



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: **Judge Daniel Fransén**

The Registrar: **Mr. Herman von Hebel**

Date: **19 December 2012**

Original language: **English**

Classification: **Public Redacted**

**THE PROSECUTOR**

v.

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

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**PUBLIC REDACTED VERSION OF THE DECISION ON PROSECUTION'S  
REQUEST TO EXTEND WORKING PLAN DEADLINES OF 17 DECEMBER 2012**

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## **I. INTRODUCTION**

1. The Pre-Trial Judge has established a Working Plan setting various deadlines for the Parties and participating victims to complete necessary tasks in preparing the case for trial. The Prosecution has since requested an extension of time to comply with certain of its obligations under that Working Plan and the Pre-Trial Judge hereby issues his decision on this request.

## **II. PROCEDURAL BACKGROUND**

2. On 25 October 2012, the Pre-Trial Judge issued orders establishing a Working Plan pursuant to Rule 91(A) of the Rules of Procedure and Evidence (the “Rules”).<sup>1</sup>

3. On 14 November 2012, the Prosecution filed a Notice advising on the status of its compliance with the Working Plan and requesting extensions to certain deadlines in the Working Plan for the disclosure of material to the Defence (the “Prosecution Request”).<sup>2</sup>

4. On 29 November 2012, Defence Counsel for Mr. Sabra (“Sabra Defence”) and Mr. Ayyash (“Ayyash Defence”) filed responses to the Prosecution Request.<sup>3</sup>

## **III. DISCUSSION**

5. The Prosecution seeks extensions to deadlines in relation to the disclosure of three types of material, namely: (a) 368 specific exhibits subject to a decision on protective measures for experts; (b) 10 expert reports [REDACTED]; and (c) Rule 113 material generally.

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<sup>1</sup> STL, *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 (“Working Plan Order”). Rule 91(A) provides: “At the beginning of the pre-trial proceedings, the Pre-Trial Judge shall establish a working plan indicating, in general terms, the obligations that the Parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled”.

<sup>2</sup> STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Notice regarding the Working Plan and Request to Extend Certain Deadlines, confidential, 14 November 2012, with a public redacted version filed on 15 November 2012.

<sup>3</sup> STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Sabra’s Consolidated Response to Prosecution Motions regarding Disclosure, confidential, 29 November 2012 (“Sabra Response”); Ayyash Response to the Prosecution Notice regarding the Working Plan and Request to Extend Certain Deadlines, confidential, 29 November 2012 (“Ayyash Response”).

6. The Prosecution also seeks authorisation to place 170 CDs, referenced in the 368 exhibits, on the [REDACTED] Tribunal's internal computer system.

#### **A. General observations**

7. The Pre-Trial Judge recalls his Working Plan Order which stipulates that where Parties have "sufficient grounds to establish that they cannot comply with the dates set out in the working plan" they may seize the Pre-Trial Judge with a request for variation on showing "good cause".<sup>4</sup>

8. For the reasons explained below, the Pre-Trial Judge grants the extensions in relation to the expert reports [REDACTED] and the Rule 113 material generally. However, it must be stressed at the outset that in the circumstances, the finding of "good cause" for such extensions of time is made with some reluctance and is heavily qualified for these two sets of requests, albeit to a lesser extent in relation to the expert reports. It is abundantly clear, by the Prosecution's own admission, that its "procedures in place previously were inadequate" and that only fairly recently, "new systems and procedures were established and staffing put in place".<sup>5</sup> As a matter of principle, internal organisational considerations, a heavy workload, or technical impediments alone are insufficient bases as "good cause" in seeking extensions of judicially set deadlines.<sup>6</sup> Delays of a Party's own making are not a satisfactory reason to justify the "good cause" threshold. Moreover, they place the Pre-Trial Judge in the invidious position of ruling on what is in effect a *fait accompli*.

9. However the Pre-Trial Judge is satisfied that in the current circumstances, the Prosecution is acting in good faith and taking all necessary measures to remedy its failures, in order to fulfil the Prosecutor's unique responsibilities as a minister of justice charged with assisting in the administration of justice.<sup>7</sup> The Pre-Trial Judge also takes into account the overriding benefit to the Defence of the potential disclosure of exculpatory material pursuant to Rule 113 which is intrinsic to the Defence's fundamental right to a fair trial. In

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<sup>4</sup> Working Plan Order, para. 22.

<sup>5</sup> Prosecution Request, para. 46.

