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 Daryl Mundis**
Date:	**2 August 2013**
Original language:	**French**
Classification:	**Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH,
MUSTAFA AMINE BADREDDINE,
HUSSEIN HASSAN ONEISSI &
ASSAD HASSAN SABRA

REDACTED VERSION OF THE DECISION RELATING TO THE PROSECUTION REQUEST OF 21 JUNE 2013 FOR LEAVE TO AMEND THE INDICTMENT OF 6 FEBRUARY 2013, DATED 31 JULY 2013

Office of the Prosecutor:
Mr Norman Farrell

Legal Representative of Victims:
Mr Peter Haynes

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan

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 Prosecution Request of 21 June 2013 seeking leave to file an amended indictment (the "Request").[1]

II. Background to the Proceedings

2. On 28 June 2011, the Pre-Trial Judge issued a decision relating to the Indictment of 10 June 2011 pursuant to which Messrs Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra were indicted in relation to the attack of 14 February 2005 committed against Mr Rafik Hariri and others (respectively the "Decision of 28 June 2011", the "Indictment of 10 June 2011" and the "Accused").[2]

3. On 17 August 2012, the Prosecution sought leave to amend the Indictment of 10 June 2011[3]. On 25 October 2012, the Pre-Trial Judge declared the Prosecution request admissible subject to a number of changes (the "Decision of 25 October 2012").[4] In accordance with the Decision of 25 October 2012, on 8 November 2012, the Prosecution filed a new indictment (the "Indictment of 8 November 2012") together with a request for additional amendments.[5] On 6 February 2013, the Prosecution seized the Pre-Trial Judge with a request to amend the

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[1] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Prosecution Further Request for Leave to Amend the Indictment, confidential, 21 June 2013. The Request was officially filed with the Court Management Services Section (the "CMSS") on 21 June 2013, date mentioned on the cover page. However, the Prosecutor signed the Request on 18 June 2013. The Prosecution filed a public redacted version of the Request on 1 July 2013.

[2] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/I/PTJ, 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, confidential, 28 June 2011. A public redacted version dated the same day was filed on 16 August 2011. This decision confirms the counts of indictment contained in the Indictment of 10 June 2011 with the exception of the attempted homicide of 231 other persons, which is not included in the constituent elements of the terrorist act but in those of attempted intentional homicide.

[3] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A)(ii), 17 August 2012, with a public redacted version dated 18 September 2012.

[4] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Decision on the Prosecution Request of 17 August 2012 for Leave to File an Amended Indictment, 25 October 2012.

[5] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Filing of the Amended Indictment in Compliance with the Decision of 25 October 2012 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, confidential, 8 November 2012.

Indictment of 8 November 2012 and filed an indictment including all the proposed amendments (the "Indictment of 6 February 2013").[6]

4. On 12 April 2013, the Pre-Trial Judge granted the requests of 8 November 2012 and 6 February 2013, authorising the amendments to the Indictment of 10 June 2011 as they appear in the Indictment of 6 February 2013 (the "Decision of 12 April 2013").[7] In accordance with the Decision of 12 April 2013, on 17 April 2013, the Prosecution filed a signed version of the Indictment of 6 February 2013.[8]

5. On 26 June 2013, the Pre-Trial Judge was officially seized of the Request for leave to amend the Indictment of 6 February 2013 together with, in the annex, an amended version of that Indictment dated 21 June 2013 (the "Indictment of 21 June 2013").[9]

6. On 10 July 2013, Defence Counsel for Messrs Badreddine[10] Oneissi[11], and Sabra[12] responded to that Request (respectively the "Badreddine Response", the "Oneissi Response" and the "Sabra Response").

7. On 15 July 2013, the Prosecution sought leave to file a reply. On 17 July 2013, the Pre-Trial Judge granted that request.[13] On 22 July 2013, the Prosecution filed the reply (the "Reply").[14]

