



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: **5 August 2013**

Original language: **English**

Classification: **Public**

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

**DECISION ON TWO PROSECUTION SUBMISSIONS IN RELATION TO
AMENDING THE PROSECUTION RULE 91 FILINGS**

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Mr. Norman Farrell

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Counsel for Mr. Hussein Hassan Oneissi:
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I. INTRODUCTION

1. The Pre-Trial Judge hereby renders a decision on the Prosecution submissions of 10 and 15 July 2013 in relation to updating its filings pursuant to Rule 91 of the Rules of Procedure and Evidence (the “Rules”).

II. PROCEDURAL BACKGROUND

2. On 5 July 2013, the Pre-Trial Judge ordered the Parties to re-file their respective pre-trial briefs and other Rule 91 filings (the “5 July 2013 Decision”).¹

3. On 10 July 2013, the Prosecution filed a notice of intention and reclassification in relation to its Rule 91 Exhibit and Witness Lists.² On 15 July 2013, it filed a corrigendum³ along with a corrected version of this notice (the “Notice”).⁴

4. On 15 July 2013, the Prosecution filed a submission updating its Rule 91 filings (the “Submission”)⁵ in compliance with the 5 July 2013 Decision.

5. On 22 July 2013, Counsel for Mr. Salim Jamil Ayyash (the “Ayyash Defence”) filed a response to the Submission (the “Ayyash Response”)⁶ and Counsel for Mr. Mustafa Amine Badreddine (the “Badreddine Defence”) filed a response to both the Submission and the Notice (the “Badreddine Response”).⁷

6. On 24 July 2013, the Prosecution requested leave to reply to the Badreddine Response (the “Reply Request”).⁸ In a separate filing, the Prosecution requested that both the Ayyash

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on “Prosecution Motion Regarding the Defence Pre-Trial Briefs”, 5 July 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Prosecution’s Notice of Intention in relation to Exhibits and Witnesses and Notice of Reclassification, with Confidential Annexes A, B and C, 10 July 2013.

³ Corrigendum to “Prosecution’s Notice of Intention in relation to Exhibits and Witnesses and Notice of Reclassification” and to the Confidential Annex B, 15 July 2013.

⁴ Corrected version of “Prosecution’s Notice of Intention in relation to Exhibits and Witnesses and Notice of Reclassification,” filed 10 July 2013, with Confidential Annexes A, B and C (Annex B Corrected), 15 July 2013.

⁵ Prosecution’s Submission Pursuant to Rule 91, Confidential with Confidential Annexes A to H, 15 July 2013.

⁶ Response on Behalf of Mr. Ayyash to “Prosecution Submissions Pursuant to Rule 91”, Confidential with Confidential Annexes A to I, 22 July 2013.

⁷ Response on Behalf of Mr Badreddine to the Prosecution’s Notice of Intention in Relation to Exhibits and Witnesses and Submission Pursuant to Rule 91, Confidential, 22 July 2013.

⁸ Prosecution Request for Leave to Reply to the Badreddine Defence Response of 22 July 2013, Confidential, 24 July 2013.

and the Badreddine Responses be either struck out from the record or reclassified as motions (the “24 July 2013 Request”).⁹

7. On 26 July 2013, the Badreddine Defence filed a response to the Reply Request and the 24 July 2013 Request (the “Badreddine 26 July 2013 Response”).¹⁰

III. SUBMISSIONS

A. The Notice and the Badreddine Response

8. In the Notice, the Prosecution avers that it no longer intends to rely upon 6,511 exhibits and 68 witnesses currently included in its Rule 91 Exhibit and Witness Lists.¹¹ The Prosecution submits that, although the disclosed material would remain available to the four defence teams in the *Ayyash et al.* case (the “Defence”), these exhibits and witnesses should be withdrawn from its Rule 91 lists.¹² The Prosecution argues that the Defence would suffer no prejudice with the withdrawal and it would additionally “not be required to prepare for the cross-examination of the withdrawn witnesses or address issues related to the withdrawn exhibits, such as admissibility.”¹³

9. Aside from generally seeking clarifications from the Prosecution as to the legal status of the withdrawn exhibits,¹⁴ the Badreddine Response makes no specific submission in relation to the Notice.

