

**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: **27 February 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION REQUEST OF 21 DECEMBER 2012 TO AMEND
THE WITNESS AND EXHIBIT LISTS AND FOR AUTHORISATION FOR
FURTHER DISCLOSURE**

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. In this decision, the Pre-Trial Judge rules on the Prosecution's requests to amend the Witness and Exhibit Lists, and for authorisation for further disclosure.¹

II. Procedural History

2. On 25 October 2012, the Pre-Trial Judge issued an order on a working plan by which *inter alia* he ordered the Prosecution to file its pre-trial brief — which was to include its list of witnesses and exhibits, as well as the statements of all listed witnesses, all listed exhibits and all expert reports it intended to rely on at trial — by 15 November 2012.²

3. On 15 November 2012, and pursuant to the Order on a Working Plan, the Prosecution filed its pre-trial brief.³

4. On 17 December 2012, the Pre-Trial Judge issued his Decision on the Prosecution's Request to Extend Working Plan Deadlines in which *inter alia* he extended certain deadlines, and imposed several others.⁴

5. On 21 December 2012, the Prosecution filed the Request.

6. On 15 January 2013, Counsel for Messrs Ayyash,⁵ Badreddine,⁶ and Sabra⁷ filed their respective responses to the Request. Counsel for Mr. Oneissi joined the Sabra Response “in

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request to Amend the Witness and Exhibit Lists and Authorization for Further Disclosure (Confidential with Confidential Annexes A to I), 21 December 2012 (the “Request”). A public redacted version of the Request was filed on the same day. The “Witness List” and the “Exhibit List” were filed as confidential Annexes B and C, respectively, to the Prosecution's Submission Pursuant to Rule 91, confidential, 15 November 2012, with a public redacted version of the submission dated the same day. All further references to filings and decisions relate to this case number unless otherwise stated.

² Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012 (the “Order on a Working Plan”).

³ Prosecution's Submission Pursuant to Rule 91, 15 November 2012, which included its confidential pre-trial brief (Annex A) with a public redacted version of Annex A dated the same day.

⁴ Decision on Prosecution's Request to Extend Working Plan Deadlines, confidential, 17 December 2012 (the “Decision of 17 December 2012”) with a public redacted version dated 19 December 2012. This Decision ruled on the 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.

⁵ Ayyash Response to Prosecution Request to Amend the Witness and Exhibit Lists and Authorization for Further Disclosure, confidential, 15 January 2013 (the “Ayyash Response”).

⁶ *Réponse de la Défense de M. Badreddine à la requête du Procureur aux fins d'amendement de ses listes de pièces et de témoins et de divulgation de pièces supplémentaires*, confidential, 15 January 2013 (the “Badreddine Response”) with a public redacted version dated 17 January 2013.

⁷ Sabra Response to Prosecution Request to Amend the Witness and Exhibits Lists and Authorisation for Further Disclosure, confidential, 15 January 2013 (the “Sabra Response”).

all respects”.⁸ Counsel for each accused are hereinafter collectively referred to as the “Defence”.

7. On 28 January 2013, the Prosecution filed a corrigendum to the Request.⁹

III. Summary of Issues and Contentions

8. In the Request, the Prosecution seeks leave to amend its Witness List and Exhibit List, and disclose further material as specified, and submits that there is good cause for granting the requested relief.

9. Given the numerous issues for determination, together with the various responses received from the Defence, the Pre-Trial Judge shall address each in turn below (paragraph IV.A-F), following the issues raised by the Prosecution in the Request.