<sup>6</sup> International Criminal Tribunal for the former Yugoslavia ("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.

<sup>7</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Sabra Defence's First, Second Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para. 32 ("Decision on Motions for Disclosure"); STL, Case No. CH/PTJ/2009/06, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, 29 April 2009, para. 25; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 50(1).

combination with the Prosecution's assurances that it will meet the new deadlines requested due to the steps it has taken to remedy the problems identified,<sup>8</sup> the Pre-Trial Judge finds, on balance, that the "good cause" threshold has been met in this exceptional instance.

10. Accordingly, on balance, the Pre-Trial Judge will rule in favour of an extension of the deadlines to the Prosecution insofar as they relate to expert reports and Rule 113 disclosures. It must be made clear however that the Pre-Trial Judge, by this ruling, does not condone the failings within the Office of the Prosecutor which have resulted in these delays to the Working Plan and may possibly impact on the preparation of the Defence.

11. The Pre-Trial Judge is conscious that the granting of the various extensions sought by the Prosecution may have an impact on the rights of the defence to have adequate time to prepare its case. As the Pre-Trial Judge noted at a previous status conference on 27 November 2012, procedures must be both expeditious and fair so if the Defence sees fit to seise him with a motion detailing any actual prejudice suffered by the Defence together with reasonable alternative proposals to ameliorate such prejudice, such matters will be duly considered.<sup>9</sup>

#### **B. Exhibits subject to decision on protective measures for experts**

12. The Prosecution has identified 368 exhibits consisting of reports or documents as well as video and audio files.<sup>10</sup> Of these 368 exhibits, 104 exhibits contain CD attachments,<sup>11</sup> totalling 170 CDs.<sup>12</sup>

13. The Prosecution requests an extension to 31 January 2013 to disclose the 368 exhibits, including the associated 170 CDs. At the time of filing the Prosecution Request, a separate motion by the Prosecution seeking protective measures in relation to the identities of State-provided international experts was still pending (the "Protective Measures Motion").<sup>13</sup> The

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<sup>8</sup> Prosecution Request, paras 46-48.

<sup>9</sup> See, STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Official Transcript of Status Conference, 27 November 2012 ("Transcript 27 November 2012"), p. 71, lines 6-10.

<sup>10</sup> Prosecution Request, para, 14, Annexes B and C.

<sup>11</sup> Prosecution Request, Annex B.

<sup>12</sup> Prosecution Request, para. 16.

<sup>13</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution's Second Application for Interim Non-Disclosure of the Identity of Witnesses Pursuant to Rule 115 and Witness Protective Measures Pursuant to Rule 113, 15 March 2012; as amended by Prosecution Notice Pursuant to the Pre-Trial Judge's Decision of 2 August 2012 & Request for Interim Protective Measures, 24 September 2012; Prosecution Request for Leave to Withdraw its Application of 21 December 2011 and Modify its Application of 15 March 2011 (*sic*) for Protective Measures, 5 June 2012; Prosecution Notice Pursuant to the Pre-Trial Judge's Decision of 14 June

Prosecution submits that an extension of time to disclose the 368 exhibits is justified as it needs to redact the exhibits, on an interim basis, insofar as they identify experts subject to the Protective Measures Motion.<sup>14</sup>

14. On 13 December 2012, the Pre-Trial Judge issued his decision denying the Protective Measures Motion and ordered the disclosure of the identities of the relevant experts by 15 January 2013.<sup>15</sup> As a consequence, the Prosecution's request for an extension in relation to the 368 exhibits is moot. For the sake of consistency, however, the Pre-Trial Judge orders that an extension of time will be granted for the disclosure of the 368 exhibits by no later than 15 January 2013 though the Prosecution is strongly encouraged to disclose those documents on a rolling basis if necessary, and in any event, as soon as possible prior to that date.

15. For these same reasons, the Pre-Trial Judge authorises the Prosecution to disclose the 170 CDs attached to the 368 exhibits by placing them on [REDACTED] by no later than 15 January 2013.