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[6] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Include Further Amendments to its Proposed Amended Indictment, 6 February 2013.
[7] STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment, 12 April 2013.
[8] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Prosecution's Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge's Decision of 12 April 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, 17 April 2013, Annex A.
[9] The Indictment of 21 June 2013 was officially filed with the CMSS on 21 June 2013, date mentioned on the cover page. However, the Prosecutor signed the Indictment of 21 June 2013 on 18 June 2013.
[10] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, *Réponse de la Défense de M. Mustafa Amine Badreddine à la* "Prosecution Further Request for Leave to Amend the Indictment", confidential, 10 July 2013, with a public redacted version dated 19 July 2013.
[11] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, *Réponse de la Défense à la* "Prosecution Further Request for Leave to Amend the Indictment", confidential, 10 July 2013.
[12] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Sabra Response to Prosecution Request for Leave to Amend the Second Amended Indictment, confidential, 10 July 2013. On 11 July 2013, the Pre-Trial Judge was informed by the Sabra Defence Counsel and by the CMSS that, for technical reasons, the Sabra Response was filed after the deadline, on 11 July 2013.
[13] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Order Granting the Prosecution Request for Leave to Reply to the Defence Reponses to "Prosecution Further Request for Leave to Amend the Indictment", 17 July 2013.
[14] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Prosecution Reply to the Defence Responses to "Prosecution Further Request for Leave to Amend the Indictment", confidential, 22 July 2013.

III. Submissions of the Parties

A. The Prosecution

8. In support of the Request, the Prosecution invokes the following main arguments:

i) the proposed amendments relate in substance to: a) the attribution of the "Green 071" and "Purple 231" phones to one and the same user; b) the identification of the named user of the "Green 071" and "Purple 231" phones and who the Prosecution has identified as having participated in the crimes with the other Accused (the "fifth person"); c) the relationships between the three phones belonging to the "Green" network; d) the diagram relating to the phone use; e) the involvement from the beginning of the "Green 071" phone in the conspiracy; f) further details relating to the contact between the "Purple 231" phone and the "PMP 091" phone used by Mr Ayyash between 23 January 2005 and 6 February 2005; g) changes in the order of the paragraphs of the Indictment of 6 February 2013 in order to present the material facts in a more coherent manner; and h) the addition of new information or corrections;[15]

ii) the proposed amendments are based on evidence which is, first and foremost, sufficient and credible and, in particular, on three expert reports relating to the attribution of the phones, as well as on new call data records relating to the "Purple 231" phone, which were received on 1 March 2013;[16]

iii) the proposed amendments do not cause any prejudice to the Accused nor do they unduly delay the proceedings for, *inter alia*, the following reasons: a) the charges are unaltered; b) the user of the "Purple 231" phone was already mentioned among the members of the conspiracy in the Indictment of 6 February 2013; c) the Indictment of 6 February 2013 already made note of the fact that the user of the "Purple 231" phone carried out functions in relation to the preparation and the dissemination of the false claim of

[15] Request, para. 10.
[16] *Id.*, para. 13.

responsibility; d) Defence Counsel are already informed of the implication of the owner of the "Green 071" phone in the conspiracy; e) the user of the "Green 071" phone was already included among the members of the "Green" network in the initial Indictment; f) the proposed amendments do not in any way alter the general qualification of the role and the conduct of the Accused; g) the role of Mr Ayyash, his relationship with Mr Badreddine and his contact activity with the "Green" network and his contact with the "Red", "Blue" and "Yellow" networks have not been altered; h) the roles of the "Green", "Red", "Yellow" and "Blue" networks, as well as the "Purple" phones have not changed, with the exception of one "Green" network phone – "Green 071" – which is now linked to the false claim of responsibility; i) no Accused has been detained and the delays in the proceedings cannot therefore affect them; j) Defence Counsel already had access, through the materials filed in support of the initial Indictment, to the phone contact between the "Green 023" and "Green 071" phones;[17] and

iv) the proposed amendments provide significant details regarding, for example, the relationships between the "Green" network and the "Purple" phones, the activities of their users and, in particular, of the owner of the "Green 071" phone; as a consequence, these amendments are an aid to the understanding and preparation of the case for Defence Counsel and should be seen in the context of the duty that is enshrined in Rule 55 (C) of the Rules of Procedure and Evidence (the "Rules") according to which the Prosecution must assist in establishing the truth.[18]

B. The Defence

1. <u>The Badreddine Defence</u>

9. Defence Counsel for Mr Badreddine opposes the Request[19] for the following main reasons:

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[17] *Id.*, para. 16.
[18] *Id.*, paras 18-23.
[19] Badreddine Response, paras 1 and 23.

i) contrary to the Prosecution statements according to which the proposed amendments are minor and "[TRANSLATION] simple clarifications" only, they represent a fundamental change to the Indictment of 6 February 2013[20] with regard to "[TRANSLATION] the overall structure of the alleged conspiracy and the role that Mr Badreddine supposedly played therein";[21] indeed,

