



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 Fransen**

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

Date: **24 December 2012**

Original language: **English**

Classification: **Confidential**

THE PROSECUTOR

v.

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

ORDER REGARDING NARROWING ISSUES CONTESTED AT TRIAL

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. Introduction

1. By way of this order, the Pre-Trial Judge renders a decision on the process by which the Prosecution, the respective Counsel for the Defence of Mr. Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra (collectively, the "Defence" and the "Accused") and the Legal Representative of Victims (the "LRV") can cooperate to record facts which may not be contested at trial.

II. Background and submissions by the participants

2. On 26 July 2012, during a Status Conference, the Pre-Trial Judge issued an oral order instructing the Prosecution and the Defence to submit a report on the situation as to points of agreement or disagreement between them.¹

3. On 28 August 2012, the Prosecution and the Defence submitted a joint report on discussions concerning agreed facts, stating that they were still at a preliminary stage.² The Parties agreed to a process by which the Prosecution would submit "evidentiary bundles" to the Defence for "review and decision on what procedural mechanisms they would consider agreeing to".³

4. On 5 September 2012, during a Working Group Meeting, the Prosecution explained that the Parties are engaged in discussions on agreed facts within the parameters of *inter alia* Rule 122 of the Rules of Procedure and Evidence (the "Rules").⁴

5. On 28 September 2012, during a Status Conference, the Prosecution claimed that the Defence was non-responsive to its efforts to advance the negotiations on agreed facts.⁵ Meanwhile, the Defence argued that whether it can agree to facts without instructions from the Accused is a complicated question of principle.⁶

¹ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Status Conference Official Transcript, 26 July 2012, p. 9.

² STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Prosecution and Defence Submission of Joint Report on Discussions concerning Agreed Facts, 28 August 2012, Confidential Annex A, paras 1, 5-6.

³ *Id.*, para. 6.

⁴ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Rule 91(D) and (E) Meeting Official Transcript, Confidential, 5 September 2012, pp. 42.

⁵ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Status Conference Official Transcript, 28 September 2012, pp. 58-62.

⁶ *Id.*, pp. 64-65.

6. On 9 October 2012, the Defence submitted a joint letter to the Prosecution clarifying its shared position. It stated that although it is not inclined to agree to any alleged fact, it is open to not objecting “to the admission of evidence from the bar table on topics that do not pertain to critical live issues in the case”,⁷ adding that “this procedural route will be just as effective [...] as the Rule 122 process would be.”⁸ The Defence further asserted that it would not make its position known until it receives “assurances that Victims Legal Representatives will not seek to present evidence, and have fulfilled their obligation to disclose exculpatory evidence in relation to each issue subject to discussion.”⁹

7. On 19 October 2012, the LRV submitted a letter to the Parties and the Victims’ Participation Unit stating that he did not wish to participate actively in the process since the potential agreed facts “will likely have no bearing upon the presentation of the participating victims’ case.”¹⁰ However, he asked to be kept informed of the progress made between the Parties on this matter.¹¹

8. On 30 October 2012, during a Working Group Meeting, Counsel for Mr. Ayyash submitted that “the most constructive and ethically sound position for the Defence is found in Rule 122,”¹² more specifically by not contesting an alleged fact, as opposed to overtly agreeing to it.¹³ The Prosecution replied that, to date, the Defence has maintained that it would only agree to not opposing a bar table motion “if and once all the evidence [...] has been disclosed”.¹⁴ On that basis, the Prosecution considered the negotiations between the Parties as having failed and it would no longer provide “evidentiary bundles” to the Defence.¹⁵ The Pre-Trial Judge took note of the positions of the Parties and stated that he would reflect on the matter to find a constructive proposal that could help it move forward.¹⁶

9. On 27 November 2012, during a Status Conference, the Prosecution reiterated that the process has failed because of the Defence’s lack of response and the difficult framework it

⁷ Confidential letter from the Defence to the Office of the Prosecutor, dated 9 October 2012, paras 2-3.

⁸ *Id.*, para. 3.

⁹ *Id.*, para. 4.

¹⁰ Confidential letter from the LRV to the Office of the Prosecutor, Defence Counsel, Pre-Trial Chamber and Victims’ Participation Unit, dated 19 October 2012, para. 2.

¹¹ *Id.*, para. 3.

¹² STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Rule 91(D) and (E) Meeting Official Transcript, Confidential, 30 October 2012, pp. 32-33 (“30 October 2012 Transcript”).

¹³ *Id.*, p. 34.

¹⁴ *Id.*, p. 37.

¹⁵ *Id.*, p. 38.

¹⁶ *Id.*, p. 39.

established by, on the one hand, stating that it would not agree to facts but only consider not opposing the admission of evidence from the bar table, and on the other hand, requiring assurances from the LRV before moving forward.¹⁷ In reply, Counsel for Mr. Badreddine and Mr. Oneissi each reaffirmed that the *in absentia* nature of the proceedings makes it impossible for the Defence to verify certain facts and state its position accordingly.¹⁸ They added however that the Defence would clearly not challenge or object to "obvious" facts.¹⁹ The Pre-Trial Judge stated that he would render a decision on the matter, adding that it would be helpful to allow the Parties to anticipate the "not contested" facts to avoid that they prepare evidence in support of them in vain.²⁰ He specified that preparing the "not contested" facts before the hearing would expedite proceedings and save time and energy for everyone, including for both Parties.²¹

III. Discussion

10. The Pre-Trial Judge has carefully considered the submissions made by the Parties and by the LRV, including those noted in the previous section, in relation to recording points of agreement and disagreement between them.