### **C. Expert Reports [REDACTED]**

16. The Working Plan required the Prosecution to disclose all expert reports it intends to rely on at trial by 15 November 2012.<sup>16</sup>

#### **1. Prosecution Submissions**

17. The Prosecution seeks extensions of various dates with respect to 10 pending expert reports [REDACTED]. The Prosecution submits that the Pre-Trial Judge retains the inherent authority to vary his own orders with good cause,<sup>17</sup> observing also the reliance on Rule 9 to do so in previous instances in these proceedings where Prosecution responses to filings by the Defence were filed after the deadline.<sup>18</sup>

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2012 & Request for Interim Protective Measures, Confidential and ex parte, 17 July 2012, with a public redacted version filed the same day. *See also*, Decision Authorising the Withdrawal of the Prosecution Application of 21 December 2011 and the Modification of the Application of 15 March 2012 Requesting Protective Measures for Witnesses, 14 June 2012; and Interim Order Relating to the Prosecution's Request Concerning Interim Protective Measures of 17 July 2012, 2 August 2012.

<sup>14</sup> Prosecution Request, para. 14.

<sup>15</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Décision relative à la requête du Procureur sollicitant des mesures provisoires de protection de témoins experts*, 13 December 2012 ("Protective Measures Decision"), Disposition, p. 15.

<sup>16</sup> Working Plan Order, Disposition, p. 15, para. (2).

<sup>17</sup> Prosecution Request, para. 8 and footnotes thereto.

<sup>18</sup> *Ibid.* *See*, Decision on Motions for Disclosure, para. 59, Disposition, p. 20, para. (g).

18. In general, the Prosecution explains that the delays have arisen due to its dependence on the schedule and workloads of external experts authoring these reports.<sup>19</sup> Furthermore, in some cases, an expert is required to consider conclusions of one or more other experts and the Prosecution has had to manage the finalisation of its expert reports sequentially.<sup>20</sup> Consequently, a delay by one expert has created delays in the finalisation of reports by related experts.<sup>21</sup>

19. The Prosecution contends it has good cause in seeking an extension of time to disclose eight outstanding expert reports and two models, listed in Annex A to the Prosecution Request, for the reasons which follow:

- a) "Report 1" [REDACTED].<sup>22</sup> [REDACTED].<sup>23</sup> [REDACTED].<sup>24</sup> The Prosecution requests an extension of time to disclose this report by 11 January 2013.<sup>25</sup>
- b) "Report 2" [REDACTED].<sup>26</sup> [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup> [REDACTED].<sup>29</sup> [REDACTED].<sup>30</sup> The Prosecution seeks an extension of time to disclose Report 2 by 11 January 2013.<sup>31</sup>
- c) "Report 3", [REDACTED].<sup>32</sup> The Prosecution seeks an extension of time to disclose this report by 31 January 2013.<sup>33</sup>
- d) "Report 4" [REDACTED].<sup>34</sup> The Prosecution seeks an extension of time to disclose this report by 8 February 2013.<sup>35</sup>
- e) "Report 10" [REDACTED].<sup>36</sup> [REDACTED].<sup>37</sup> The Prosecution indicates its intention to disclose a preliminary report by 30 November 2012 (see paragraph 20(b))

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<sup>19</sup> Prosecution Request, para. 21.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Prosecution Request, para. 23.

<sup>23</sup> *Ibid.*

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

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

<sup>26</sup> Prosecution Request, paras 35-37.

<sup>27</sup> Prosecution Request, para. 36.

<sup>28</sup> Prosecution Request, para. 37.

<sup>29</sup> Prosecution Request, para. 41.

<sup>30</sup> Prosecution Request, para. 42.

<sup>31</sup> Prosecution Request, para. 57(c)(ii).

<sup>32</sup> Prosecution Request, paras 31-32.

<sup>33</sup> Prosecution Request, para. 57(c)(iii).

<sup>34</sup> Prosecution Request, para. 32.

<sup>35</sup> Prosecution Request, para. 57(c)(iv).

below), but also requests an extension of time to disclose a final report by 21 December 2012.<sup>38</sup>

- f) "Report 11" [REDACTED].<sup>39</sup> [REDACTED].<sup>40</sup> The Prosecution expects to receive this report by 31 January 2013 and requests an extension of time to disclose the report by 8 February 2013.<sup>41</sup>
- g) The Prosecution intends to disclose [REDACTED] (Item 14 on Annex A) [REDACTED].<sup>42</sup> The Prosecution expects to receive [REDACTED] by 31 December 2012 and make them available for inspection by 15 January 2013.<sup>43</sup>
- h) An addendum to the Report of [REDACTED] is subject to finalisation of Reports 2, 3 and 4 above.<sup>44</sup> This suite of reports supplements an interim report by [REDACTED] which has already been disclosed (see paragraph 20(a) below). The Prosecution seeks an extension of time to disclose this addendum by 15 February 2013.<sup>45</sup>