B. The Submission and the Badreddine and Ayyash Responses

10. Pursuant to Articles 11(1) and 18(2) of the Statute and Rules 77(A), 91(G) and 146, the Prosecution has filed further updated versions of its Witness and Exhibit Lists, as well as an updated version of its pre-trial brief. In this filing, in addition to requesting the removal of another 37 exhibits, the Prosecution also requests the addition of three witnesses and

⁹ Prosecution Request for an Order Pursuant to Rule 77 to Strike from the Record or, in the Alternative, Reclassify as Motions, Badreddine and Ayyash Requests for Relief in their Responses of 22 July 2013, Confidential, 24 July 2013.

¹⁰ Response on behalf of Mr Badreddine to the Prosecution's Requests Dated 24 July 2013 Relating to the Defence Response of 22 July 2013, Confidential, 26 July 2013.

¹¹ Notice, para. 3.

¹² *Id.*, para. 4.

¹³ *Ibid.*

¹⁴ Badreddine Response, para. 4.

115 exhibits to its Rule 91 lists.¹⁵ It submits that these requests “result from the Prosecution’s efforts over the last several months to streamline the evidence it intends to present at trial.”¹⁶

1. The Prosecution Witness List

11. The Prosecution proposes to add three witnesses to its Rule 91 Witness List,¹⁷ for which Rule 110(A)(ii) disclosure was completed on 17 July 2013.¹⁸ For two of the three witnesses, their main statements have already been disclosed and the third witness is expected to testify in relation to the chain of custody of evidence already on the Prosecution’s Exhibit List.¹⁹

2. The Prosecution Exhibit List

12. The Prosecution proposes to add 115 exhibits, for which disclosure was completed on 18 July 2013,²⁰ to its Rule 91 Exhibit List. These exhibits consist of the following:²¹

- i. six previously disclosed witness statements of witnesses already on the Prosecution Witness List;
- ii. witness statements of two proposed additional witnesses;
- iii. newly created evidence as the result of ongoing analysis, related to a new sequential mobile phone (SMP) attributed to Mr. Badreddine;
- iv. newly created extracts from evidence already on the Prosecution Exhibit List;
- v. evidence previously disclosed pursuant to Rule 110(B) to the Defence along with a notification of the Prosecution’s intention to use it at trial.

13. The Prosecution also gives notice that it no longer intends to rely on 37 exhibits, mostly related to forensics, and requests that these exhibits be removed from its Exhibit List.²² It repeats the arguments stated in the Notice, notably that the disclosed material

¹⁵ Submission, para. 3.

¹⁶ *Ibid.*

¹⁷ *Id.*, para. 25.

¹⁸ *Id.*, para. 29; Letter from the Office of the Prosecutor re: Disclosures 572-573, Confidential, 17 July 2013.

¹⁹ Submission, paras 26-28.

²⁰ *Id.*, para. 30; Letter from the Office of the Prosecutor re: Disclosures 572-573, Confidential, 17 July 2013; Letter from the Office of the Prosecution re: Disclosures 574-575, Confidential, 18 July 2013.

²¹ Submission, paras 30-32.

²² *Id.*, para. 34.

remains available to the Defence, whom the Prosecution avers will not be prejudiced by the withdrawal of these exhibits.²³ Amongst the exhibits the Prosecution seeks to withdraw are three communications evidence reports, each specific to one or two of the accused (collectively, “Indictment Report”),²⁴ as well as four investigators notes and two reports prepared by Prosecution staff members (collectively, “Summary Reports”).²⁵ The Prosecution submits that both the substance of the Indictment Report and all evidence cited therein remain on the Prosecution’s Rule 91 lists through other reports.²⁶ The Prosecution applies the same reasoning in relation to the Summary Reports it no longer intends to offer as exhibits at trial, specifying that they are “best considered as interpretive guides.”²⁷

14. Of the 115 exhibits that the Prosecution wishes to add to its Exhibit Lists, the Ayyash Defence specifically objects to the addition of one investigator’s note in particular.²⁸ The Ayyash Defence argues that, despite repeated requests, the Prosecution has neither disclosed the unredacted version of this document nor provided a legal basis for the redactions.²⁹ The Ayyash Defence requests that the Pre-Trial Judge deny the addition of this document to the Prosecution’s Rule 91 Exhibit List or, in the alternative, he should order the Prosecution to disclose its unredacted version.³⁰

15. The Badreddine Defence does not oppose the withdrawal of the exhibits the Prosecution no longer intends to rely on at trial, but it seeks clarifications with respect to two of them in particular. It submits that “the Pre-Trial Judge should seek clarification from the Prosecution as to the legal status of these withdrawn documents, in particular the ‘summary-reports’”.³¹ Additionally, the Badreddine Defence questions that a report concerning the connected cases — which it claims was “initially entitled part 4 of the Indictment Report” — was not included in the withdrawn exhibits and it requests clarification as to the status of this report and its author.³² As for the exhibits the Prosecution wishes to add to its Rule 91 Exhibit List, the Badreddine Defence “objects to this late addition”,³³

²³ *Id.*, paras 34-35.