10. Counsel for Mr. Ayyash (the “Ayyash Defence”) objects to the Request in general, on the grounds that the Prosecution has failed to demonstrate good cause for the addition of further witnesses or exhibits to the lists, and citing the Pre-Trial Judge’s previous ruling that delays of a Party’s own making do not constitute good cause.¹⁰ The Ayyash Defence claims the Request is “framed [...] as a ‘fait accompli’” which asks the Pre-Trial Judge to authorise further witnesses and exhibits and late disclosure “to the detriment and prejudice of the Accused and their attempts to prepare for trial.”¹¹ In relation to the Prosecution’s policy of not disclosing underlying materials, the Ayyash Defence submits that all underlying material should be both disclosed and exhibited.¹² Lastly, the Ayyash Defence opposes the Prosecution’s request for disclosure “on a rolling basis” and argues for full and complete disclosure immediately.¹³

11. Counsel for Mr. Badreddine (the “Badreddine Defence”) likewise emphasises that the Request is a further example of the Prosecution’s policy of imposing a *fait accompli*. For the Badreddine Defence, the filing of the Request one month after the applicable deadline is an

⁸ The Defence for Hussein Hassan Oneissi Joinder to the ‘Sabra Response to Prosecution Request to Amend the Witness and Exhibits Lists and Authorisation for Further Disclosure’ dated 15 January 2013, confidential, 15 January 2013.

⁹ Corrigendum to Prosecution Request to Amend the Witness and Exhibit Lists and Authorization for Further Disclosure, confidential, 28 January 2013 (the “Corrigendum”) with a public redacted version dated the same day.

¹⁰ Ayyash Response, paras 1-3, citing the Decision of 17 December 2012 at para. 8.

¹¹ *Id.* at para. 4.

¹² *Id.* at para. 5.

¹³ *Id.* at para. 6.

unreasonably long time in which to seek to rectify clerical errors, all the more so given the importance which the Prosecution attaches to the witnesses and exhibits it seeks to add to its lists.¹⁴

12. Furthermore, the Badreddine Defence opposes the variation sought by the Prosecution of the mode of expected testimony of one of three witnesses on the Witness List, and the addition of both a further 14 specific exhibits (identified as numbers 2-15 in Annex D to the Request) together with the addition of a witness. The Badreddine Defence submits that the Prosecution seeks these changes after reconsideration of its trial preparation, and that the changes seek to establish alleged facts that the Prosecution failed to include in either the confirmed indictment or in the Prosecution's pre-trial brief, and which are therefore new allegations.¹⁵

13. Counsel for Mr. Sabra (the "Sabra Defence") opposes the Request for its alleged failure to show the requisite good cause, because it prejudices the Defence's preparations for trial in advance of the tentative 25 March 2013 start date, and because it again demonstrates the Prosecution's failure to exercise due diligence.¹⁶ Following an analysis of prior decisions, the Sabra Defence submits that "'good cause' implies both sufficiently detailed justification for the addition of the witness or exhibit, and some reason as to why it wasn't included previously, together with an assessment of the prejudice to the affected party, in this case the Defence."¹⁷

14. In addition to its responses to the particular matters raised in the Request, the Sabra Defence requests the Pre-Trial Judge to order the Prosecution to fully review all its evidence collections to ensure that all prior statements of the proposed Prosecution witnesses have now been disclosed.¹⁸

IV. Submissions

15. The Pre-Trial Judge will now consider the particular requests of the Prosecution — together with the relevant responses thereto, if any, by the Defence — in order to determine whether each is supported by the requisite good cause.

¹⁴ Badreddine Response, para. 2.

¹⁵ *Id.* at paras 8-11.

¹⁶ Sabra Response, para. 1.

¹⁷ *Id.* at para. 2.

¹⁸ *Id.* at para. 21.

A. Amendments to the Witness List

16. The Prosecution seeks leave to add 27 witnesses to its Witness List, and to amend the summary or mode of testimony of three witnesses. This is because:

- a) 12 witnesses were “inadvertently omitted from the Witness List”;¹⁹
- b) 11 witnesses are subject to pending responses from the Defence on the possible admission of their statements from the bar table;²⁰
- c) four witnesses are being added after reconsideration of the Prosecution’s trial preparation (one of whom required consideration for protective measures);²¹
- d) three witnesses on the Witness List require amendment in respect of either their mode of testimony or their summaries.²²