20. In addition to the abovementioned reports, extensions requested in relation to the following three reports are now moot:

- a) An interim report by [REDACTED] (described in paragraph 19(h) above) which the Prosecution confirmed, at a status conference of 27 November 2012, has since been disclosed.<sup>46</sup> This interim report was in fact disclosed on 16 November 2012.<sup>47</sup>
- b) A preliminary report by [REDACTED] (described in paragraph 19(e) above) which the Prosecution indicated would be disclosed by 30 November 2012,<sup>48</sup> and was in fact disclosed on 10 December 2012.<sup>49</sup>

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<sup>36</sup> Prosecution Request, para. 25.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Prosecution Request, para. 26.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Prosecution Request, para. 27.

<sup>43</sup> *Ibid.*

<sup>44</sup> Prosecution Request, para. 32.

<sup>45</sup> Prosecution Request, para. 43.

<sup>46</sup> Transcript 27 November 2012, p. 3, lines 21-25. The Prosecution originally requested relief for the filing of the interim report of the Prosecution Forensics Coordinator by 19 November 2012. This interim report has since been filed and is now moot.

<sup>47</sup> Email correspondence by the Office of the Prosecutor to a Legal Officer of the Pre-Trial Chamber, dated 11 December 2012.

<sup>48</sup> Prosecution Request, para. 25.

c) "Report 9" [REDACTED].<sup>50</sup> This report was disclosed on 14 December 2012.<sup>51</sup>

## 2. Defence Responses

21. The Ayyash Defence opposes the Prosecution Request on the basis that the Prosecution has failed to demonstrate good cause for the delays requested. Furthermore, the Ayyash Defence submits that the Prosecution should be precluded from relying on any expert evidence at trial which has been disclosed after 15 November 2012, except by leave showing just cause and exceptional circumstances.<sup>52</sup>

22. The Ayyash Defence contends that "good cause" requires the Prosecution to demonstrate thorough due diligence in meeting deadlines.<sup>53</sup> It queries various deficiencies in the Prosecution's explanations.<sup>54</sup> For instance, the Ayyash Defence queries unexplained delays in forwarding certain reports to other experts relying on those reports,<sup>55</sup> how much time had passed in between the decision to forego unavailable experts and retaining substitute experts,<sup>56</sup> or why further work is claimed to be required after having actually received certain reports.<sup>57</sup>

23. The Sabra Defence opposes the Prosecution Request on two grounds. First, it takes issue with the procedure employed to vary the deadline, in particular, the Prosecution's reliance on the notion of "good cause" contained in Rule 9.<sup>58</sup> The Sabra Defence seeks to distinguish reliance on Rule 9 for variations to time limits for filing responses to motions, as opposed to motions seeking variation of time limits to disclose evidence.<sup>59</sup> Moreover, it asserts that it will be prejudiced by these "unreasonable delays" which will result in it having insufficient time to prepare its defence and instruct its own experts.<sup>60</sup> In the examples supplied by the Prosecution, the Sabra Defence argues that the variation of responses for late filings were a matter of hours, as opposed to several months as is being requested in the

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<sup>49</sup> Email correspondence by the Office of the Prosecutor to a Legal Officer of the Pre-Trial Chamber, dated 11 December 2012.

<sup>50</sup> Prosecution Request, para. 24.

<sup>51</sup> Email correspondence by the Office of the Prosecutor to a Legal Officer of the Pre-Trial Chamber, dated 14 December 2012.

<sup>52</sup> Ayyash Response, paras 2 and 17(a).

<sup>53</sup> Ayyash Response, para 3.

<sup>54</sup> Ayyash Response, paras 3-9.

<sup>55</sup> Ayyash Response, para. 3 (Report 1).

<sup>56</sup> Ayyash Response, para. 4 (Report 9); para. 6 (Report 11).

<sup>57</sup> Ayyash Response, para. 9 (Report 2).

<sup>58</sup> Sabra Response, para. 15.

<sup>59</sup> Sabra Response, para. 15.

