

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**
The Pre-Trial Judge: **Mr Daniel Fransén**
The Registrar: **Mr Herman von Hebel**
Date: **21 February 2013**
Original language: **French**
Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION RELATING TO THE DEFENCE MOTION TO VACATE THE DATE FOR THE
START OF 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. Subject of the decision

1. By way of the present decision, the Pre-Trial Judge rules on the request of 23 January 2013 from the Defence for Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra (the “Defence” and the “Accused”) to postpone the date for the start of trial in accordance with Rule 91 (C) of the Rules of Procedure and Evidence (the “Rules” and the “Motion”).¹

II. Procedural background

2. On 28 June 2011, the Pre-Trial Judge issued a decision relating to the indictment of 10 June 2011 drawn up by the Prosecutor. Pursuant to that decision, the Accused were indicted in relation to the attack of 14 February 2005 which resulted in the death of Mr Rafic Hariri and others, and caused injury to other persons.²

3. On 19 July 2012, the Pre-Trial Judge set the tentative date for the start of trial at 25 March 2013, in light, in particular, of his consultation with the Parties during the Status Conference of 12 June 2012, as well as with the President of the Tribunal, with the Presiding Judge of the Trial Chamber and with the Registrar (the “Order Setting the Date of Trial”).³

4. On 25 October 2012, in accordance with Rule 91 (A) of the Rules, the Pre-Trial Judge established a working plan determining the obligations of the Parties and of the participants in the proceedings with a view to the start of trial on 25 March 2013 (the “Working Plan”).⁴

¹ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Defence Motion to Vacate Tentative Date for Start of Trial, confidential, 23 January 2013. A public redacted version was filed on 24 January 2013.

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

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

⁴ 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 (“Order on a Working Plan”).



5. On 23 January 2013, the Defence sought the postponement of the date of the trial in accordance with Article 16 of the Statute and Rules 69 and 77 (A) of the Rules.⁵
6. On 29 January 2013, the Prosecution responded to the Motion (the "Response").⁶
7. On 30 January 2013, the Parties were heard with regard to the Motion during a Status Conference.
8. On 15 February 2013, in accordance with the instructions given by the Pre-Trial Judge during the Status Conference of 30 January 2013, the Prosecution filed a notice regarding the fulfillment of its disclosure obligations (the "Notice").⁷

III. Arguments of the Parties

A. The Motion

9. The Defence seeks the postponement of the date for the start of trial for, among others, the following reasons: the incomplete disclosure of documents by the Prosecution, the volume of evidentiary materials disclosed, the size of the Prosecution file, the shortcomings of the Prosecution's pre-trial brief, the technical and translation issues relating to the documents disclosed, the non-cooperation by the Lebanese authorities, the impact of the possible need for the Defence to have to prepare for allegations of a deliberate line of conduct of the Accused and the absence of the Accused. The Defence considers that together these factors have contributed to restricting its ability to conduct its investigations and prepare for trial. It deems that the date of 25 March 2013 is neither realistic nor reasonable and that the Prosecution itself should have sought the postponement of the start of trial.⁸

10. In concrete terms, the Defence submits that the Prosecution still has to disclose to it approximately 200 documents in accordance with Rule 91 of the Rules, 85 documents being

⁵ Motion, para. 1.

⁶ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to "Joint Defence Motion to Vacate Tentative Date for Start of Trial", confidential, 29 January 2013, with a public redacted version of the same date.

⁷ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution's Notice Regarding Disclosure, confidential, 15 February 2013. The Prosecution filed a public redacted version of the Notice on 18 February 2013.

⁸ Motion, paras 1 and 2.



the subject of a Prosecution request to amend its list of exhibits and others, including some expert reports, which are conditional upon pending requests for witness protection.⁹ The Defence states that the Prosecutor has failed in the disclosure obligations incumbent upon him pursuant to Rule 110 (A) (ii) of the Rules with respect to a number of witnesses.¹⁰ It states that the disclosure relating to the expert witnesses is incomplete and is having a serious impact on its preparation and the work of its own experts.¹¹ The Defence recalls that the Prosecutor also failed to meet his obligations with regard to Rule 110 (B) of the Rules, as indicated by the requests for intervention that it made to the Pre-Trial Judge.¹² It also states that the disclosure of documents in accordance with Rule 113 of the Rules has been extremely tardy and is not yet complete.¹³

11. With regard to the volume of the documents disclosed as of 22 January 2013, the Defence states that it has received 86,236 documents, amounting to approximately 469,000 pages, of which 92 % were only disclosed after 13 November 2012.¹⁴ It adds that it has experienced some technical difficulties to access and understand the documents, as well as difficulties related to the lack of translation of some of them.¹⁵ The Defence reports other difficulties in connection with the Lebanese investigative file, including in particular the lack of an index for the documents disclosed by way of the "Z drive" in that respect.¹⁶ It recalls that the Prosecution witness list comprises 557 witnesses, including 128 experts, and that the list of exhibits comprises 13,173 items.¹⁷

12. Given the number of matters still outstanding, the Defence considers that it is not able to propose a new date for the trial. It considers that the Pre-Trial Judge should not set a new date before the Prosecution has met its disclosure obligations and the Lebanese authorities have responded to their requests for cooperation.¹⁸

⁹ *Id.*, para. 17.