> "[TRANSLATION] [...] initially placed in a nebulous plane where Mr Ayyash allegedly played a pivotal role between an assassination team, whose members are unknown after more than eight years of investigation and prosecution, and a team which took care of the supposed false claim of responsibility for the attack in which Mr Badreddine was not at all implicated, Mr Badreddine is now perched at the top of a pyramid, in charge of the monitoring/control (?) and coordination of, on the one hand, the preparation of the attack and, on the other hand, the supposed false claim of responsibility thereof";[22]

ii) the proposed amendments contain new material facts incriminating Mr Badreddine "[TRANSLATION] which affect both the nature of and the reasons for the charges brought against him";[23] indeed, the previous versions of the Indictment of 6 February 2013 included no allegations which implicated Mr Badreddine in the monitoring and the coordination of the false claim of responsibility, as, moreover, the Prosecution itself recognised in July 2012;[24]

iii) the proposed amendments are thus "[TRANSLATION] of a sort to aggravate the crimes of which he is accused as well as the punishments related thereto, to generate considerable delays in the conduct of the proceedings against him and to significantly compromise the fairness thereof";[25]

iv) the impact of the proposed amendments on the time and resources necessary for the Defence to prepare is significant; indeed, the Defence has defined the main strategic lines of its preparation for trial on the basis of inexact and incomplete information provided by the Prosecution;[26]

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[20] *Id.*, paras 9 to 11.
[21] *Id.*, para. 9.
[22] *Ibid.* Footnote omitted.
[23] *Id.*, para. 11.
[24] *Id.*, para. 13.
[25] *Id.*, para. 12.
[26] *Id.*, paras 13 and 14.

v) the Prosecution's argument that the proposed amendments will not cause prejudice to the Accused insofar as they are not in custody is not admissible: the right to be tried without excessive delay rests on "[TRANSLATION] the cardinal principle of the presumption of innocence of any accused, which requires not only that any period of custody not be unreasonably prolonged, but also that it be possible to be found innocent of any unfounded accusation as quickly as possible, taking into account the media interest in this attack and its political exploitation";[27]

vi) were the trial to start at the beginning of December 2013, as envisaged by the Pre-Trial Judge, the Request should then be dismissed,[28] as is permitted by the case law from the other international criminal tribunals;[29] the Defence should not be subjected to "[TRANSLATION] the amateurism, inefficiency and tardiness of the investigations and prosecutions"[30] conducted by the Prosecution; in that regard, "[TRANSLATION] the undue nature of the prejudice that the proposed amendments would cause to the Accused must be considered in the light of the context in which the Request is made and, particularly, of the lack of diligence by the Prosecution in the conduct of its investigations and in the implementation of its duty to inform the Defence as quickly as possible of the nature and reasons for the charges brought against the Accused, as well as the undue tactical advantage that the Prosecution believed it could thus grant itself";[31] and

vii) were the Pre-Trial Judge to find it appropriate to authorise the proposed amendments, the date for trial could only be set after having given the Defence sufficient time to analyse the new information received; that time not being shorter than the time the Prosecution had available to it for that purpose.[32]

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[27] *Id.*, para. 15.
[28] *Id.*, para. 16.
[29] *Id.*, para. 17.
[30] *Id.*, para. 16.
[31] *Id.*, para. 17. Footnote omitted.
[32] *Id.*, para. 22.

2. The Oneissi Defence

10. Defence Counsel for Mr Oneissi opposes the Request[33] for the following main reasons:

i) since its purpose is to add a suspect by way of amending the Indictment of 6 February 2013 even before that suspect has been accused and is, thus, able to benefit from the rights that status confers on him, the Request should be declared inadmissible and unfounded;[34] furthermore, as the Pre-Trial Judge noted, "an amendment of this kind may not contain a new suspect as this would result in the Trial Chamber, which at a later stage would have to rule on the merits of the case, having to rule on the confirmation of the counts against that suspect";[35]

ii) the proposed amendments "[TRANSLATION] do not define in a clear, precise and unequivocal manner the nature of the material facts of which Mr Oneissi is accused",[36] nor do they establish the nature and the kind of relationships that existed between Mr Oneissi, Mr Sabra and the fifth person;[37] in that regard, paragraph 27 of the Indictment of 21 June 2013 contains a new allegation according to which Mr Oneissi [REDACTED];[38]

iii) neither the Request nor its Annex show to which allegations retained in the Indictment of 21 June 2013 the 2523 documents provided in the Annex to the Request refer; this prevents the Defence from having a clear and precise view of the case file ;[39] among those documents, 258 have never been disclosed before to the Defence whereas the large majority of them were obtained before 2013 and should therefore already have been provided to it;[40] furthermore, these documents are "[TRANSLATION] summaries of incriminating evidence compiled by the Prosecution on the basis of other sources" and contain two