<sup>60</sup> Sabra Response, para. 16.



present application.<sup>61</sup> Secondly, the Sabra Defence contends that “good cause” alone is insufficient and that the variation must also be justified on the grounds of “interest of justice” in the same manner as required for the amendment of witness lists.<sup>62</sup> This would require the Pre-Trial Judge to assess the relevance and probative value of the proposed evidence, and inquire whether the admission of the evidence is outweighed by the need to ensure a fair trial.<sup>63</sup>

### 3. Reasons for Decision

24. Rule 77(A) provides the Pre-Trial Judge with the authority and broad discretionary power to grant variations of the orders establishing the Working Plan deadlines.<sup>64</sup> The Pre-Trial Judge recalls in this specific context, that the requirement of good cause arises expressly from his decision in the Working Plan Order which stipulates that where Parties have “sufficient grounds to establish that they cannot comply with the dates set out in the working plan” they may seize the Pre-Trial Judge with a request for variation on showing “good cause”.<sup>65</sup>

25. Insofar as Rule 9 has been raised by the Parties, the Pre-Trial Judge considers that this is irrelevant in determining this matter. Rule 9(A)(i) is limited only to “any time prescribed by the Rules” while Rule 9(A)(ii) operates retrospectively to recognise as validly done “any act carried out after the expiration of a time so prescribed”. The additional criterion of the “interest of justice”, proposed by the Sabra Defence, and any analogy to the variation of witness lists is inappropriate in the present circumstances, particularly where that evidence is presently unavailable to the Pre-Trial Judge to balance it against the need to ensure a fair trial.

26. Having considered the Prosecution’s submissions, the Pre-Trial Judge is satisfied that the Prosecution is exercising its best efforts to manage and expedite the finalisation of its pending expert reports. In circumstances where the Prosecution is reliant on external experts, these delays are, to some extent, outside its control and good cause for the requested extensions has been demonstrated, qualified by the general observations set out in

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<sup>61</sup> Sabra Response, para. 15.

<sup>62</sup> Sabra Response, para. 18 citing *Prosecution v. Milutinovic*, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to add Wesley Clark, 16 February 2007, para. 12.

<sup>63</sup> *Ibid.*

<sup>64</sup> Rule 77(A) STL RPE provides that “[a]t the request of a Party, the Pre-Trial Judge may issue such orders [...] as may be necessary for [...] the preparation or conduct of the proceedings.”

<sup>65</sup> Working Plan Order, para. 22. *See also*, comments in Section III.A above.

Section III.A above. Accordingly, the Pre-Trial Judge grants on this occasion, the extension of time sought for the reports and models.

27. This decision is not to be taken for granted and there may be adverse consequences for repeated failures to comply with set deadlines. The Pre-Trial Judge takes the opportunity to stress that all efforts must be made to comply with these new deadlines and that any further requests for extensions will not be lightly entertained. The Pre-Trial Judge fully expects that requests for extensions of deadlines will not be presented to him as a *fait accompli* but be supported by an indication of when exactly the Prosecution undertook various relevant tasks (such as retaining experts) and why this could not have taken place sooner.

#### **D. Rule 113 material**

28. The Working Plan Order required the Prosecution to disclose all exculpatory Rule 113 material by 30 November 2012.<sup>66</sup>

##### **1. Prosecution Submissions**

29. The Prosecution submits that it will strive to complete its review of Rule 113 material by 31 January 2013, and process the disclosure via the Legal Workflow System on a rolling basis by no later than 28 February 2013.<sup>67</sup> In doing so, the Prosecution refers to its previous “conservative estimate” made prior to the Working Plan Order that it would be in a position to disclose Rule 113 material by 31 January 2013.<sup>68</sup> However, the Prosecution now submits that it has determined that further material beyond what was contemplated in that earlier assessment necessitates a longer period to complete disclosure. The Prosecution advises that it will only be able to complete its review by 31 January 2013 and achieve final disclosure by 28 February 2013.<sup>69</sup>

30. The Prosecution admits that systems, procedures and resources had originally not been put in place to systematically review its collection of material for Rule 113 disclosures

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<sup>66</sup> Working Plan Order, para. 28. Rule 113 provides: “(A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence.”

<sup>67</sup> Prosecution Request, para. 49.

<sup>68</sup> Prosecution Request, para. 47, citing Supplemental Response of 10 October 2012, para. 15.