17. The Prosecution undertook to disclose the associated materials by 25 January 2013,²³ and to file an amended Witness List reflecting all the amendments authorised within two working days of any order granted.²⁴

18. The Prosecution submits that good cause exists for the Pre-Trial Judge to amend the Witness List as requested pursuant to Article 18(2) of the Statute and Rule 77(A) of the Rules of Procedure and Evidence (the “Rules”).²⁵ The Prosecution makes general submissions that no undue prejudice would be occasioned to the Defence, that the Request was made three months ahead of the tentative date for the start of trial, and that the witnesses concerned are few in number. In addition, the Prosecution contends as follows:

- a) With respect to the 12 additional witnesses, the good cause is that “the Prosecution intended to include these witnesses on the Witness List, but despite its best efforts,

¹⁹ Request, para. 5. The Prosecution avers that the Defence was already aware of two of these Witnesses as their reports have already been disclosed; the remaining 10 witnesses relate to exhibits which appear on the Exhibit List and have already been disclosed.

²⁰ *Id.* at paras 6, 7. The Prosecution avers that these 11 witnesses “relate to a future bar table motion regarding the admissibility of four exhibits” who — depending on the position of the Defence — may not need to be added to the Witness List after all.

²¹ *Id.* at para. 8.

²² *Id.* at para. 10. The Prosecution seeks to change the expected format of testimony of one witness from Rule 155 to *viva voce*, of another witness from *viva voce* to Rule 155, and to amend the summary of a third witness.

²³ *Id.* at para. 3.

²⁴ *Id.* at paras. 4, 24.

²⁵ *Id.* at paras 11-17.

[they] were inadvertently omitted” from the final list “through clerical error”²⁶ which error was identified during the Prosecution’s further review to ensure that all witnesses had been listed, and all relevant material disclosed.²⁷

- b) With respect to the 11 additional witnesses, the good cause is that these witnesses are “necessary in order to provenance [*sic*] four exhibits” should the Defence oppose their future admission via a bar table motion.²⁸
- c) With respect to the four additional witnesses, but for one witness, no further arguments are made to establish the good cause supporting their admission to the Witness List.²⁹
- d) With respect to the three witnesses on the Witness List for whom corrections to their modes of testimony or summaries are sought, “the good cause for granting leave is that these are minor corrections”.³⁰

19. The Prosecution highlights that the Rules of this Tribunal — unlike the Rules of the International Criminal Tribunals for the Former Yugoslavia and Rwanda — contain no specific provision on the amendment of a Witness List. Nevertheless, the Prosecution submits that the criterion of “the interests of justice” can be adopted from those *fora* and applied in cases before this Tribunal.³¹

20. With respect to the four exhibits the Prosecution seeks to admit from the bar table, the Badreddine Defence does not oppose this form of admission for these four exhibits.³²

21. Further to its generic reasons for opposing the Request,³³ the Sabra Defence opposes the addition to the Witness List of three sets of witnesses. First, for the 12 witnesses the Prosecution inadvertently omitted from the list, the Sabra Defence avers that the Prosecution is seeking to benefit from its own inadequacies. Second, the Sabra Defence points out that many witnesses who have been accorded protective measures appear on the Witness List using pseudonyms, and the Prosecution fails to explain why any such witness was not listed

²⁶ *Id.* at para. 12.

²⁷ *Id.* at para. 13.

²⁸ *Id.* at para. 14.

²⁹ *Id.* at para. 15. The Pre-Trial Judge notes that only the importance of these four witnesses to the Prosecution’s case is advanced.

³⁰ *Id.* at para. 16.

³¹ *Id.* at para. 17.

³² Badreddine Response, paras 6, 7, Annex B.