²⁴ *Id.*, para. 36, fn. 25.

²⁵ *Id.*, para. 40.

²⁶ *Id.*, para. 36.

²⁷ *Id.*, para. 39.

²⁸ Ayyash Response, paras 2-3.

²⁹ *Id.*, paras 3-5.

³⁰ *Id.*, para. 8.

³¹ Badreddine Response, para. 4.

³² *Id.*, para. 6.

³³ *Id.*, para. 7.

“several months after the trial was initially supposed to start.”³⁴ It adds that “[t]he Prosecution should be required to provide detailed explanations as to the relevance of the exhibits it seeks to add at this late stage”.³⁵

3. The Prosecution’s Pre-Trial Brief

16. In accordance with the 5 July 2013 Decision, the Prosecution indicates that it has updated its pre-trial brief to reflect the amended *Ayyash et al.* indictment of 6 February 2013 (the “Amended Indictment”).³⁶ Aside from the minor typographical corrections, the Prosecution submits that the changes serve to provide additional detail and to better reflect the amendments made in the Amended Indictment.³⁷

17. The Badreddine Defence submits that the updated pre-trial brief filed by the Prosecution is “defective and inadequate.”³⁸ It argues that the Prosecution should have provided further details as to the evidence it relies on to support the amended allegations.³⁹

C. The Reply Request and the 24 July 2013 Request

18. In the Reply Request, the Prosecution submits that the Badreddine Response raises a new issue by proposing a “new legal standard [...] that would prohibit the addition of exhibits to the Rule 91 Exhibit List where the evidence in the exhibits is not referred to in the Indictment.”⁴⁰ In the 24 July 2013 Request, the Prosecution argues that both the Badreddine Response and the Ayyash Response go beyond the scope of a proper response and are effectively distinct motions.⁴¹ The Prosecution requests either that they be struck from the record pursuant to Rule 77 or, that they be reclassified as motions, allowing for a Prosecution response.⁴²

D. The Badreddine 26 July 2013 Response

19. The Badreddine Defence asks the Pre-Trial Judge to deny both the Reply Request and the 24 July 2013 Request. In the alternative, “if the Pre-Trial Judge feels that the Defence

³⁴ *Id.*, para. 8.

³⁵ *Id.*, para. 9.

³⁶ Submission, para. 2.

³⁷ *Id.*, paras 6-7.

³⁸ Badreddine Response, para. 12.

³⁹ *Ibid.*

⁴⁰ Reply Request, para. 2.

⁴¹ 24 July 2013 Request, paras 1-2, 4.

⁴² *Id.*, paras 1, 8.

should have filed a separate motion to validly raise the matter of the inadequacy of the Prosecution Updated Pre-Trial Brief,” he is asked to allow the Prosecution to respond.⁴³

IV. APPLICABLE LAW

20. International criminal jurisprudence has established that a Judge or Chamber, in the exercise of inherent discretion, may grant a request for amendments to a Party’s witness and exhibit lists if satisfied that it is in the interests of justice.⁴⁴ This determination requires balancing the right of one Party to present available evidence to prove its case with the right of the opposing Party to have adequate time and facilities to prepare its own case. The Judge or Chamber must therefore consider any burden placed on the Parties by the late addition of a witness or exhibit to the Rule 91 lists.⁴⁵ Factors considered in granting a Prosecution request to amend its Rule 91 lists include: whether the proposed evidence is *prima facie* relevant and of probative value of issues raised in the indictment; whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage of the proceedings; the rights of the accused to a fair and expeditious trial; the stage of the trial and whether granting the amendment would result in undue delay in the proceedings; and other circumstances specific to each case.⁴⁶

V. DISCUSSION

A. The Prosecution request to withdraw 68 witnesses and 6,548 exhibits from its Rule 91 Witness and Exhibit Lists

21. The Pre-Trial Judge notes that the Defence has not opposed the Prosecution’s request to remove exhibits and witnesses for its Rule 91 lists. Insofar as the Prosecution no longer considers certain exhibits and witnesses necessary or suitable for trial, removing them from its Rule 91 lists is in the interest of preparing for an efficient and expeditious trial. The

⁴³ Badreddine 26 July 2013 Response, paras 8-9.