11. Despite the legitimacy of the concerns raised by the Parties, the Pre-Trial Judge recalls that narrowing the issues in dispute is crucial for the proper administration of justice and for the preparation of an expeditious trial. Furthermore, it is both in the interests of justice and in the interests of the Parties themselves by avoiding that they spend limited resources and courtroom time on bringing evidence in support of facts that may not be in dispute.

12. The Pre-Trial Judge defers to the Defence with respect to its contentions that it cannot in good conscience explicitly agree to facts in the absence of directions from the Accused. However, he considers it fundamental to continue the process of narrowing the issues in

¹⁷ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01//PT/PTJ, Status Conference Official Transcript, 27 November 2012, p. 30 ("27 November 2012 Transcript").

¹⁸ *Id.*, p. 33-34.

¹⁹ *Ibid.*

²⁰ *Id.*, pp. 34-35.

²¹ *Ibid.*

dispute through mutual cooperation with the Prosecution, and more specifically, by qualifying alleged facts as “not contested”, as opposed to “agreed”.²²

13. The Pre-Trial Judge is of the view that the “not contested” facts process can and should take place at an early stage, and it does not require that the Prosecution first complete its disclosure obligations. He stresses that the Prosecution’s witness and exhibit lists could be condensed through narrowing of the issues in dispute. Indeed, the Pre-Trial Judge considers that the “not contested” facts process will in part alleviate the Defence’s concerns in relation to the large amount of evidence in this case. Furthermore, the Defence maintains the option of retracting a “not contested” qualification should the disclosure of new evidence reveal that certain alleged facts in question are indeed subject to contestation.

14. The Pre-Trial Judge has considered the Prosecution’s allegations of a lack of response from the Defence in relation to the “evidentiary bundles” it has provided to date, and hereby establishes a modified framework with set deadlines for the participants.

15. In order to encourage the most efficient use of time and resources, the Pre-Trial Judge invites the Prosecution to identify alleged facts which are likely not to be subject to dispute and to enumerate them in the form of a list. The alleged facts should stem directly from the Indictment in the *Ayyash et al.* case or from the Prosecution’s Pre-Trial Brief and, whenever possible, they should quote these two documents verbatim.

16. The Pre-Trial Judge invites the Defence to respond to the aforementioned list by stating, for each alleged fact listed by the Prosecution, whether it consists of a “not contested” fact in that the Defence has no intention of contesting it at trial. Without prejudice to the rights of the Accused, and only whenever possible, the Defence is encouraged to make the “not contested” attribution collectively. In cases where an alleged fact does not concern all four Accused, Counsel for the Accused who consider themselves unaffected can qualify the alleged fact in question as “not applicable” to their client. This will allow that an alleged fact be recorded as “not contested” by the Accused it concerns without requiring that the other

²² 30 October 2012 Transcript, Counsel for Mr. Ayyash states at pp. 33-34: “So, to summarize, it's our position that we would not be in a position to agree facts; we may be in a position, through 122 and other rules, to not contest facts which achieves the expedited nature of presenting evidence through 155, 156, and the bar table. [. . .]. And for that reason, we've told the Prosecutor that, by all means, we should continue the process by which they provide bundles of evidence on matters that they think are susceptible to agreement through – or non-contestation through 122.”

Accused take position with respect to an alleged fact they consider to be irrelevant for their individual defences.

17. After the Defence has responded to the Prosecution's submission by stating which, if any, alleged facts are "not contested", the LRV is encouraged to review both the Prosecution's list and the Defence's selection of the "not contested" facts, and to make any observations he deems helpful or necessary.

18. The Pre-Trial Judge will then record the narrowing of the issues in dispute conducted by the Parties, as well as any observations made by the LRV.

19. The Pre-Trial Judge reiterates the importance of having the Parties engage in the aforementioned process of narrowing the issues in dispute, as described in Rule 122. While this method of procedural efficiency does not render the "not contested" facts evidence, it does make them alleged facts which the Chamber may consider as being proved²³ and may rely upon, without the need for any evidence to be brought in support of them. The Pre-Trial Judge specifies however that the Chamber is always at liberty to require additional evidence in relation to any allegation, including "not contested" facts.²⁴

²³ Rule 122.

²⁴ *Ibid.*

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 89(D) and 122 of the Rules

INVITES the Prosecution to submit to the Defence and the LRV a list of alleged facts likely not to be contested at trial, as described in this order, by 21 January 2013 at the latest;

INVITES the Defence to respond to the Prosecution's list by indicating which alleged facts are not contested by 21 February 2013 at the latest;

INVITES the LRV to make observations in relation to the Prosecution's list and the Defence's attributions of not contested facts by 7 March 2013 at the latest.

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

Leidschendam, 24 December 2012



Daniel Fransen
Pre-Trial Judge