³³ Sabra Response, para. 3.

according to the applicable deadline. Third, for the four witnesses identified for inclusion on the list after reconsideration of the Prosecution's trial preparation, the Sabra Defence submits that the Prosecution's attempted explanation "means effectively nothing".³⁴

B. Late Rule 110(A)(ii) Disclosure of statements of witnesses already on the list

22. The Prosecution seeks authorisation for the late disclosure of the statements pursuant to Rule 110(A)(ii) of 14 witnesses already on the Witness List which were "inadvertently omitted from the disclosure regime". The Prosecution alleges that the good cause for authorising this aspect of the Request "is that the Prosecution is obligated pursuant to Rule 110(A)(ii) to disclose these statements and it was through inadvertent omission that the Prosecution did not conduct the search and disclosure of these statements by the Working Plan deadline of 30 November 2012."³⁵

23. In response, the Sabra Defence submits that in relying on its disclosure obligations to demonstrate "good cause" for the delay in doing so "completely misunderstands the rationale of the Working Plan Order and the requirement for seeking authorisation for belated disclosure." Rather, the Sabra Defence asserts, the test for "good cause" is whether the Prosecution may be allowed to maintain witnesses on its Witness List despite its failure to disclose all Rule 110(A)(ii) statements in accordance with the schedule set by the Pre-Trial Judge "or whether the prejudice to the Defence by the late disclosure of these statements would prevent" their late disclosure. As such, the Sabra Defence submits that the Prosecution has failed to show good cause in this regard.³⁶

C. Amendments to the Exhibit List

24. The Prosecution seeks leave to amend its Exhibit List by adding 81 exhibits and updating the description of one exhibit already on that list, together with authorisation for the relevant disclosure associated with these amendments.³⁷ These exhibits were either "inadvertently omitted" or only recently "determined necessary for trial".³⁸ In particular, the Prosecution avers the following:

³⁴ *Id.* at paras 4-7

³⁵ Request, paras 1.b, 20.

³⁶ Sabra Response, para. 17.

³⁷ Corrigendum, para. 3. The one exhibit is item 74 described in Annex D to the Request, and has the incorrect ERN range and Title/Description.

³⁸ Request, paras 1(c), 22.

- a) The addition of three particular exhibits is necessary “in order to correct inadvertent disclosure errors”.³⁹
- b) 17 further exhibits were only determined to be necessary to the Prosecution’s case after further review following the deadline of 15 November 2012.⁴⁰
- c) 55 further exhibits were omitted from the Exhibit List “through clerical errors”.⁴¹
- d) Two exhibits were not finalised until after the deadline for filing the Exhibit List.⁴²
- e) Four exhibits were omitted as they relate to protective measures being considered at that time.⁴³

25. In addition, the Prosecution seeks to add a description to Exhibit R91-602920, which has already been disclosed and is already on the Exhibit List but lacks a description.⁴⁴

26. The Prosecution claims that good cause exists to amend the Exhibit List as requested on the grounds that “there is no undue prejudice to the Defence.”⁴⁵ The Prosecution concedes that “most of the exhibits were expected to be on the Exhibit List, but [were not] due to clerical error” while other additional exhibits are now submitted because their necessity has only subsequently become apparent, or because their addition has only recently become possible.⁴⁶ The Prosecution also suggests that the proposed additional exhibits constitute a small fraction of the Exhibit List, and points out that the Request was filed three months ahead of the tentative date for the start of the trial.⁴⁷ Taken together with the relevance and importance of the exhibits, the Prosecution argues that it is in the interests of justice to allow their addition to the Exhibit List.⁴⁸

27. The Prosecution undertook to have completed the disclosure of the materials associated with its proposed amendments to the Exhibit List by 14 January 2013.⁴⁹

³⁹ *Id.* at para. 25(a), referring to items 27, 31 and 70 in Annex D to the Request.

⁴⁰ *Id.* at para. 25(b), (f), referring to items 2-15 and 32-34 in Annex D to the Request.

⁴¹ *Id.* at paras 25(c)–(e), (g)-(i), and Corrigendum para. 2, referring to items 1, 16-22, 24-26, 28-30, 35, 38-45, 47-51, 53-59, 64-69 and 71-85 in Annex D to the Request.