¹⁰ *Id.*, para. 19.

¹¹ *Id.*, paras 20 and 21.

¹² *Id.*, para. 22.

¹³ *Id.*, para. 23.

¹⁴ *Id.*, paras 25-28.

¹⁵ *Id.*, paras 32 et seq.

¹⁶ *Id.*, para. 42.

¹⁷ *Id.*, para. 30.

¹⁸ *Id.*, paras 4 and 60.



B. The Response

13. According to the Prosecution, the following factors identified by the Defence could justify postponing the date of the trial: the incomplete disclosure of the documents, the volume of evidence disclosed, the scale of the case, as well as the technical and translation issues relating to the disclosures.¹⁹ Nevertheless, the Prosecution contests the assertion that it bears the entire responsibility for the delay in the proceedings and that it should itself have sought a postponement.²⁰ It considers that it filed its pre-trial brief, the witness list and the list of exhibits in conformity with Rule 91 (G) (ii)²¹ of the Rules.

14. The Prosecution states that it intends to expand access for the Defence to the call data records in the inspection room and that it is consulting with various organs to find a solution for the documents the Defence is still unable to access on the “Z drive”. It nevertheless considers that it has no obligation to provide an “organisational system” of the “Z drive” along with the disclosures it makes.²²

C. The Notice

15. The Prosecution emphasises the following points: with the exception of two expert reports, one addendum and supporting material for expert reports, all the documents referred to in Rule 91 (G) (iii) of the Rules have been disclosed;²³ the documents referred to in Rules 110 (A) (i) and 88 of the Rules have been disclosed since June 2012;²⁴ with the exception of a number of witness statements which are the subject of a request filed before the Pre-Trial Judge, all the documents referred to in Rule 110 (A) (ii) of the Rules have been disclosed;²⁵

¹⁹ Response, paras 1 and 2

²⁰ *Id.*, paras 4 and 5.

²¹ *Id.*, para. 11 et seq

²² *Id.*, paras 16-18.

²³ Notice, para. 5.

²⁴ *Id.*, para. 6.

²⁵ *Id.*, para. 7.



due to technical difficulties, some documents will be made available for inspection in accordance with Rule 110 (B) of the Rules only from 11 March 2013;²⁶ the disclosure of all the exculpatory evidence (Rule 113 of the Rules) should be finalised on 17 June 2013 instead of 11 March 2013 due to the nature of the research the Prosecution has to conduct.²⁷

IV. Applicable law

16. Rule 91 (C) of the Rules, applicable in the case at hand, provides as follows:

The Pre-Trial Judge, in consultation with the Parties, the Registrar, the Presiding Judge of the Trial Chamber and, if necessary, the President, shall set a tentative date for the start of trial proceedings at least four months prior to that date.

17. In order to rule on a request for postponement of the trial, the case law of the ad hoc tribunals prescribes that, having been seized, a chamber examines whether the interests of justice justify such a request.²⁸

V. Statement of reasons

18. On 19 July 2012, the Pre-Trial Judge decided, in the interests of justice, to set the tentative date for the start of trial for 25 March 2013. He set that date as early as possible so that the Parties and the other participants in the proceedings would be able to anticipate future deadlines and better prepare their case.²⁹ That decision was in response to the obligation of the Pre-Trial Judge to ensure that the proceedings are not unjustifiably delayed in any way, in particular by imposing any measures necessary for the case to be ready for a fair and expeditious trial.³⁰

²⁶ *Id.*, paras 8-13.

²⁷ *Id.*, paras 14-20.

²⁸ ICTY, *The Prosecutor v Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Reasons for Decision Partially Granting the Simatović Defence Urgent Request for Adjournment, 17 April 2012.

²⁹ Order Setting the Date of Trial, para. 19.

³⁰ Article 18, paragraph 2 of the Statute.