<sup>69</sup> Prosecution Request, para. 49.

within the timeframe envisaged by the Working Plan, but confirms that it has re-prioritised efforts to facilitate this.<sup>70</sup>

31. The Prosecution explains several obstacles it has faced including: a high volume of material for processing; the need to approach disclosures of Rules 91, 110(B) and 113 incrementally and shift resources as deadlines have been met; the imprecise nature of Optical Character Recognition (“OCR”) software, particularly for Arabic-language documents; a high volume of graphic, table or handwritten documents requiring manual reviews; high volumes of files in the Arabic-language not all of which have been translated or transcribed and [REDACTED]; videos, audio and picture files which must be manually opened and searched; a high volume of file types requiring specialised viewers or compilers which the Prosecution had limited access to; and [REDACTED].<sup>71</sup>

## 2. Defence Responses

32. The Sabra Defence opposes the Prosecution Request on a number of procedural grounds. First, the Sabra Defence takes issue with the absence of an appeal of the Working Plan Order, and the fact that no good reasons have been shown to have arisen in the period between the issue of the Working Plan Order and when the Prosecution Request was filed.<sup>72</sup> Secondly, the Sabra Defence submits that the Prosecution did not comply with the specific procedure for Rule 113 disclosures outlined in the Working Plan Order if the Prosecutor was unable to comply with the 30 November 2012 deadline.<sup>73</sup> This process, it is recalled, required the Prosecution to file a notice: (a) detailing the circumstances in which the additional Rule 113 material was obtained and identified as exculpatory; (b) show good cause for why this additional material was not disclosed by the due date; and (c) explain steps taken, if any, to avert the recurrence of similar delays in the future (the “Rule 113 Specific Disclosure Regime”).<sup>74</sup> Thirdly, the Sabra Defence characterises the Prosecution’s request as, in effect, an application for reconsideration except it fails to follow the requirements of Rule 140 which applies.<sup>75</sup> In this regard, the Sabra Defence avers that no new fact has been demonstrated,

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<sup>70</sup> Prosecution Request, paras 46 and 48.

<sup>71</sup> Prosecution Request, para. 50.

<sup>72</sup> Sabra Response, para. 9.

<sup>73</sup> Sabra Response, para. 10.

<sup>74</sup> Working Plan Order, para. 30.

<sup>75</sup> Sabra Response, paras 11-13. Rule 140 provides: “A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice”.

apart from the Prosecution's own previously inadequate procedures which fails the test requiring new facts.<sup>76</sup> Moreover, no "injustice" has been shown.<sup>77</sup>

33. The Ayyash Defence requests, pursuant to the sanctioning power in Rule 114, that a further order be made for the Prosecution "to allocate all necessary resources to fulfill their disclosure obligation pursuant to Rule 113 forthwith".<sup>78</sup>

### 3. Reasons for Decision

34. As a preliminary matter, the Pre-Trial Judge considers that the Prosecution has provided notice in accordance with the procedure for Rule 113 disclosures set out in the Working Plan, and does not accept the Sabra Defence's characterisation of the Prosecution Request as a reconsideration, nor that certification for appeal is required by Parties to extend Working Plan deadlines.

35. The Pre-Trial Judge accepts the reasons supplied by the Prosecution constitute "good cause", qualified by the general observations set out in Section III.A above, and will grant an extension to disclose this material by no later than 28 February 2013.

36. This extension is granted subject to one important caveat: there is no good reason for the review of material and the uploading of material over Legal Workflow to be undertaken in two discrete steps in the manner suggested by the Prosecution, that is, for review of all material to be completed by 31 January 2013, before disclosure on Legal Workflow on a rolling basis can take place. Disclosure over Legal Workflow can and should take place on a rolling basis as soon as any Rule 113 material is identified and the Prosecution is required to disclose material over Legal Workflow as soon as practicable.

37. The Pre-Trial Judge otherwise dismisses the Ayyash Defence request that the Prosecution be sanctioned with an order that it be required to allocate all necessary resources towards fulfilling its Rule 113 obligations. Such an order is unenforceable and the management of the Prosecution's resources is a matter for it alone.

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<sup>76</sup> Sabra Response, para. 12.

<sup>77</sup> Sabra Response, para. 12.

<sup>78</sup> Ayyash Response, para. 17(b).