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[33] Oneissi Response, paras 1-2 and 37.
[34] *Id.*, para. 14.
[35] *Id.*, para. 15. Footnote omitted.
[36] *Id.*, para. 18.
[37] *Id.*, para. 18 (e).
[38] *Id.*, para. 18 (d).
[39] *Id.*, para. 20.
[40] *Id.*, para. 22.

reports drawn up by authors whose qualification as expert is contested by the Defence. They cannot therefore support the new allegations insofar as they do not meet the requirements of Rule 71 (B) of the Rules;[41] lastly, "[TRANSLATION] [th]e same conclusion must be drawn with regard to the evidence on the basis of which [one person] has been identified as S15 and the user of the "Purple 231" and "Green 071" numbers. The proposed amendments that this phone data is supposed to support are not provided, with the exception of some of the new data obtained in relation to the "Purple 231" phone activities;[42]

iv) the Prosecution has for a long time already been in possession of the evidence relating to the attribution of the "Purple 231" number to one person and to the identification of S15 ;[43] in accordance with the case law of the other international criminal tribunals, the requested amendments should be dismissed because the evidence on which they rely "[TRANSLATION] could have been obtained and incorporated earlier";[44] and

v) by proceeding in this manner, the Prosecution has employed delaying tactics;[45] such tactics have been condemned by the other international criminal tribunals by dismissing the amendments requested.[46]

3. The Sabra Defence

11. Counsel for the Defence of Mr Sabra opposes the Request[47] for the following main reasons:

i) the Prosecution has introduced new material allegations into the Indictment of 6 February 2013, in particular by adding new allegations against Mr Oneissi which have not previously been confirmed, [REDACTED];[48]

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[41] *Id.*, para. 23.
[42] *Id.*, para. 24.
[43] *Id.*, para. 30.
[44] *Ibid.*
[45] *Id.*, para. 32.
[46] *Ibid.*
[47] Sabra Response, para. 35.
[48] *Id.*, paras 22-23.

ii) the Prosecution cannot add new material allegations without formally requesting confirmation of the Indictment containing those allegations;[49]

iii) the new allegation according to which a fifth person was the sole user of the "Green 071" and "Purple 231" phones should be dismissed as it is not based on any evidence and has not previously been confirmed; moreover, the Defence was not informed of this amendment in a regular manner;[50] by proceeding in this way, the Prosecution has profoundly altered the relationship between the "Purple" and "Green" phones and, thus, the structure of the involvement of the different Accused;[51] as revealed in paragraphs 3 (a), 23 (c) and (d), 27 to 28, 30 to 31 and 37 of the Indictment of 21 June 2013, the Prosecution is making new allegations relating to the contacts between the four Accused and the fifth person and, in particular, with regard to the responsibility of Mr Badreddine;[52]

iv) the Sabra Defence has not been clearly informed as to the impact the relationship between the fifth person and Mr Badreddine might have on Mr Sabra;[53]

v) these new allegations cannot be authorised as long as an indictment has not been confirmed against the fifth person and sufficient evidence has not been submitted in support of those allegations;[54]

vi) the proposed amendments do not in any way strengthen the precision of the Indictment of 6 February 2013 with respect to the allegations against Mr Sabra; on the contrary, they generate further imprecision;[55]

vii) the Indictment of 21 June 2013 refers to other unidentified persons, members of the conspiracy; in accordance with the duty it has to provide as much

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[49] *Ibid.*
[50] *Id.*, para. 23.
[51] *Id.*, para. 24.
[52] *Id.*, para. 25.
[53] *Id.*, para. 26.
[54] *Id.*, para. 27.
[55] *Id.*, para. 30.

information as the evidence in its possession allows it, the Prosecution should provide the identity of these other persons;[56] and

viii) to continually amend the Indictment of 10 June 2011, as the Prosecution is doing, constitutes a violation of the right of the Accused to be tried without excessive delay; were the proposed amendments to be adopted, further evidence would be disclosed to the Defence, which would cause further delay.[57]