⁴⁴ ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007, para. 37 (“Popović Decision”); ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Witness List to Add Witness KDZ597, 30 June 2010, paras 4-5 (“Karadžić Decision”); ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion to Vary List of Witnesses, 21 February 2013, para. 5; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Stanišić Defence Motion to Add Witness DST-081 to its Rule 65 *ter* Witness List, 20 October 2011, para. 4; ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6 (“Mladić Decision”).

⁴⁵ *Ibid.*

⁴⁶ Mladić Decision, para. 6; Karadžić Decision, para. 5; Popović Decision, para. 37.

Defence can accordingly limit the preparation of its case and cross-examinations to the relevant material and witnesses.

22. The Pre-Trial Judge therefore grants the relief sought in the Notice in whole and grants the relief sought in the Submission in relation to removing 37 exhibits from its Exhibit List. He thereby allows the Prosecution to remove a total of 6,548 exhibits and 68 witnesses⁴⁷ from its Rule 91 lists.

23. As for the request by the Badreddine Defence that the Prosecution clarify the legal status of these withdrawn documents,⁴⁸ the Pre-Trial Judge considers that although they no longer form part of the Prosecution Exhibit List, having already been disclosed to the Defence, the latter is free to use them for the preparation of its case. With respect to the Badreddine Defence taking issue with a report concerning the connected cases not being amongst the withdrawn exhibits, the Pre-Trial Judge recalls that the Prosecution is afforded a degree of discretion in preparing its case and determining what evidence to present, and it is not for the Defence to determine whether a certain document ought to be withdrawn from the Prosecution Exhibit List.

B. The Prosecution request to add three witnesses to its Rule 91 Witness List

24. On the basis of the information provided by the Prosecution in Annex E to the Submission, the Pre-Trial Judge is satisfied as to the *prima facie* relevance and probative value of the evidence the three witnesses are expected to provide. He further notes that the statements of two of the witnesses have already been disclosed to the Defence, and the third witness is expected to testify in relation the chain of custody of evidence already disclosed.⁴⁹ The Pre-Trial Judge therefore considers that adding three witnesses to the Prosecution's Witness List at this stage of proceedings will not cause undue delays or prejudice to the rights of the Accused. The Pre-Trial Judge additionally notes that the Defence did not oppose this Prosecution request and he therefore allows the latter to add the three witnesses to its Witness List.

⁴⁷ Submission, para. 11.

⁴⁸ Badreddine Response, para. 4.

⁴⁹ Submission, paras 26-28.

C. The Prosecution request to add 115 exhibits to its Rule 91 Exhibit List

25. The Pre-Trial Judge considers that the *prima facie* relevance and probative value of the 115 exhibits the Prosecution wishes to add to its Exhibit List has been adequately demonstrated in the Submission and Annex F thereto.⁵⁰ Furthermore, the Pre-Trial Judge notes that several of the proposed exhibits have already been disclosed to the Defence and/or consist of extracts from evidence already on the Prosecution's Exhibit List. Taking into consideration the number of the proposed exhibits and their nature, as well as the fact that the Prosecution has condensed its Rule 91 lists, the Pre-Trial Judge considers that the requested additions will not place an undue burden on the Defence at this stage of the proceedings.

26. With respect to the Ayyash Response taking issue with the redacted version of one exhibit in particular, the Pre-Trial Judge considers that, to the extent it relates to a specific disclosure concern, the Ayyash Defence is free to raise it in a separate motion. He further recalls that the evidentiary value of a redacted document, if any, will ultimately be determined by the Trial Chamber.

27. In balancing the Prosecution's right to present evidence to prove its case with the rights of the accused to a fair and expeditious trial, the Pre-Trial Judge is satisfied that it is in the interests of justice to grant the Prosecution leave to add the 115 proposed exhibits its Rule 91 Exhibit List.

D. The Prosecution's updated pre-trial brief

28. In his 5 July 2013 Decision, the Pre-Trial Judge ordered the Prosecution to update its pre-trial brief to reflect the Amended Indictment as part of a decision focussing on the need for the Defence to resubmit their respective pre-trial briefs. Since the Prosecution was ordered to file an updated pre-trial brief, it is not necessary for it to request leave to amend it in the Submission. The Pre-Trial Judge therefore considers this requested relief to be unfounded, as well as the Badreddine Defence's request to order the Prosecution to file a further updated pre-trial brief.