### **E. Additional Material: External Media Holdings**

38. The Prosecution has also distinguished from the material outlined in Section III.C above, a large amount of additional material in its possession which it has determined on an “initial cursory review” is of “limited, if any, relevance”.<sup>79</sup> These holdings consist of [REDACTED] (the “external media holdings”).<sup>80</sup>

39. The Prosecution indicates that it intends to properly review the external media holdings for Rule 113 purposes. The Prosecution anticipates that review of this material will take longer than 28 February 2013. Instead, it proposes to adopt and apply the Rule 113 Specific Disclosure Regime outlined in paragraph 32 above and seize the Pre-Trial Judge of a notice of disclosure if Rule 113 material is identified within the collection of external media holdings.<sup>81</sup>

40. The purpose of the Rule 113 Specific Disclosure Regime must be restated. Rule 113 obliges the Prosecution to disclose “any information in [the Prosecution’s] possession or actual knowledge” of an exculpatory nature. It must be expected that the active review and disclosure of Rule 113 material is completed prior to the start of trial notwithstanding that the Prosecution has a continuous obligation to disclose any exculpatory material throughout the proceedings. The Rule 113 Specific Disclosure Regime applies to any “additional” and discrete material which has come into the Prosecution’s possession or actual knowledge at a late stage in the proceeding. It is for this reason that the Pre-Trial Judge established the original deadline of 30 November 2012.

41. The Pre-Trial Judge is surprised and concerned at being placed on notice, at this late stage in the pre-trial phase, of the Prosecution’s failure to properly review the volume of material in its external media holdings which has been in its possession for a lengthy period of time, likely to amount to a number of years. As the Pre-Trial Judge has made clear on previous occasions, the wide measure of discretion afforded to the Prosecution in relation to Rule 113 disclosures is not to be abused but carries with it the heavy responsibility that the Prosecution will fulfil these disclosure obligations in an “organised, comprehensible, useful and effective manner” to ensure delays are minimised and the accused’s fundamental rights

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<sup>79</sup> Prosecution Request, para. 51.

<sup>80</sup> *Ibid.*

<sup>81</sup> Prosecution Request, para. 52.

to a fair trial are fully respected.<sup>82</sup> The general observations in Section III.A are highly relevant to this category of external material holdings.

42. Having now placed the Pre-Trial Judge on notice of that potential source of Rule 113 material in these external media holdings, the Prosecution cannot expect that it has an indefinite amount of time to actively review and disclose any relevant material. Accordingly, taking into consideration the scheduled start date for trial of 25 March 2013, and the need for the Defence to receive these documents prior to that date, the Pre-Trial Judge orders that any Rule 113 material from the external media holdings must be disclosed by no later than 11 March 2013.

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<sup>82</sup> Decision on Motions for Disclosure, para. 32.

**V. DISPOSITION**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO Rule 77(A) of the Rules,**

**GRANTS** the application by the Prosecution in part, and

1. **EXTENDS** the timeframe to 15 January 2013 to complete disclosure of 368 exhibits identified in Annex A to the Prosecution Request.
2. **AUTHORISES** the placement on [REDACTED] the Tribunal's computer system of 170 CDs referenced in 104 exhibits by no later than 15 January 2013.
3. **ORDERS** the disclosure, by way of inspection, of the following:
  - a. Report 1 on Annex A [REDACTED] by 11 January 2013;
  - b. Report 2 on Annex A [REDACTED] by 11 January 2013;
  - c. Report 3 on Annex A [REDACTED] by 31 January 2013;
  - d. Report 4 on Annex A [REDACTED] by 8 February 2013;
  - e. Final Report 10 on Annex A [REDACTED] by 21 December 2012;
  - f. Report 11 on Annex A [REDACTED] by 8 February 2013;
  - g. [REDACTED] (listed in as item 14 on Annex A) by 15 January 2013; and
  - h. Addendum to the Report of [REDACTED] by 15 February 2013.
4. **DISMISSES** as moot, the requests for an extension of time to disclose the following reports:
  - a. Preliminary Report 10 on Annex A [REDACTED];
  - b. Interim report of the [REDACTED]; and

- c. Report 9 on Annex A [REDACTED].
5. **ORDERS** the Prosecution to disclose any Rule 113 material by 28 February 2013.
6. **ORDERS** the Prosecution to review the external media holdings and disclose any Rule 113 material contained therein by no later than 11 March 2013.
7. **ORDERS** that the “Prosecution Notice regarding the Working Plan and Request to Extend Certain Deadlines” and Annex A thereto remain confidential, and Annexes B and C thereto remain confidential and *ex parte*, until further order, subject to any further submission by the Prosecution on the lifting of the confidential or *ex parte* status of these filings.
8. **DENIES** all other requests.

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

Leidschendam, 19 December 2012



Daniel Fransen  
Pre-Trial Judge

