



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: **28 February 2013**

Original language: **English**

Classification: **Public with Confidential Annex A**

THE PROSECUTOR

v.

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

DECISION IN RELATION TO RULE 161 NOTICES ON EXPERT WITNESSES

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I. Introduction

1. By way of this decision, the Pre-Trial Judge rules on the relief requested by Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) in its notice (the “Sabra Notice”)¹ filed on 24 January 2013 pursuant to Rule 161(B) of the Rules of Procedure and Evidence (the “Rules”). Pursuant to Rule 89(E), the Pre-Trial Judge informs the Trial Chamber of the five Rule 161 notices submitted by, respectively, the Sabra Defence, Counsel for Mr. Salim Jamil Ayyash,² Counsel for Mr. Mustafa Amine Badreddine,³ Counsel for Mr. Hussein Hassan Oneissi⁴ (collectively, the “Defence”), and the Prosecution; and refers the matter to said Chamber.

II. Procedural background

2. On 10 December 2012, the Prosecution filed a disclosure notice in relation to expert witnesses pursuant to Rule 161(A), with five confidential annexes (the “Prosecution Notice”).⁵ The contents of the annexes to the Prosecution Notice can be summarised as follows:

- a) Annex A contains an index of 92 reports by 45 expert witnesses. The Prosecution notifies the Pre-Trial Judge that disclosure is complete in relation to these documents.⁶
- b) Annexes B, C, and D contain information relating to 83 expert witnesses on whom the Prosecution intends to rely at trial, but for whom disclosure of relevant documents is still pending.⁷
- c) Annex E is a compilation of the *curriculum vitae* (“CVs”) of some expert witnesses listed in Annex A.⁸

¹ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Sabra Defence Notice Pursuant to Rule 161(B), Public with Confidential Annex, 24 January 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Notice by Ayyash Defence Pursuant to Rule 161(B), Confidential with Confidential Annex, 24 January 2013 (“Ayyash Notice”).

³ Badreddine Defence Notice Pursuant to Rule 161(B), Public with Confidential Annex, 24 January 2013 (“Badreddine Notice”).

⁴ The Defence for Hussein Hassan Oneissi Notice under Rule 161(B) in Response to the Prosecution Notice in Relation to Expert Witnesses Dated 10 December 2012, Confidential, 24 January 2013 (“Oneissi Notice”).

⁵ Prosecution Notice in Relation to Expert Witnesses, Public with Confidential Annexes A through E, 10 December 2012.

⁶ *Ibid.*

⁷ *Id.*, para. 2.

3. The Prosecution therefore expected the Defence to file notices pursuant to Rule 161(B) solely in relation to the experts and statements listed in Annex A to the Prosecution Notice, and within 30 days of it being filed.⁹

4. On 24 January 2013, the Defence filed their respective notices¹⁰ in response to the Prosecution Notice. In particular, the Sabra Notice included, in addition to submissions related to the testimony of expert witnesses, a request to the Pre-Trial Judge for relief.¹¹

5. On 14 February 2013, the Prosecution filed a submission in response to the Sabra Notice (the "Prosecution Response").¹²

III. Submissions

A. The Sabra Notice

6. The Sabra Defence submits that the information provided in Annex A to the Prosecution Notice is insufficient for the Defence to adequately file a Rule 161(B) notice in response. The Sabra Defence believes that the Prosecution should not only indicate the part of the Indictment in the *Ayyash et al.* case (the "Indictment") to which each expert report relates, but it should also specify the material allegation against each accused.¹³

7. The Sabra Defence requests that the Pre-Trial Judge order the Prosecution to: (i) provide additional information as to the intended purpose of the reports listed in Annex A (the "First Request"); and (ii) file a notice regarding the remaining 83 proposed expert witnesses by no later than 15 February 2013 (the "Second Request").¹⁴

8. Pending the requested additional information as to "the intended purpose and relevance of various expert reports",¹⁵ the Sabra Defence takes "a broad approach"¹⁶ to its submissions pursuant to Rule 161(B), only making its position known for 21 of the 92 reports

⁸ *Id.*, para. 1.

⁹ *Id.*, para. 7.

¹⁰ Badreddine Notice; Oneissi Notice; Ayyash Notice; Sabra Notice.

¹¹ Sabra Notice, para. 15.

¹² Prosecution submission on 'Sabra Defence Notice Pursuant to Rule 161(B)', 14 February 2013.

¹³ Sabra Notice, para. 10.

¹⁴ *Id.*, para. 15.

¹⁵ *Id.*, para. 14.