⁴² Request, paras 25(c) and (d), referring to R91-200557 and item 23 in Annex D to the Request.

⁴³ *Id.* at para. 25(g), referring to items 60-63 in Annex D to the Request.

⁴⁴ *Id.* at para. 26; the proposed additional information is contained in Annex E to the Request.

⁴⁵ *Id.* at para. 27.

⁴⁶ *Id.* at para. 28.

⁴⁷ *Id.* at para. 29.

⁴⁸ *Id.* at para. 30.

⁴⁹ *Id.* at para. 31.

Furthermore, the Prosecution advises that it may — in the future — seek leave to include on the Exhibit List certain expert reports, if it intends to rely on those reports.⁵⁰

28. The Sabra Defence opposes the requested additions to the Prosecution's Exhibit List for the same reasons that it opposes additional witnesses. In the alternative, the Sabra Defence argues that if the requested additions are authorised, the Prosecution should disclose any associated materials immediately, and not on a rolling basis.⁵¹ The Sabra Defence does not oppose the addition of a description to Exhibit R91-602920.⁵²

D. Late Disclosure of Exhibits already on the Exhibit List

29. The Prosecution has determined that — at the date of the Request — 24 exhibits on the Exhibit List were “inadvertently omitted from the disclosure process” and only disclosed by 14 December 2012.⁵³ Furthermore, several annexes to materials already on the Exhibit List required review for potential protective measures before their disclosure “by no later than 14 January 2013”. Setting aside the question of the need to move the Pre-Trial Judge for protective measures by way of a separate motion, the Prosecution seeks authorisation for the late disclosure of these materials.⁵⁴

30. The Sabra Defence's opposition to the Prosecution's request for leave to file late disclosures is for the same reasons as summarised at paragraph 21 above.

E. Leave to file amended Witness and Exhibit Lists

31. The Prosecution seeks leave to file amended Witness and Exhibit Lists reflecting all the amendments authorised, and undertakes to do so within two working days of any such authorisation being granted.⁵⁵

F. Guidance on items referred to in Exhibits

32. The Prosecution recalls that referenced or attached items contained within current exhibits, as well as open-source materials, have not been detailed as separate exhibits on the Exhibit List. The Prosecution does not consider that it has an obligation to list these items

⁵⁰ *Id.* at para. 23.

⁵¹ Sabra Response, paras 14-15.

⁵² *Id.* at para. 19.

⁵³ Request, para. 32. These exhibits are listed in Annex F to the Request.

⁵⁴ *Id.* at para. 33.

⁵⁵ *Id.* at paras. 4, 24.

separately on the Exhibit List since it would duplicate material. Nevertheless, the Prosecution reserves its right to tender such material as evidence at trial which will be disclosed to the Defence in any event,⁵⁶ and seeks guidance from the Pre-Trial Judge on the appropriateness of this approach.⁵⁷

33. The Defence opposes the Prosecution's approach. The Ayyash Defence submits that all underlying material should be both disclosed and exhibited.⁵⁸

34. The Badreddine Defence avers that the Prosecution's approach is devoid of any legal basis, that it actually circumvents other applicable provisions, and lacks transparency.⁵⁹ With respect to open-source materials referenced in a particular exhibit, the Badreddine Defence submits that this has unduly delayed the provision of the materials concerned, and that there is no reason not to include all of the materials on the Exhibit List.⁶⁰

35. The Sabra Defence argues that each and every evidential item which the Prosecution relies on should be included in the Exhibit List. To the extent that the Prosecution has not already done so, or not sought judicial clarification on the matter previously, the Sabra Defence contends that the Prosecution has failed to demonstrate good cause.⁶¹

V. Discussion

A. Good Cause

36. The Pre-Trial Judge recalls his Order on a Working Plan, which set the deadlines that the Request effectively seeks to vary, and which also 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.⁶²

⁵⁶ *Id.* at paras 34-37.

⁵⁷ *Id.* at para. 38.

