



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: **Mr Daniel Fransen**

The Registrar: **Mr Herman von Hebel**

Date: **15 April 2013**

Original language: **French**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON THE PROSECUTION'S MOTION TO REFER TO THE TRIAL CHAMBER THE REQUESTS TO ADMIT THE WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULES 89 (E) AND 155 OF THE RULES OF PROCEDURE AND EVIDENCE

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 decision, the Pre-Trial Judge rules on the Prosecution's motion of 20 February 2013 to refer to the Trial Chamber the requests to admit the statements of 10 witnesses in lieu of oral testimony pursuant to Articles 18 (2), 21 (2) and (3) of the Statute and Rules 149 and 155 of the Rules of Procedure and Evidence (respectively the "Motion" and the "Rules").¹

II. Procedural background

2. On 20 February 2013, the Prosecution filed a confidential version of the Motion.

3. On 27 February 2013 and 4 March 2013, Counsel for the Defence for Messrs. Ayyash, Badreddine, Oneissi and Sabra ("Counsel for the Defence" or "the Defence") responded to the Motion.²

4. On 5 March 2013, the Prosecution filed a notice regarding the change of classification of the Motion from confidential to public.³

III. The arguments of the Parties

A. The Motion

5. The Prosecution seeks that the Pre-Trial Judge refer to the Trial Chamber, in accordance with Rule 89 (E) of the Rules, the requests for the admission of the written statements of 10 witnesses as evidence. It states that those statements contain evidence which "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment" in

¹ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution's Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E), 20 February 2013. Any further reference to the filed documents and decisions relate to that case number, unless otherwise indicated.

² *Réponse à la "Prosecution's Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E)"*, confidential, 4 March 2013 ("Oneissi Response"); Response on Behalf of Mr. Ayyash to "Prosecution's Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E)", confidential, 4 March 2013 ("Ayyash Response"); Response to the Prosecution's Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E), confidential, 4 March 2013 ("Badreddine Response"); Sabra Defence Response to Prosecution Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E), confidential, 27 February 2013 ("Sabra Response").

³ Prosecution's Notice Regarding the Change of Classification of the Prosecution's Motion Requesting the Pre-Trial Judge to Refer its Rule 155 Application to the Trial Chamber Pursuant to Rule 89 (E), 5 March 2013.

accordance with Rule 155 of the Rules.⁴ Indeed, that evidence does not attribute any telephones to the accused.⁵

6. The Prosecution considers that, in accordance with Rule 89 (E) of the Rules, the Pre-Trial Judge may refer certain matters to the Trial Chamber before it is formally seized of the case.⁶ It considers that there is nothing in Rule 127 of the Rules which prevents the Trial Chamber from ruling on matters regarding the admissibility of evidence before the start of trial.⁷ Furthermore, the matter of the admissibility of the written statements of witnesses, in accordance with Rule 155 of the Rules, falls within that jurisdiction as its determination, at the earliest opportunity, would permit a better assessment as to the duration of the presentation of its evidence.⁸ Moreover, the determination of that matter by the Trial Chamber at this stage will make it possible to shorten the time needed between the transfer of the file and the start of the presentation of evidence,⁹ to better understand the organisational aspects regarding the witnesses¹⁰ and to provide the Defence with the necessary information concerning the witnesses who will be called to testify *viva voce*.¹¹

7. The Prosecution states that Counsel for the Defence was contacted for that purpose before filing the Motion. According to the Prosecution, after having initially declined to state its position on that matter, Counsel for the Defence opposed the proposed admissions.¹²

8. The Prosecution adds that the witness statements meet the admissibility obligations set forth in Rule 149 (C) and (F) of the Rules, even if they do not conform in all aspects to the “Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155” of 15 January 2010 (the “Practice Direction”).¹³ The Prosecution states that the obligations set out in Article 2 (1) (c) (iv), Article (2) (2) (c) and (e) and Article 2 (3) (d) of that Practice Direction have not been met.

⁴ Motion, paras 1 and 2.

⁵ *Id.*, para. 13.

⁶ *Id.*, para. 8.

⁷ *Id.*, para. 14.

⁸ *Id.*, para. 9.

⁹ *Id.*, para. 10.

¹⁰ *Id.*, para. 11.

¹¹ *Id.*, para. 12.

¹² *Id.*, paras 3 and 4.

¹³ *Id.*, paras 6 and 25.

The Prosecution points out that if the statements are not admitted because they do not comply with the Practice Direction, it would be obliged to re-interview over one hundred witnesses.¹⁴

9. Lastly, the Prosecution submits that the determination of those matters at this stage of the proceedings will lead to a better management of the trial as it intends to seek the admission of the written statements of 443 of the 557 witnesses at its disposal.¹⁵

B. The Responses

10. In general, the Defence opposes the Motion. It submits the following points:

- Rule 89 (E) of the Rules does not permit the referral of all types of matters to the Trial Chamber;
- the Prosecution's assertion that the Defence allegedly did not state its position on the subject is erroneous; and
- the confidential nature of the Motion is not justified, a public redacted version of the Motion should have been filed.

11. More specifically, the Defence considers that the Trial Chamber cannot rule on those matters before it has been seized of the complete file in accordance with Rule 95 of the Rules. Indeed, in order to rule on the admissibility of evidence, the Trial Chamber must have knowledge of all the evidence of the file in order to consider its probative value and relevance. As such, seized of a request based on Rule 155 of the Rules, the Trial Chamber must, in particular, assess to what extent such evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.¹⁶ To that end, Rule 95 sets out that the Pre-Trial Judge shall submit to the Trial Chamber a complete file containing the evidence received and there is no Rule in the Rules which envisages the disclosure of evidence in advance. It is of the opinion that the case law cited by the Prosecution fails to support the request.