¹⁶ *Id.*, para. 11.

listed in Annex A to the Prosecution Notice.¹⁷ It further reserves the right to file an updated notice should it receive other relevant information.¹⁸

B. The Prosecution Response

9. The Prosecution argues that, firstly, a notice should not include a request for judicial relief and, secondly, the Sabra Notice fails to indicate the basis and reasons for the relief requested.¹⁹

10. In addition, the Prosecution submits that the intended purpose of the expert reports is sufficiently clear, having linked each report to paragraphs of the Indictment.²⁰ The Prosecution further relies on jurisprudence from other international tribunals to stress that it has no obligation to provide additional information as to the purpose and relevance of the reports.²¹ The Prosecution therefore asks the Pre-Trial Judge to dismiss the request for relief sought in the Sabra Notice.²²

IV. Applicable Law

11. Rule 161(A) provides that the “full statement of any expert witness to be called by a Party shall be disclosed to the opposing Party and to the victims participating in the proceedings”.

12. Rule 161(B) reads as follows:

Within thirty days of disclosure of the statement of the expert witness, or such other time prescribed by the Pre-Trial Judge or the Trial Chamber, the opposing Party shall file a notice indicating whether:

- (i) it accepts the expert witness statement;
- (ii) it wishes to cross-examine the expert witness; or
- (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report and, if so, which parts.

13. Therefore, Rule 161(B) establishes a 30-day time limit for the opposing Party to file its submissions on the following four questions: (1) whether it wishes to cross-examine the

¹⁷ Annex A to Sabra Notice, “Rule 161(B) Notice with respect to 45 proposed Prosecution expert witnesses”.

¹⁸ Sabra Notice, para. 14.

¹⁹ Prosecution Response, paras 1-2.

²⁰ *Id.*, para. 10.

²¹ *Id.*, para. 11.

²² *Id.*, para. 12 [*sic.*].

expert; (2) whether it challenges the qualifications of the expert; (3) whether it accepts the expert report; and (4) whether it challenges the relevance of all or parts of the report.²³

14. Rule 161(C) specifies that where the opposing Party accepts an expert statement, the Trial Chamber may admit it into evidence without calling the witness to testify in person.

V. Discussion

A. Jurisdiction of the Pre-Trial Judge

15. The Pre-Trial Judge notes that Rule 161 is designed as a tool for the Trial Chamber to know, ahead of trial, a party's position with respect to the opposing party's experts. It also permits the Trial Chamber to organise the testimonies of expert witnesses by ruling on their qualifications and, eventually, on the admissibility of their evidence. The Pre-Trial Judge recalls that it is generally "for the Chamber to assess whether the witness has sufficient expertise in a relevant subject area and whether the Chamber may benefit from hearing his or her opinion."²⁴ He further recalls that Rule 149(C) and (D), which grants a Chamber the power to admit or exclude evidence, applies to expert evidence as well.²⁵

16. The Pre-Trial Judge therefore lacks jurisdiction with respect to the admissibility of expert evidence and testimony. However, he bears the responsibility of preparing for a fair and expeditious trial and of organising the conduct of proceedings.²⁶ In particular, pursuant to Rule 95, the Pre-Trial Judge is tasked with examining "the documents filed during the pre-trial phase in order to provide the trial judges with useful guidance for preparing for trial."²⁷ He therefore has jurisdiction in deciding upon the procedural matters addressed by the Parties in their respective Rule 161 notices, as evidenced by the references in Rule 161(A) and (B) to the Pre-Trial Judge in relation to setting time-limits.

²³ The Pre-Trial Judge has used these four categories for the confidential table attached to this decision as Annex A ("Annex A to this Decision").

²⁴ International Criminal Tribunal of the former Yugoslavia ("ICTY"), *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 10 October 2012, para. 6, given the similar wording of 149 (C) and (D) and Rule 89(C) and (D) of the ICTY Rules of Procedure and Evidence (the "ICTY Rules").

²⁵ *Id.*, para. 8.

²⁶ Article 21(1) of the Statute; Rules 77(A) and 88(C).

²⁷ Decision on the Motion of the Defence for Mr Badreddine Seeking an Order to Strike Out Certain Sections of the Prosecutor's Pre-Trial Brief, 7 February 2013, para. 13

B. The relief requested in the Sabra Notice

17. The Pre-Trial Judge agrees with the Prosecution that the “requests for judicial relief sought by the Sabra Defence, fall outside the limited procedural scope of a Notice”²⁸ and reminds all the Parties that such requests ought to be filed as motions. The Pre-Trial Judge also notes that this filing oversight has occurred in other instances, notably in the recent notice on disclosure filed by the Prosecution itself.²⁹ Such practice is to be discouraged and the Pre-Trial Judge stresses that future motions seeking judicial relief should be filed separately from notices.