⁵⁸ Ayyash Response, para. 5.

⁵⁹ Badreddine Response, paras 12-13.

⁶⁰ *Id.* at para. 5, referring to Exhibit R91-100040; see Request, para. 35.

⁶¹ Sabra Response, para. 18.

⁶² Order on a Working Plan, para. 22.

37. The Pre-Trial Judge has previously reminded the Prosecution that it is its responsibility to ensure that delays be kept to a minimum in light of the imperative of preparing for a fair and expeditious trial.⁶³

38. In his decision of 25 January 2013,⁶⁴ the Pre-Trial Judge expressly avoided “prescribing an exclusive or exhaustive list of what constitutes ‘good cause’ given his broad discretionary power in Rule 77(A) other than restating that it must be ‘exceptional’ for relief to be granted.”⁶⁵ What constitutes good cause will therefore be determined on a case-by-case basis; it must however be “exceptional” for relief to be granted.⁶⁶ Notwithstanding the foregoing, in subsequent decisions, the Pre-Trial Judge has partially elaborated what is required to show good cause.

39. In the Decision of 17 December 2012, upon finding that the good cause threshold had been met in the “exceptional instance” appertaining, the Pre-Trial Judge held that:

[...] 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 [...]. 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. 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*.⁶⁷

40. The Prosecution’s dealings must be presented transparently and in such a way as to satisfy the Pre-Trial Judge that it is acting in good faith and with due diligence; regular and systematic requests for extensions of time are by definition not exceptional.⁶⁸

41. The Pre-Trial Judge has also stated 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”.⁶⁹ Managing the potential prejudice occasioned to the Defence by authorising relief — upon good cause being shown — is a step subsequent to good cause

⁶³ Decision on Prosecution Request for Extension of Time to Disclose Expert Report and Addendum, confidential, 8 February 2013 (the “Decision of 8 February 2013”), para. 12.

⁶⁴ Decision on Prosecution Request for Extension of Time to Disclose Expert Reports, confidential, 25 January 2013 (the “Decision of 25 January 2013”),

⁶⁵ *Id.* at para. 10 (internal citations omitted).

⁶⁶ Decision of 8 February 2013, para. 10.

⁶⁷ Decision of 17 December 2012, para. 8 (internal citations omitted).

⁶⁸ Decision of 8 February 2013, para. 11.

⁶⁹ Decision of 17 December 2012, para. 11.

being shown, and is not in itself a criterion for establishing good cause. As the Pre-Trial Judge has held previously:

[T]he absence of prejudice to opposing Parties or victims participating in the proceedings [...] per se is not a proper basis for demonstrating the element of “good cause”. It is merely a consideration, and a distinct one from the “good cause” element, that a Chamber may take into account in determining overall whether to grant an extension of time request.⁷⁰

42. The Prosecution therefore cannot base good cause on the absence of prejudice to the Defence or the Legal Representative of Victims (“LRV”); the two concepts are discrete.

43. Based on the foregoing, the Pre-Trial Judge agrees with the Defence’s position and finds that the Prosecution has not shown sufficient good cause that would ordinarily be required to justify the prayers of relief sought in the Request. The litany of reasons offered by the Prosecution fall short of the threshold required for this form of exceptional relief.

44. Furthermore, the Prosecution has shown neither the absence of any prejudice that would be caused to the Defence or the LRV, nor how such prejudice might be mitigated.

45. The Pre-Trial Judge therefore finds himself once again in the position of ruling on what is in effect a *fait accompli*. Although the Prosecution’s own practices have generated the reasons for the Request, the following considerations favour the granting of the Request, notwithstanding the foregoing.

46. First, the Pre-Trial Judge has previously ruled on attempts by the Prosecution to establish good cause, and has recognised that in instances where the jurisprudence has evolved subsequent to the filing of a motion, that motion ought not to be denied for having failed to meet the evolved standard.