⁵⁰ *Id.*, paras 30-33.

E. The Reply Request and the 24 July 2013 Request

29. The Pre-Trial Judge considers that a Prosecution reply to the Badreddine Response is not necessary for the purposes of rendering this decision. He therefore denies the Reply Request.

30. He further notes that this decision specifies the instances in which the relief sought by either the Ayyash or Badreddine Defence went beyond the scope of a response to requests made by the Prosecution in the Notice and the Submission. The Pre-Trial Judge therefore considers the issues raised in the 24 July 2013 Request to be moot and it is denied.

F. The Badreddine 26 July 2013 Response

31. Having already denied both the Reply Request and the 24 July 2013 Request, the Pre-Trial Judge considers that he need not decide on the Badreddine 26 July 2013 Response.

VI. CONFIDENTIALITY

32. The Pre-Trial Judge notes that the Submission and the annexes to the Notice were filed confidentially because the Prosecution claims that “[t]he Annexes contain information concerning confidential witnesses and exhibits”.⁵¹ Accordingly, the Ayyash Response, the Badreddine Response, the Reply Request, the 24 July 2013 Request and the Badreddine 26 July 2013 Response were also filed confidentially. The Pre-Trial Judge notes that the reasoning justifying the confidential status of the Prosecution’s filing is specific to the annexes, and therefore invites the Prosecution to consider whether the Submission could have been filed publicly with confidential annexes. In the alternative, he orders the Prosecution to file a public redacted version of the Submission. Nevertheless, since this decision contains no information specific to items listed in the annexes to the Submission or the annexes to the Notice, the Pre-Trial Judge renders it publicly.

⁵¹ Notice, para. 11; Submission, paras 45, 46(g): the Pre-Trial Judge notes that the reasoning of this paragraph is specific to the annexes, and not to the Submission.

VII. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

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

GRANTS the Notice in whole and the Submission in part;

GRANTS the Prosecution leave to amend its Rule 91 Witness and Exhibits Lists by removing the witnesses listed in Annex B to the Notice, as well as removing the exhibits listed in Annex A to the Notice and the exhibits listed in Annex G to the Submission;

GRANTS the Prosecution leave to amend its Rule 91 Witness List by adding the three witnesses listed in Annex E to the Submission;

GRANTS the Prosecution leave to amend its Rule 91 Exhibit List by adding the 115 exhibits listed in Annex F to the Submission;

GRANTS the Prosecution leave to file the amended Rule 91 Exhibit and Witness Lists containing the changes authorised by this decision;

TAKES NOTE of the disclosure of the additional exhibits which have not been previously disclosed, and of the disclosure of Rule 110(A)(ii) materials related to the proposed additional three witnesses, all of which was completed by 18 July 2013;

DECLARES that the Prosecution request for leave to amend its pre-trial brief as reflected in track changes in Annex B to the Submission, and in final updated form in Annex A to the Submission to be moot;

DENIES the relief requested in both the Ayyash Response and the Badreddine Response;

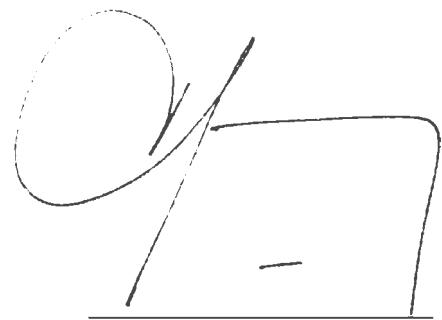
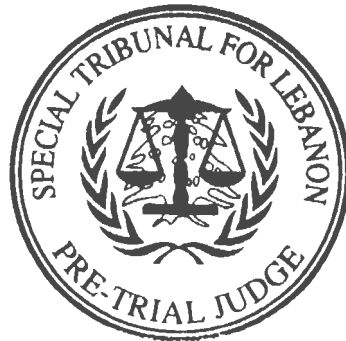
DENIES both the Reply Request and the 24 July 2013 Request;

ORDERS that the Prosecution either re-file the Submission publicly while maintaining the confidentiality of the annexes, or file a public redacted version of the Submission; and

DECLARES the Badreddine 26 July 2013 Response to be moot.

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

Leidschendam, 5 August 2013



Daniel Fransen
Pre-Trial Judge