C. The Prosecution Reply

12. In the Reply, the Prosecution invokes the following main arguments:

i) the fifth person does not have to be indicted to be named in the Indictment of 21 June 2013: neither the Pre-Trial Judge's Decision of 13 March 2012 relating to the Prosecution Request of 8 February 2012 for leave to file an Amended Indictment (the "Decision of 13 March 2012"),[58] nor the experience of the other international criminal tribunals requires it;[59]

ii) the argument invoked by the Sabra Defence according to which "new material allegations" should be reviewed in the context of the confirmation process provided for in Rule 68 of the Rules is unfounded; the notion of "new material allegations" is not considered by the Rules, not by Rule 68 nor by Rule 71 (B) of the Rules;[60]

iii) no tactical advantage has been sought by way of this amendment request, as suggested by the Defence Counsel for Mr Oneissi and Mr Badreddine; the notion of "tactical advantage" moreover has not been defined by Defence Counsel;[61] and

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[56] *Id.*, para. 31.
[57] *Id.*, para. 32.
[58] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Request of 8 February 2012 for leave to file an Amended Indictment, confidential, 13 March 2012.
[59] Reply, paras 8-11.
[60] *Id.*, paras 11-14.
[61] *Id.*, paras 15-22.

iv) neither the significance nor the organisation of the exhibits provided in support of the proposed amendments can justify dismissing the Request; in that regard, the Prosecution notes that it has already provided approximately 90 % of those documents to Defence Counsel.[62]

IV. Statement of Reasons

13. After having ruled on his jurisdiction (A) and recalled the applicable law (B), the Pre-Trial Judge shall examine the amendments proposed by the Prosecution in the light of the supporting documents and of the arguments invoked by the Parties (C). He will thereafter rule on the measures of confidentiality sought by the Prosecution (D).

A. Jurisdiction

14. Rule 71 (A) (ii) of the Rules provides that between the moment when an Indictment has been confirmed and when the case is referred to the Trial Chamber, the Prosecution may only amend the indictment with leave from the Pre-Trial Judge. At this stage in the proceedings, the Pre-Trial Judge has jurisdiction to rule on the Request as the Trial Chamber has not been seized of the case file pursuant to Rule 95 of the Rules.

B. Applicable Law

15. The principles governing the review of an amendment of an indictment were set out in the context of the Decision of 25 October 2012 and the Decision of 12 April 2013. To recall, the essential provisions in that respect are as follows:

i) according to Rule 71 (B) of the Rules, an indictment may only be amended if there is "prima facie evidence to support the proposed amendment" and if "[...] the amendment would not result in improper prejudice to the accused";

ii) when reviewing an amendment, the Pre-Trial Judge must, first and above all else, take into account the effect of an amendment on the rights of the accused,

[62] *Id.*, para. 23.

in particular to properly prepare his defence or to be tried without delay;[63]

iii) when an amendment is a substantive one, the Pre-Trial Judge must ensure that it is, first of all, based on credible and sufficient evidence;[64]

iv) when an amendment relates only to clarification, the Pre-Trial Judge must ensure that it strengthens the preciseness of the indictment and, thus, explain the content of the case and allow the accused to better comprehend it;[65] and

v) two elements should be considered: on the one hand, the delays in the proceedings which might result from an amendment of the indictment and, on the other hand, the benefit that the accused and the judges concerned might derive from it.[66]

C. Analysis of the proposed amendments

16. To begin with, the Pre-Trial Judge wishes to make six observations which follow from a number of arguments invoked by the Prosecution and Defence Counsel, as well as from the filing of the documents submitted in support of the proposed amendments.

17. First, contrary to the claims made by the Prosecution,[67] the fact that the Accused are not in custody cannot in any way justify excessive delay in the conduct of the proceedings. Indeed, as noted, correctly, by the Badreddine Defence,[68] the right for his case to be heard within a reasonable time period is not linked to a person's detention. As recalled by the European Court of Human Rights (the "ECHR"), that right aims first and foremost to ensure that "accused persons do not have to lie under a charge for too long and that the charge is determined".[69]

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[63] Decision of 25 October 2012, para. 20; Decision of 12 April 2013, para. 17.
[64] Decision of 25 October 2012, para. 22; Decision of 12 April 2013, para. 17.
[65] *Ibid.*
[66] *Ibid.*
[67] Request, para. 16 (xii).
[68] Badreddine Response, para. 15.
[69] ECHR, *Wemhoff v. Allemagne*, Application No. 2122/64, 27 June 1968, section "As to the Law", para. 18.