18. With respect to the First Request of the Sabra Notice, the Pre-Trial Judge notes that Rule 161(A) states that the “full statement” of an expert witness called to testify must be disclosed; it is silent as to the disclosure of additional information related to the expert’s statement.

19. The Pre-Trial Judge takes note of the Prosecution’s arguments³⁰ that the expert reports have already been disclosed in full to the Defence, that the Prosecution has linked each report to specific sections of the Indictment, and that it has no generic obligation under Rule 161(A) “to disclose communication or documents drafted in preparation of such a report or early drafts thereof”.³¹ However, the Pre-Trial Judge also recalls that a Chamber, having found that the information contained in a report does not “suffice for purposes of allowing the Defence to challenge it pursuant to Rule [161]”,³² can order the Prosecution to provide additional information and material related to a disclosed expert report.³³

20. The extent of the Prosecution’s disclosure obligations with respect to each expert report, and whether they should include information as to the “specific material allegation against Mr. Sabra, or the other accused”,³⁴ is ultimately a matter for the Trial Chamber to

²⁸ *Id.*, para. 6.

²⁹ Prosecution’s Notice Regarding Disclosure, Confidential, 15 February 2013, para 22, where the Prosecution seeks relief with respect to extensions of time. A Public Redacted Version was filed on 18 February 2013.

³⁰ Prosecution Response, paras 10-11.

³¹ ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69, Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens, 11 March 2011, para. 20.

³² ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Defence Notice Concerning Proposed Expert Witnesses Martin Ols and Susan Maljaars, 9 November 2012, para. 10, given the similar wording of Rule 161 and Rule 94 *bis* of the ICTY Rules.

³³ *Id.*, para. 14, Disposition

³⁴ Sabra Notice, para. 10.

assess as part of its Rule 161 analysis. The Pre-Trial Judge therefore finds that he is not competent to decide on the merits of the First Request of the Sabra Notice.

21. As for the Second Request relating to the remaining 83 expert witnesses, the Pre-Trial Judge considers that, for the reasons elaborated in the following section, the Prosecution must file a complete and final notice pursuant to Rule 161(A) after it has disclosed all the CVs and reports of the expert witnesses it intends to rely on at trial. This updated notice shall address the concerns raised by the Defence in relation to the Prosecution Notice, as outlined in the confidential table attached to this decision as Annex A (“Annex A to this Decision”).

22. Accordingly, in noting that the disclosure deadline for the last expert report is set for the 18 March 2013,³⁵ the Pre-Trial Judge orders the Prosecution to file a complete and final notice pursuant to Rule 161(A) by 2 April 2013 at the latest. The time limit established by Rule 161(B) will then apply.

C. Other procedural concerns raised by the Parties

23. The Pre-Trial Judge notes that although only the Sabra Notice contains a request for relief, the notices of all four Defence teams recorded “deficiencies”³⁶ in the Prosecution Notice. The Pre-Trial Judge has summarised the disclosure issues noted by the Defence in Annex A to this Decision. Where applicable, the Pre-Trial Judge has also included his views with respect to the procedural concerns raised by the Defence.

24. In particular, the Pre-Trial Judge notes the Defence’s complaints that the CVs for 10 of the 45 experts listed in Annex A to the Prosecution Notice have not been disclosed in one of the Tribunal’s official languages.³⁷ Indeed, the 10 CVs in question were disclosed on 13 February 2013,³⁸ close to three weeks after the Defence had filed its Rule 161(B) notices. Given this delayed disclosure, the Pre-Trial Judge accepts that the Defence was not in a position to make submissions in relation to the expertise of the 10 witnesses concerned.

25. Additionally, the CVs of some co-authors of expert reports listed in Annex A to the Prosecution Notice have yet to be disclosed, often because the co-authors in question are

³⁵ Decision on Prosecution Request for Extension of Time to Disclose Expert Report and Addendum, Confidential, 8 February 2013.

³⁶ Badreddine Notice, para. 4.

³⁷ Oneissi Notice, para. 12; Ayyash Notice, para. 10; Badreddine Notice, para. 2.