12. The Defence considers that to rule on that matter at this stage of the proceedings would cause prejudice to its rights. Such a procedure would result in the Trial Chamber ruling on the admissibility of the vast majority of the evidence before the trial starts when it has not even been

¹⁴ *Id.*, para. 41.

¹⁵ *Id.*, paras 5 and 9.

¹⁶ Sabra Response, para. 10.

seized of the file yet. They recall that the Prosecution has not completed the disclosure of the inculpatory and exculpatory evidence and is of the view that a determination on the file can only be made once the facts imputed by the Prosecution and the evidence submitted in support of those facts have been clearly identified in accordance with Rule 91 (G) of the Rules. It notes, in particular, that a request for leave to amend the indictment is still pending, that the Prosecution requested an extension of the date for the disclosure of the exculpatory evidence until 17 June 2013 and that the list of witnesses and Prosecution evidence was recently amended. The Defence is of the opinion that, in order to respond on an equitable basis to the Motion it must have access to all the evidence so as to assess its probative value and relevance, particularly in light of the fact that the Prosecution evidence is essentially circumstantial.

13. Lastly, according to the Defence, the fact that certain statements do not comply with the Practice Direction, even though the Prosecution attempts to minimise the implications, does have an effect on their admissibility.

IV. Statement of reasons

14. The Pre-Trial Judge recalls that under the terms of Article 21 (1) of the Statute, there must be no unreasonable delay to the proceedings and all necessary measures must be taken to prepare the case for a fair and expeditious trial. He also recalls that Rule 89 (E) of the Rules allows him to refer to the Trial Chamber any matter which, in his opinion, may be determined before the latter has been seized of the case, namely before the submission of the file as set forth in Rule 95 of the Rules.¹⁷

15. In order to determine the matters which may be referred to the Trial Chamber pursuant to Rule 89 (E) of the Rules, the Pre-Trial Judge took into consideration the following criteria:

- a) the matters referred do not fall or no longer fall within the jurisdiction of the Pre-Trial Judge, but within that of the Trial Chamber; and
- b) the referral of those matters does not cause prejudice to the respective rights of the Parties and the victims participating in the proceedings; and

¹⁷ Before the recent amendment of Rule 89 (E) of the Rules, the Pre-Trial Judge referred two separate matters to the Trial Chamber, one relating to a Defence request to strike out certain sections of the Prosecutor's Pre-Trial Brief and the other relating to the qualifications of the Prosecution's expert witnesses.

- c) the Trial Chamber is able to determine those matters at this stage of the proceedings and its decision is likely to expedite the preparation for trial; or, alternatively
- d) even if they are matters that the Trial Chamber is unable to determine at this stage of the proceedings, their referral to the Trial Chamber is likely to enable it to prepare the case effectively, for example by already requesting the submissions of the Parties and the Legal Representative of Victims (the “LRV”).

16. In this case, any matter relating to the admission of evidence, of which the requests submitted pursuant to Rule 155 of the Rules, fall, by their very nature, within the jurisdiction of the Trial Chamber.¹⁸ Consequently, the Pre-Trial Judge considers that the first criterion has been met.

17. With regard to the possible prejudice to the rights of the Parties which might be caused by the referral of those matters in question to the Trial Chamber at this stage of the proceedings, it should be noted that the Prosecution’s disclosure of documents to the Defence is still ongoing. However, in order to decide properly on the admissibility of the written statements of witnesses, the Defence must have received all the documents that the Prosecution intends to use during the trial, including the exculpatory evidence, which is not currently the case. Consequently, the Pre-Trial Judge considers that it would be prejudicial to the Defence to have to decide on the admissibility of the written statements of witnesses at this stage. In order to guarantee the fairness of the proceedings, those matters therefore should not be referred to the Trial Chamber at the current stage of the proceedings

18. However, the Pre-Trial Judge considers that the Motion contains a separate and additional matter whose referral to the Trial Chamber at this stage of the proceedings is likely to expedite the proceedings.

19. Indeed, the Prosecution stated that many of the witness statements fail to meet the obligations set out at Article 2 (1) (c) (iv), Article 2 (2) (c) and (e) and Article 2 (3) (d) of the Practice Direction, but do, however, comply with Rule 149 (C) and (F) of the Rules. The Pre-Trial Judge considers that this matter does not fall within his jurisdiction, but within that of the Trial Chamber. The referral of that matter to the Trial Chamber for its determination at this stage

¹⁸ 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.

of the proceedings, if it deems it appropriate, would not cause prejudice to the Defence or to the LRV. Indeed, the matter raised by the Prosecution is theoretical and does not require access to the documents of the file or to evidence mentioned in the Motion. The determination of that matter, at the earliest opportunity, is likely to have an impact on the time required for preparing for trial. Indeed, as the Prosecution states, based on the decision of the Trial Chamber, it might have to re-interview a number of witnesses. Consequently, the Pre-Trial Judge considers that, in the context of the proper administration of justice, it is appropriate, pursuant to Rule 89 (E) of the Rules, to inform the Trial Chamber of that matter and refer it to the Trial Chamber so that it is able to consider it during the preparation stage of the case.

V. The disposition

FOR THESE REASONS,

Pursuant to Rule 89 (E) of the Rules,

THE PRE-TRIAL JUDGE,

REFERS to the Trial Chamber the matter regarding the impact the non-compliance of the formal requirements for the written statements of witnesses, as set out by the Practice Direction, has on their admissibility pursuant to Rule 155 of the Rules; and

DISMISSES the Motion in all other respects.

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

Leidschendam, 15 April 2013

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