18. Second, according to Article 11 of the Statute, the decision to prosecute is at the sole discretion of the Prosecutor. As a consequence, the Prosecution's argument according to which a person may be named in an indictment as a co-perpetrator, co-participant or accomplice in a crime without being formally indicted[70] is well-founded. Indeed, contrary to that suggested by the Oneissi Defence,[71] the Decision of 13 March 2012 does not at all prohibit that possibility. However, it does not allow a person to be indicted by way of the amendment of an existing indictment. Indeed, according to the terms of the Decision of 13 March 2012,

> "[...] if the Prosecution intends seeking the indictment of any person other than the Accused who, in its opinion, is implicated in the attack carried out against Mr Hariri, or in the connected cases, it should first submit a separate indictment to the Pre-Trial Judge for confirmation. That indictment shall refer to each person that the Prosecution intends charging, in accordance with Rule 68 of the Rules."[72]

In the case at hand, in accordance with the Decision of 13 March 2012, the Indictment of 21 June 2013 does not include charges against the fifth person.

19. Third, the argument of the Sabra Defence according to which the reference to a fifth person in the Indictment of 21 June 2013 as the sole user of the "Green 071" and "Purple 231" phones constitutes a "new material allegation" requiring implementation of the specific confirmation procedure referred to in Rule 68 of the Rules is unfounded. Indeed, as the Decision of 25 October 2012[73] and the Decision of 12 April 2013[74] show, an indictment may be amended substantively by way of the procedure provided for in Rule 71 (B) of the Rules. Clearly, under such circumstances, those amendments must be based *prima facie* on sufficient and credible evidence, following the example of what is required for confirmation of a new indictment.[75] It should, furthermore, be ensured that the amendment procedure does

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[70] Reply, para. 9.
[71] Oneissi Response, paras 10-15.
[72] Decision of 13 March 2012, para. 28.
[73] Decision of 25 October 2012, para. 22.
[74] Decision of 12 April 2013, para. 17.
[75] Article 71 (B) of the Rules; Decision of 25 October 2012, para. 22; Decision of 12 April 2013, para. 17. See also the Decision of 28 June 2011, para. 28; ICTY, *The Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Indictment, 7 July 2008, para. 28; ICTY, *The Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Motion to Amend the Indictment and on the Challenges to the Form of the Amended Indictment, 25 October 2006, para. 19; ICTY, *The Prosecutor v. Karadžić.*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion to Reconsider the Trial Chamber's Decision on the Motion to Amend the First Amended Indictment, 26 February 2009, para. 12.

not adversely affect the rights of the Accused and, in particular, their right to effectively prepare for trial.

20. Fourth, the question of whether the reports submitted by the Prosecution in support of the amendments meet the requirements of international case law to be qualified as expert reports does not have to be determined at this stage in the proceedings.[76] Rule 161 of the Rules provides a specific procedure for that purpose.

21. Fifth, insofar as Defence Counsel did not set out their position and their strategy in the pre-trial briefs that they have filed up to now and the date for trial has not yet been set, the Prosecution cannot be accused of having attempted to gain a tactical advantage by requesting the amendment of the Indictment of 6 February 2013 to take account of the Defence's arguments, nor to have employed delaying tactics.

22. Sixth, while reviewing the exhibits and, in particular, the communications reports on which the Prosecution bases itself to justify the proposed amendments, the Pre-Trial Judge has identified a series of points which require clarification or correction. These points, for which the Prosecution shall have to provide explanations, are reproduced in an annex to the present decision. The responses to these points of clarification are not, however, of a kind to affect the merits of the amendments concerned and consequently of the present decision.

23. These observations having been made, it is necessary to review the well-foundedness of the proposed amendments. Among them, there are a number which are essentially aimed at providing clarification, others are of a more substantive nature, even if the distinction proves to be, in some cases, difficult to make. In any case, whatever the nature of the amendments concerned, they must be based on credible and sufficient evidence and not cause any undue prejudice to the rights of the Accused.