³⁸ Disclosure 293, see Confidential letter from the Office of the Prosecution to the Defence, dated 13 February 2013.

amongst the expert witnesses listed in Annex B to the Prosecution Notice.³⁹ Furthermore, despite the Prosecution's attempts not to include witnesses in more than one list,⁴⁰ one expert witness appears in both Annexes A and B to the Prosecution Notice, with different reports listed under each annex.⁴¹ Finally, it is conceivable that disclosure of some expert reports listed in Annexes B, C and D may alter the Defence's position with respect to expert reports listed in Annex A to the Prosecution Notice, especially if their findings conflict. Indeed, the Pre-Trial Judge considers it logical that the Defence will only be in a position to assess adequately whether it can accept certain expert reports once it has had the opportunity to compare them with other reports in a similar field of expertise that the Prosecution also intends to rely on at trial.

26. Therefore, the Pre-Trial Judge takes note of the incomplete nature of the Prosecution Notice and of the Defence's submissions reserving the right to change its position following full and complete disclosure of expert reports.⁴²

27. The Pre-Trial Judge reminds the Prosecutor that, as a minister of justice charged with assisting the Tribunal in the administration of justice,⁴³ he bears the responsibility to ensure that delays are kept to a minimum and that proceedings are conducted both fairly and expeditiously. It is neither helpful nor beneficial to the Parties or a Chamber for the Prosecution to submit incomplete notices, which in turn trigger the corresponding delay periods for responses.

28. Similarly, however, the Pre-Trial Judge finds it unhelpful for the Defence to submit blanket statements, grouping all experts and reports in a single category.⁴⁴ The Pre-Trial Judge emphasises that Rule 161(B) notices may impact upon trial proceedings and are meant to "assist the Trial Chamber in making its decision regarding the admissibility of *each*

³⁹ *E.g.* Annex A to this Decision, numbers 9, 13.

⁴⁰ Prosecution Notice, para. 2.

⁴¹ *See* Annex A to this Decision, number 15.

⁴² Ayyash Notice, para. 6; Badreddine Notice, para. 3, Sabra Notice, para. 14.

⁴³ Decision on the Sabra Defence's First, Second Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para. 32; 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; *See also* ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 50(1).

⁴⁴ The Pre-Trial Judge notes in particular that the Onassis Defence submitted that: (i) it does not accept any of the expert reports listed in Annex A to the Prosecution Notice; and (ii) it challenges the relevance of all of them; (iii) it wishes cross-examine all experts listed in Annex A to the Prosecution Notice; and (iv) it challenges the qualifications of all of them, paras 2, 14-19.

*report*⁴⁵. There is therefore an expectation that the Defence will “review the statements and file a notice of their position in relation to *each report*.”⁴⁶ Similarly, where the Defence believes that it lacks the necessary information to file a complete Rule 161(B) notice, it is invited to specify, for each report, where the insufficiency stems from and what additional information or material is required.

D. Referral to the Trial Chamber

29. The Pre-Trial Judge recalls that Rule 161 concerns the admissibility of evidence, which falls within the ambit of the Trial Chamber. Insofar as he does not have jurisdiction to rule on the qualification of experts or to admit their reports into evidence, the Pre-Trial Judge, pursuant to Rule 89(E), considers it appropriate for the proper administration of justice to inform the Trial Chamber of the Rule 161 notices and refer them to said Chamber, so that it may examine the matter in dispute.

30. Once the Pre-Trial Judge has received the Prosecution’s final and complete Rule 161(A) notice, and the corresponding Rule 161(B) notices from the Defence, the Pre-Trial Judge will also, pursuant to Rule 89(E), transfer these notices to the Trial Chamber.

VI. Disposition

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77(A) and 89(E) of the Rules,

DECLARES the Sabra Notice receivable;

DECLARES that he is not competent to decide on the relief requested in the First Request of the Sabra Notice;

⁴⁵ ICTY, *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60; Order for Filings Related to 92 bis and 94 bis Motions, 20 February 2003, p.2 [emphasis added].

⁴⁶ *Ibid* [emphasis added].

GRANTS the Second Request of the Sabra Notice in part;

ORDERS the Prosecution to file a final and complete notice pursuant to Rule 161(A) by 2 April 2013, at the latest;

DISMISSES the relief requested in the Second Request of the Sabra Notice in all other respects;

INFORMS the Trial Chamber of the Prosecution Notice, the Oneissi Notice, the Sabra Notice, the Ayyash Notice, and the Badreddine Notice;

REFERS these notices to the Trial Chamber; and

ORDERS that Annex A to this Decision remain confidential until further order.

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

Leidschendam, 28 February 2013



Daniel Fransen
Pre-Trial Judge

