criteria set forth in Rule 126 (C) of the Rules are satisfied and firstly whether, in the light of the aforementioned case law, the impugned decisions involve an issue that would significantly affect the fair and expeditious conduct of the proceedings.

18. With regard to the Request for certification, the Pre-Trial Judge recalls firstly that, according to Article 20 (2) of the Statute, unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the Presiding Judge, followed by questions posed by the other judges, the Prosecutor and the Defence. This statutory prerogative – which is consistent with Lebanese criminal procedure – could not be exercised by the judges dealing with the substance of the case without having had access to the witness statements and to the expert reports, as well as to the exhibits on which they are based. In other words, in order to fully comprehend the implications of the case in question and to be, thus, in a position to examine the witnesses and experts, the judges dealing with the substance of the case must have access, in due time, to the evidence gathered by the Parties throughout their respective investigations. That interpretation is, moreover, in full accordance with that expressed by the President of the Tribunal in the Explanatory Memorandum of the Rules. Indeed, recalling the spirit of Article 20 (2) of the Statute, the President of the Tribunal states that:

Article 20(2) of the Statute envisages a mode of hearing witnesses along the lines of inquisitorial systems; questions are first put by the Presiding Judge and the other judges, then by the parties. This, however, presupposes that the Trial Chamber is provided with a complete file (*dossier de la cause*) enabling it to be familiar with the evidence collected

¹⁰ STL, *The Prosecutor v. Ayyash et al*, Case no. STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 13 and 14.

both against and in favour of the defendant, as well as with all the legal and factual problems that arise.¹¹

19. Four observations should be made in this regard. First, as he has stated many times, the Pre-Trial Judge is aware of the need to ensure the fairness of the proceedings and the observance of the rights of the Defence. In this regard, he recalls that, although it is not obliged to disclose its evidence before the incriminating evidence has been presented, the Defence has nevertheless the possibility to do so if it considers that the fairness and independence of the proceedings require it, in order that the Pre-Trial Judge and the Trial Chamber may take it into consideration at this stage.

20. Second, in this same spirit of fairness, to prepare the detailed report he is obliged to transmit to the Trial Chamber in accordance with Rule 95 (A) (vii) of the Rules, the Pre-Trial Judge must, notably, base himself on the pre-trial briefs submitted by the parties. In this regard, the Pre-Trial Judge takes note of the observations formulated by the Defence on the subject of not being able to prepare an in-depth brief in the time allowed, given the difficulties caused by the non-disclosure of certain documents and the lack of cooperation of the Lebanese authorities with which it is confronted. These issues are the subject of separate proceedings and will be, as appropriate, resolved in the context of separate orders. The Pre-Trial Judge recalls nevertheless that, as stated during the status conference of 27 November 2012¹² and in the Decision of 17 December 2012 relating to the request to extend working plan deadlines,¹³ he is prepared to review any request by the Defence relating to the difficulties encountered in the context of preparing the case and to the manner in which to resolve them. In any case, these difficulties cannot call into question the principle according to which the Pre-Trial Judge is obliged to prepare a detailed and fair report and, in order to do so, to rely in particular on the briefs and documents that the Prosecution and the Defence intend to provide him.

21. Third, the Pre-Trial Judge notes that Rules 155 and 156 of the Rules provide that the Trial Chamber rule on the admission of written statements and transcripts of testimonies from witnesses. This procedure necessarily implies that the Trial Chamber review these documents to be able to rule on their admission. The Rules thus explicitly provide the possibility for the

¹¹ STL, Rules Of Procedure And Evidence Explanatory Memorandum by the Tribunal's President (hereinafter "President's Explanatory Memorandum"), 12 April 2012, para. 29.

¹² STL, *The Prosecutor v. Ayyash et al*, Case no. STL-11-01/PT/PTJ, Official Transcript of the Status Conference, 27 November 2012, p. 71, lines 6-10 [French version].

¹³ STL, *The Prosecutor v. Ayyash et al*, Case no. STL-11-01/PT/PTJ, Decision on Prosecution's Request to Extend Working Plan Deadlines, 17 December 2012, para. 11.

Chamber to apprise itself of the evidence gathered by the Parties before they are included in the file.