24. The principal amendments proposed for clarification purposes by the Prosecution are the following:

[76] Decision of 28 June 2011, para. 35.

i) in order to clearly reflect the separate activities of Mr Sabra and Mr Oneissi, paragraph 20 (a) of the Indictment of 6 February 2013 has been divided into two parts and moved to paragraph 23 (a) and (b) of the Indictment of 21 June 2013, with the exception of the two last sentences which have been moved to paragraph 23 (e) of the Indictment of 21 June 2013. Paragraph 23 of the Indictment of 21 June 2013 has also been the subject of substantive amendments resulting from the identification of the person referred to by the pseudonym "S15", from their implication in the phone activities;[77]

ii) the last but one sentence of paragraph 20 (a) of the Indictment of 6 February 2013 has been reproduced in paragraph 29 of the Indictment of 21 June 2013. That sentence was also the subject of substantive amendments resulting from the identification of the person referred to by the pseudonym "S15";[78] and

iii) the content of paragraph 20 (b) and (c) of the Indictment of 6 February 2013, previously included in part (D) relating to the chronology of the attack, has been moved to paragraph 17 of the Indictment of 21 June 2013, which is found in part (C) relating to the phone networks implicated in the attack. That paragraph was also the subject of substantive amendments resulting from the identification of the person referred to by the pseudonym "S15".[79]

25. The Pre-Trial Judge notes that these amendments proposed for clarification purposes are likely to strengthen the precision of the Indictment of 6 February 2013 and, thus, clarify the content of the case and, thereby, allow the Accused to better understand it. They are therefore allowed.

26. The principal substantive amendments proposed by the Prosecution are the following:

[77] These more substantive amendments will be addressed in paragraphs 26 to 31 of the present decision.
[78] *Ibid.*
[79] *Ibid.*

i) the attribution of the "Green 071" and "Purple 231" phones to one and the same user;[80]

ii) the relationships which allegedly existed between the "Green 023", "Green 071" and "Green 300" phones, in particular, the phone activity to and from the "Green 071" phone, the alleged monitoring and coordination role of Mr Badreddine and the alleged role of the user of the "Green 071" phone in the preparation of the false claim of responsibility;[81]

iii) insofar as the "Green 071" and "Purple 231" phones have been attributed to one and the same user, that person is implicated in the activities of the "Green" network on the one hand and of the "Purple" phones on the other;[82]

iv) the alleged involvement of the user of the "Green 071" phone in the conspiracy at an earlier date than that initially maintained;[83]

v) new information regarding the alleged contact between the user of the "Purple 231" phone and the "PMP 091" phone of Mr Ayyash from 23 January to 6 February 2005;[84]

vi) the allegation according to which Mr Oneissi [REDACTED];[85]

vii) a correction regarding the number of times there was contact between Mr Oneissi and Mr Sabra during the period from 22 December 2004 to 7 January 2005;[86] and

viii) the identification of the person referred to by the pseudonyms "S3" and "S15" and the user of the "Green 071" and "Purple 231" phones.

27. In the light of a review of the relevant documents provided by the Prosecution in support of the Request and, in particular, of the reports of 24 and 31 May 2013[87] and the

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[80] Indictment of 21 June 2013, paras 18 and 19.
[81] *Id.*, para. 3 (a), para. 19 (a) and diagram, paras 21, 30 and 37.
[82] *Id.*, para. 19.
[83] *Id.*, para. 48 (a) and para. 54.
[84] *Id.*, paras 31 and 37.
[85] *Id.*, para. 27.
[86] *Id.*, para. 23 (a).
[87] [REDACTED], Indictment Report – Attribution of Phone Numbers to [...], ERN D0321658-D0321753, 31 May 2013; [REDACTED], *Déclaration relative au positionnement coïncident des téléphones*

documents on which they are based,[88] the Pre-Trial Judge considers that the proposed amendments are based *prima facie* on credible and sufficient evidence.[89]

28. As a consequence, it should be examined whether the proposed amendments are likely to cause undue prejudice to the Accused and, in particular, whether they have an influence on the rights of the Accused, notably to sufficiently prepare their defence or to be tried without delay.[90] In that regard, the Pre-Trial Judge observes that those amendments do not fundamentally alter the alleged roles of the Accused. Indeed, the counts of indictment issued against them in the Indictment of 6 February 2013 remain unchanged, with the exception of the identification of a fifth person to Count 1 relating to the conspiracy.[91] However, that person was already referred to by the pseudonym "S15" in the description of the conspiracy in paragraph 42 of the Indictment of 6 February 2013 and his identity had been revealed to Defence Counsel from 14 September 2012.[92] Moreover, the Indictment of 6 February 2013 already refers to the fact that the two phones of the "Green" network, whose users are identified as Messrs Badreddine and Ayyash, were used to monitor and coordinate the preparations, as well as to monitor the progress of the attack.[93]