[...] considering that the requirements to demonstrate “good cause” for seeking an extension of time as outlined in the foregoing paragraph were not expressly and fully considered in prior jurisprudence, the Pre-Trial Judge grants the [Request] on this occasion insofar as it seeks an extension of time to disclose the Undisclosed Material, or otherwise to file any further motions for protective measures by 28 February 2013. However, in future, the Pre-Trial Judge shall require the matters outlined in the foregoing paragraph to be addressed in submissions, if any, seeking an extension of time for “good cause”.⁷¹

⁷⁰ Decision of 25 January 2013, para. 11.

⁷¹ Decision on Prosecution Request for Extension of Time dated 15 January 2013 – Disclosure of Exhibits, 8 February 2013, confidential, para. 17.

[...] considering that the “good cause” requirements outlined in the foregoing paragraphs were not explicitly considered in prior jurisprudence, the Pre-Trial Judge grants the Request on this occasion.⁷²

47. The motions that resulted in the two decisions cited above were themselves both filed subsequent to the Request in this matter. It would therefore be inconsistent for the Pre-Trial Judge not to apply the same reasoning in this case and thereby grant the Prosecution the leave it seeks on this occasion.

48. Second, and in addition to the foregoing, the Pre-Trial Judge has recently ruled on a joint Defence motion in which he ordered the adjournment of the tentative date of the start of the trial of 25 March 2013, pending determination of a replacement date.⁷³ For current purposes, this substantially mitigates any prejudice that would otherwise be caused to the Defence or the LRV by granting the Request.

49. On balance therefore, the Pre-Trial Judge considers that it is necessary to grant the Request, notwithstanding the multiple failures of the Prosecution identified above.

50. The Pre-Trial Judge emphasises that the Parties are now fully informed of what is required to show good cause for requests for extensions of time. Future failures correctly to demonstrate good cause, consistent with this and previous decisions, will result in the request being rejected.

B. Remaining Matters

51. There are several matters that fall to be distinguished from the foregoing analysis. The first matter to be addressed is the Badreddine Defence’s submission that the Prosecution effectively seeks to establish alleged facts that the Prosecution failed to include in either the confirmed indictment or in the Prosecution’s pre-trial brief. This it allegedly does by requesting leave for the variation of the mode of expected testimony of one of three witnesses on the Witness List, and the addition of both a further 14 specific exhibits, together with the addition of a witness. The Pre-Trial Judge does not consider that the addition of these materials to the Witness and Exhibit Lists is inconsistent with the Prosecution’s obligation,

⁷² Decision of 8 February 2013, para. 13 (internal citations omitted).

⁷³ *Décision relative à la Requête de la Défense en ajournement de la date d’ouverture du procès*, 21 February 2013. In the same Decision, the Pre-Trial Judge ordered the Defence and LRV to provide their estimates of the time they need for their preparation for trial, together with a motivated proposal for a new tentative date of the start of the trial. The Prosecution was likewise ordered to file a motivated proposal for a new tentative date of the start of the trial.

pursuant to Rule 91 of the Rules, to file a pre-trial brief detailing the evidence which the Prosecutor intends to bring at trial. The Defence retains the right to challenge the relevance and admissibility of any evidence before the Trial or Appeals Chambers; Rule 149(C) of the Rules specifically empowers a Chamber to admit any relevant evidence which it deems to have probative value.

52. The second matter is the request in the Sabra Response for the Pre-Trial Judge to order the Prosecution to fully review its entire evidence collection to ensure that all prior statements of the proposed Prosecution witnesses have now been disclosed. This request falls to be denied on two grounds. First, it is made in a response, to which the Prosecution has not had the opportunity to be heard in reply. Second, the Pre-Trial Judge notes two recent filings in the *Ayyash et al.* case: the Prosecution's Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, confidential, 13 February 2013;⁷⁴ and the Prosecution's Notice Regarding Disclosure, which was filed pursuant to a request from the Pre-Trial Judge for the Prosecution to indicate the dates on which it will complete its disclosure obligations.⁷⁵ Since these filings include requests to extend existing timeframes in which the Prosecution is to meet its disclosure obligations, the Pre-Trial Judge is seised of a matter that may resolve the Sabra Defence's request.