19. In order to determine the tentative date for the start of trial on 25 March 2013 and the Working Plan that followed, the Pre-Trial Judge took several factors into consideration, and in particular Article 16 (4) (b) of the Statute, which provides that the accused has the right “[t]o have adequate time and facilities for the preparation of his or her defence”.³¹ The Pre-Trial Judge, moreover, took account of the international case law according to which “[w]hat constitutes ‘adequate time and facilities’ cannot be assessed in the abstract [...]”.³² That time depends on the specific circumstances of the case at hand, and especially on the following criteria: “i) the complexity of the case; ii) the number of counts and charges; iii) the gravity of the crimes charged; iv) the status and scale of the Prosecution’s disclosure; and v) the staffing of the Defence team”.³³

20. The Pre-Trial Judge now notes that some of the obligations provided for in the context of the Working Plan were not met within the deadlines set, as is indeed recognised by the Prosecution. Among those is the fact that the Prosecution did not disclose all the case materials to the Defence as provided by Rules 91 (G) (iii) and 110 (A) (ii) of the Rules. It should also, in addition, be noted that the Defence has encountered and is still encountering technical difficulties in accessing some of these documents and analysing them. Clearly, problems such as these, together with the pending requests for cooperation to the Lebanese authorities, which could not have been anticipated in the Order setting the date of trial, to which can be added the volume of evidence disclosed, are of a nature that justifies and renders legitimate the request to postpone the tentative date for the start of trial submitted by the Defence. Indeed, those factors do not allow the Defence to make efficient use of the time and facilities required to prepare, thus jeopardising the fairness of the proceedings and the

³¹ Order Setting the Date of Trial, para. 14.

³² Order Setting the Date of Trial, para. 13 citing ICTY, *The Prosecutor v Krajišnik*, Case No. ICTY-00-39-A, Appeal Chamber Judgement, 17 March 2009, para. 80; SCSL, *Prosecutor v Taylor*, Case No. SCSL-2003-01-T, Decision on “Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence Its Case on 29 June 2009”, 23 June 2009, para. 19.

³³ *Id.*, citing ICTR, *The Prosecutor v Ndirabwire*, Case No. ICTR-99-54-A, Decision on Augustin Ndirabwire’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28; See also ICTY, *The Prosecutor v S. Milašević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, paras 8-19; See also, ECHR, *Twalib v Greece* (42/1997/826/1032), Judgment of 9 June 1998, para. 40.



compliance with the fundamental guarantees recognised by the general principles of law.³⁴

21. Under the current circumstances of the case, the Pre-Trial Judge considers that maintaining the date for the start of trial at 25 March 2013 would unduly favour the imperative of expeditiousness to the detriment of the fairness of the proceedings. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) stated, “[t]he Trial Chamber’s duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests. This is particularly so in a trial of this scope and complexity, for which there is little precedent.”³⁵ In the case at hand, it is in the interests of justice and the fairness of the proceedings to set a new tentative date for the start of trial.

22. Out of concern for reducing the financial and human resources associated with the organisation of the trial, the Pre-Trial Judge deems it appropriate to inform, as of now, all the interested persons of the postponement of the date for the start of trial.

23. Furthermore, a new tentative date for the start of trial should be set as soon as possible in order to ensure that the proceedings are not unjustifiably delayed in any way. For that purpose, the consultation procedure with the Parties and the participants in the proceedings provided for in Rule 91 (C) of the Rules should start now. In that regard, the Pre-Trial Judge considers that, even if some documents have not yet been filed by the Prosecution, the information currently available, especially that provided by the Prosecution on 15 February 2013 in the Notice, allows the Parties and the participants in the proceedings to already estimate the time they consider they need to prepare. In accordance with Rule 91 (C) of the Rules, the Pre-Trial Judge will then consult with the President of the Tribunal, the Presiding Judge of the Trial Chamber and the Registrar.

24. At the end of this consultation process, the Pre-Trial Judge will establish a new Working Plan setting out clearly the obligations of the Parties and of the participants with a

³⁴ Articles 16 and 18, paragraph 2 of the Statute.

³⁵ ICTY, *The Prosecutor v. Prlić et al*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 16.



view to preparing for the trial as well as the deadlines to be met and will set a new tentative date for the start of trial, taking into account the need for efficiency, expeditiousness and fairness of the trial. The Pre-Trial Judge considers that, in the meantime, every effort must be made to meet the obligations laid down in the Working Plan and the various decisions setting the deadlines. In that connection, he points out that if the Parties consider that they are unable to meet the deadlines set, they may only seek new deadlines by submitting a request for that purpose to the Pre-Trial Judge. That request, duly reasoned and filed in good time, must justify in a detailed and precise manner the reasons for which the requesting party deems itself to be unable to meet the deadlines set.³⁶

VI. Disposition

FOR THESE REASONS,

Pursuant to Rules 77 and 91 (C) of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Request admissible and well-founded;

ORDERS the postponement of the tentative date for the start of trial;

ORDERS the Defence and the Legal Representative of Victims to send him a detailed note containing a precise estimation of the time they require to prepare for the trial, as well as a reasoned proposal for a tentative date for the start of trial by 8 March 2013 at the latest;

ORDERS the Prosecution to send him a detailed note containing a reasoned proposal for a tentative date for the start of trial by 8 March 2013 at the latest; and

³⁶ Order on a Working Plan, para. 22.



REMINDS all the participants in the proceedings that they must meet their obligations in accordance with the Working Plan.

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

Léidschendam, 21 February 2013

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[signature]

Daniel Fransen
Pre-Trial Judge