29. Nevertheless, the proposed amendments alter the lines of communication between the users of the "Purple" phones and those belonging to the "Green" network. For instance, the identification of the user of the "Purple 231" phone as being the same person as the user of the "Green 071" phone – who is also in contact with Mr Badreddine – infers that the person is now directly implicated in the false claim of responsibility. Although it is not as significant as the Defence suggests, the effect of these amendments on the right conferred on the Accused by Article 16 (4) (b) of the Statute to "[t]o have adequate time and facilities for the preparation of his or her defence" must be taken into consideration. The Pre-Trial Judge will therefore take this into account in the context of the separate decision he will issue on the setting of a tentative date for the trial, in accordance with Rule 91 (C) of the Rules.

"Vert 3150071" et "Violet 3575231", ERN 60280882-60280894, 24 May 2013; [REDACTED], Communications Evidence Concerning the Assassination of Rafik Hariri, Chronology Report [...], ERN D0321754-D0321842, 31 May 2013.

[88] Indictment of 21 June 2013, Annex D.

[89] [REDACTED]

[90] See *supra* para. 17.

[91] Indictment of 21 June 2013, para. 54 (a).

[92] Letters from the Prosecution to the Defence Counsel for the Accused, Disclosure of S15 Materials and Disclosure 80, 81 & 82, 14 September 2012.

[93] Indictment of 6 February 2013, para. 15 (b).

30. Furthermore, the Pre-Trial Judge considers that it is in the interests of justice and of the Accused that they be informed, now, in the most precise and effective manner possible, of the charges that the Prosecution intends to bring against them. In other words, it is essential that they know, as soon as possible, the latest status of those charges since they are based *prima facie* on credible and sufficient evidence. In this way, Defence Counsel may already prepare themselves on that basis rather than waiting for a further amendment to the Indictment to be allowed, as appropriate, by the Trial Chamber.[94]

31. In light of the foregoing, the Pre-Trial Judge authorises the substantive amendments proposed by the Prosecution in the Indictment of 21 June 2013.

D. Confidentiality measures

32. In the Request, the Prosecution seeks the same measures of protection for the Indictment of 21 June 2013 as those which apply to the Indictment of 6 February 2013 and result from the decision of 27 May 2013 by which they were allowed (the "Decision of 27 May 2013").[95] The Pre-Trial Judge considers that the reasons associated with the need to ensure the good conduct of the ongoing investigations and to guarantee the protection of the witnesses and the victims, which justified the redaction of the Indictment of 6 February 2013,[96] also apply to the Indictment of 21 June 2013. He notes, moreover, that those same reasons justify maintaining confidential, until further notice, the identity of the "Green 071" and "Purple 231" phones in the Indictment of 21 June 2013.

33. Furthermore, the annex to the present decision is confidential insofar as it refers to documents which are, at present, protected by Rule 96 (B) of the Rules.

V. Disposition

FOR THESE REASONS,

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[94] See also STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/TC, Decision on the Requests for Certification to Lodge an Appeal Against the Trial Chamber Decision of 12 June 2013, 5 July 2013, para. 12.
[95] STL, *The Prosecutor v. Ayyash et al.,* Case No. STL-11-01/PT/PTJ, Decision on the Prosecution Request of 17 April 2013, 27 May 2013, para. 6.
[96] *Ibid.*

Pursuant to Rules 71 (A) (ii) and (B) and 74 of the Rules,

THE PRE-TRIAL JUDGE,

GRANTS the Request;

AUTHORISES the amendments of the Indictment of 6 February 2013 as they appear in the Indictment of 21 June 2013;

DECLARES that the Indictment of 21 June 2013 annuls and replaces the Indictment of 6 February 2013;

ORDERS the Prosecution to file a signed confidential version of the Indictment of 21 June 2013 by 6 August 2013 at the latest;

AUTHORISES the redactions in accordance with paragraph 32 of the present decision;

ORDERS the Prosecution to file a public redacted version of the Indictment of 21 June 2013 by 6 August 2013 at the latest;

ORDERS the Prosecution to proceed with the clarifications requested in the annex to the present decision and, where appropriate, to make the necessary amendments to the reports concerned by 6 August 2013 at the latest; and

STATES that the annex to the present decision is confidential until further notice.

Done in English, Arabic and French, the French version being authoritative.
Leidschendam, 2 August 2013

[stamp] *[signature]*

Daniel Fransen
Pre-Trial Judge