22. Fourth, the trial is conducted by professional judges whose independent and neutral position cannot be affected by reading and analysing evidence of the sort. Such evidence shall, moreover, be duly reviewed and discussed, in accordance with the procedure provided for by the Rules, and will only become evidence, strictly speaking, when it will have been admitted as such by the judges dealing with the substance of the case, after its probative value has been assessed.¹⁴

23. Accordingly, Rules 95 (A) and 91 (G) of the Rules and the Decision of 25 October 2012 pertaining thereto should be read jointly. The first provision – which concerns the presentation of the court file – provides explicitly that the Pre-Trial Judge must transmit to the Trial Chamber all the evidence he has received, as well as a detailed report specifying, in particular, “the probative material produced by each Party [...]” and “suggestions as to the number and relevance of [...] the witnesses to be called by the Prosecutor [...]”. However, to issue such a report and provide this information to the Trial Chamber, the Pre-Trial Judge must also have apprised himself of this evidence which must, as a consequence, necessarily have been submitted to him. To that end, the Pre-Trial Judge must receive, at this stage in the proceedings, all the documents referred to in Rule 91 (G) (iii) of the Rules that the Prosecution intends to rely on at trial. It should be noted that receipt of these documents must both facilitate the management of the proceedings by the Trial Chamber and allow the Pre-Trial Judge – as was emphasised by the President of the Tribunal – to “take a more active role during the initial stages of proceedings”.¹⁵

24. This practice is, moreover, similar to that implemented by the International Criminal Court in particular. Indeed, with a view to efficient and expeditious proceedings, the judges of Trial Chamber II of that Court required that they have access to the incriminating evidence gathered during – and after – the pre-trial proceedings, before the witnesses or experts relating to it were called at trial.¹⁶

¹⁴ See in particular Rule 149 of the Rules.

¹⁵ President’s Explanatory Memorandum, para. 11.

¹⁶ ICC, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, paras 23 and 24 and disposition.

25. It results from the foregoing that the submission of the Documents to the Pre-Trial Judge and their transmission to the Trial Chamber, provided for by the Decision of 25 October 2012, would not significantly affect the fairness and expeditiousness of the proceedings. On the contrary, they must allow the judges to perform their statutory duties in full knowledge of the facts in the interests and respect for the rights of the Accused. In the light of these considerations, the Pre-Trial Judge deems that the first condition required by Rule 126 (C) to grant the Request for certification is not met. As the two conditions set forth in Rule 126 (C) of the Rules are cumulative, there is no need to examine the second. The Request for certification is therefore dismissed.

26. With regard to the Second Request for certification, the Pre-Trial Judge reiterates his statement in the Decision of 25 October 2012 that, in the context of the pre-trial phase of the case, he only has to receive the documents that the Prosecution intends to rely on at trial. Only those documents will be disclosed to the Trial Chamber in accordance with Rule 95 of the Rules. This concerns, more specifically, the documents referred to in Rule 91 (G) (iii) of the Rules, with the exception of those filed exclusively pursuant to Rule 110 (A) (ii) of the Rules which are not intended to be relied upon at trial. The Decision of 15 November 2012 does not deviate from the Decision of 25 October 2012 on that point.

27. Although that point does not fall within the scope of the present Decision, the Pre-Trial Judge wishes, however, to point out that, if it disclosed documents to him exclusively on the basis of Rule 110 (A) (ii) of the Rules, the Prosecution should take the necessary steps to redress that situation. In this regard, the Pre-Trial Judge recalls that by virtue of the Memorandum of 12 November 2012, he has not apprised himself of any such documents and that no prejudice can result from the fact that they were made available to him.

28. It results from the foregoing that the fairness and expeditiousness of the proceedings cannot be affected by the Decision of 15 November 2012 which is the subject of the Second Request for certification. As the two conditions set forth in Rule 126 (C) of the Rules are cumulative, there is no need to examine the second. The Second Request for certification is therefore dismissed.

VI. Disposition

FOR THESE REASONS,

Pursuant to Rule 126 (C) of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Request for certification and the Second Request for certification admissible and unfounded.

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

Leidschendam, 19 December 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