53. The final matter is the Prosecution's request for guidance from the Pre-Trial Judge with respect to referenced or attached items contained within current exhibits, and whether they must be detailed as separate exhibits on the Exhibit List. The Prosecution has itself reserved the right to tender such material as evidence at trial, and maintains that it has been or will be disclosed to the Defence in any event. Furthermore, this approach is not supported by the Rules; on the contrary, Rule 91(G)(iii) of the Rules requires the Prosecutor to file the list of exhibits that he intends to "offer".

54. The Pre-Trial Judge therefore considers that it would be appropriate for the Prosecution to include such materials on its Exhibit List, and orders accordingly. In so ordering, the Pre-Trial Judge is cognisant that the inclusion of these materials on the Exhibit List may adversely affect the time it may take the Prosecution to finalise the latter, and the submissions of the Prosecution on the matter are invited accordingly.

⁷⁴ The Prosecution's Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, confidential, 13 February 2013

⁷⁵ The Prosecution's Notice Regarding Disclosure, confidential, 15 February 2013 ("Prosecution's Notice") with a public redacted version dated the same day.

VI. Confidentiality

55. Having filed a public redacted version, the Prosecution asks the Pre-Trial Judge to retain the confidentiality of its Request, together with its annexes, since they contain confidential information.⁷⁶

56. The Badreddine Defence reserves the right to challenge the classification of some of the confidential information so classified by the Request, and neither the Badreddine Defence nor the Sabra Defence has any objection to their own responses being rendered public.⁷⁷

57. In light of the legitimate concerns advanced by the Prosecution, the Pre-Trial Judge considers that confidentiality is warranted until further order, and grants the request.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Article 18(2) of the Statute and Rules 77(A), 89(B) and 91(G)(iii) of the Rules;

GRANTS the Request;

GRANTS the Prosecution leave to amend its Witness List by adding 27 witnesses, and to change the mode of the expected testimony or summary of three witnesses, as stated in Annexes A and B to the Request, respectively;

AUTHORISES the disclosure by the Prosecution of the witness statements, pursuant to Rule 110(A)(ii) of the Rules, of 14 witnesses already on the Witness List, and as listed in Annex C to the Request;

GRANTS the Prosecution leave to amend the Exhibit List by adding 81 exhibits, and by updating the description of one exhibit already listed on the Exhibit List, as stated in Annexes D and E to the Request, respectively;

ORDERS the Prosecution to file an amended Witness List containing the authorised amendments within two working days of this Decision,

⁷⁶ Request, para. 39.

⁷⁷ Badreddine Response, para. 4; Sabra Response, para. 20. The Ayyash Defence made no submissions on the classification of the Ayyash Response.

AUTHORISES the late disclosure of the 24 exhibits already on the Exhibit List (as listed in Annex F to the Request) and the seven annexes of Exhibit R91-600001 and **ORDERS** such disclosure within two working days of this Decision;

ORDERS the Prosecution to include in its Exhibit List those materials which are referenced or attached to or contained within currently listed exhibits;

ORDERS the Prosecution either to file an amended Exhibit List containing the authorised amendments within two working days of this Decision, or to file a submission within two working days of this Decision containing a motivated proposal for an alternative date for the filing of the Exhibit List;

ORDERS the Prosecution to file a notice before the Pre-Trial Judge, within two working days of this Decision, specifying (a) the date by which the disclosure of the material relevant to the amendment of the Witnesses List and Exhibit List, and pursuant to this Decision, will have been effected, and (b) that the Prosecution has completed its review of seven annexes to exhibit Exhibit R91-600001 already on the Exhibit list; and

ORDERS that the Request, its Annexes, and the responses of the Defence remain confidential until further order;

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

Leidschendam, 27 February 2013.



Daniel Fransen
Pre-Trial Judge

