



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: **18 September 2013**

Original language: **English**

Classification: **Public**

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

### **DECISION ON THE PROSECUTION SUBMISSION PURSUANT TO RULE 91(G)(II) AND (III)**

**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. The Pre-Trial Judge hereby decides upon the Prosecution's request for leave to amend the Witness and Exhibit Lists (the "Submission")<sup>1</sup>, filed on 19 August 2013 pursuant to Rule 91 of the Rules of Procedure and Evidence (the "Rules").

## **II. PROCEDURAL BACKGROUND**

2. On 21 June 2013, the Prosecution filed a further request for leave to amend the indictment in the *Ayyash et al.* case (the "Amendment Request").<sup>2</sup>

3. On 31 July 2013, the Pre-Trial Judge granted the Amendment Request (the "31 July 2013 Decision").<sup>3</sup>

4. On 2 August 2013, the Prosecution filed the signed version of the indictment as amended (the "Amended Indictment").<sup>4</sup>

5. On 6 August 2013, the Prosecution filed a response to questions and clarifications raised by the Pre-Trial Judge in the Confidential Annex to the 31 July 2013 Decision (the "Clarifications Submission").<sup>5</sup>

6. On 19 August 2013, the Prosecution filed the Submission.

7. On 29 August 2013, Counsel for Mr. Mustafa Amine Badreddine (the "Badreddine Defence") filed a response to the Submission (the "Response").<sup>6</sup>

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii), Confidential with Confidential Annexes A to D, 19 August 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> Prosecution Further Request for Leave to Amend the Indictment, Confidential with Confidential Annexes A-D, 21 June 2013, with a Public Redacted Version issued on 1 July 2013.

<sup>3</sup> *Amended Version*: Decision Relating to the Prosecution Request of 21 June 2013 for Leave to Amend the Indictment of 6 February 2013, Confidential, 31 July 2013, with a Public Redacted Version issued on 2 August 2013.

<sup>4</sup> Prosecution's Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge's Decision of 31 July 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, with Confidential Annexes A and B, 2 August 2013.

<sup>5</sup> Prosecution Response to Questions and Clarifications Raised by the Pre-Trial Judge in the Confidential Annex to the Pre-Trial Judge's « Décision portant sur la requête du 21 juin 2013 du Procureur en modification de l'acte d'accusation du 6 février 2013 », of 31 July 2013, and Request Seeking Leave to Add Substantive Changes to Chronology Report and to File Revised Co-location Report Number 3 with Additional Material, in Support of the Amendments to the Indictment Confirmed on 31 July 2013, Confidential with Confidential Annexes A-D, 6 August 2013.

<sup>6</sup> Badreddine Defence Response to "Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii)", Confidential, 29 August 2013.

### III. SUBMISSIONS

8. The Prosecution states that the amendments to its Rule 91 Witness and Exhibit Lists serve to better reflect the Amended Indictment.<sup>7</sup> It seeks to add eight witnesses to its Witness List and 225 exhibits to its Exhibit List, which it submits “are *prima facie* relevant and of probative value of issues raised in the [Amended Indictment].”<sup>8</sup>

9. In relation to the eight additional witnesses, listed in Annex C to the Submission, the Prosecution specifies that their anticipated testimony concerns the attribution of Purple 231 to S15.<sup>9</sup> The Prosecution intends to complete the Rule 110(A)(ii) disclosure related to these additional witnesses by 30 August 2013.<sup>10</sup> As for the 225 proposed additional exhibits, listed in Annex D to the Submission, the Prosecution argues that they are comprised of two types of material. Some material is filed in support of the Amended Indictment (the “Amendment Exhibits”), while other material is filed in support of the Clarifications Submission (the “Clarifications Exhibits”).<sup>11</sup> The Prosecution notes that “[a]ll material has been previously disclosed to the Defence.”<sup>12</sup> Additionally, by 20 August 2013, it intends to disclose, separately, eight extracts of a larger document that was included in the Amendment Request.<sup>13</sup> In summary, the Prosecution maintains that it has updated its Rule 91 Exhibit and Witness lists to “reflect the evidence [it] intends to rely upon at trial.”<sup>14</sup>

10. In response, the Badreddine Defence submits that, whilst it does not object to the addition of the eight witnesses to the Prosecution’s Witness List, it opposes the request for leave to add 225 proposed exhibits “without discrimination”.<sup>15</sup> It argues that “many of the 225 proposed additional exhibits are entirely unrelated” to the amendments to the indictment and to the questions posed by the Pre-Trial Judge in relation to those amendments.<sup>16</sup> In the absence of further justifications provided by the Prosecution, the Badreddine Defence requests that the Pre-Trial Judge deny the addition of any proposed exhibit which does not

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<sup>7</sup> Submission, para. 2.

<sup>8</sup> *Id.*, paras 3-4(a).

<sup>9</sup> *Id.*, para. 4(a).

<sup>10</sup> *Id.*, para. 6; The Pre-Trial Judge notes that the Prosecution completed this Rule 110(A)(ii) disclosure on 28 August 2013. See disclosure 593.

<sup>11</sup> *Id.*, para. 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.*, para. 9; The Pre-Trial Judge notes that the Prosecution completed the disclosure of these extracts on 20 August 2013. See disclosure 591.

<sup>14</sup> *Id.*, para. 12.

<sup>15</sup> Response, para. 1.

<sup>16</sup> *Id.*, para. 2.

amount to either an Amendment Exhibit or a Clarifications Exhibit.<sup>17</sup> While it “accepts that approximately 155 of the 225 proposed additional exhibits may fall within one or other of these two categories”, the Badreddine Defence submits that “at least 70 of the proposed additional exhibits do not.”<sup>18</sup> With respect to those 70 proposed exhibits, the Badreddine Defence argues that the Prosecution has neither shown how they are *prima facie* relevant and of probative value, nor shown good cause for their tardy addition to the Exhibit List.<sup>19</sup> It therefore opposes the addition of these proposed exhibits to the Prosecution’s Rule 91 list.

#### IV. APPLICABLE LAW

11. The Pre-Trial Judge has already, in a previous decision, outlined the applicable law in exercising his inherent discretion in relation to a Prosecution request for amendments to its Witness and Exhibit lists.<sup>20</sup> In granting such a request, he must be satisfied that doing so is in the interests of justice after having carefully balanced the right of the Prosecution to present available evidence against the right of the accused to have adequate time and facilities to prepare for trial. The Pre-Trial Judge must consider any burden placed on the defence teams by the late addition of a witness or exhibit to the Prosecution’s Rule 91 lists.<sup>21</sup> While taking into account the specific circumstances of each case, the Pre-Trial Judge will generally consider, *inter alia*: 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 stage of the trial; and whether granting the amendment would result in undue delay in the proceedings.<sup>22</sup>

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<sup>17</sup> *Id.*, para. 3.

<sup>18</sup> *Id.*, para. 7.

<sup>19</sup> *Ibid.*

<sup>20</sup> Decision on Two Prosecution Submissions in Relation to Amending the Prosecution Rule 91 Filings, 5 August 2013, para. 20, citing: 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”).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, citing: Mladić Decision, para. 6; Karadžić Decision, para. 5; Popović Decision, para. 37.

## V. DISCUSSION

12. The Pre-Trial Judge notes that, out of the 225 additional exhibits proposed by the Prosecution, the Badreddine Defence only opposes the addition of those that it considers are neither Amendment Exhibits nor Clarifications Exhibits. Accordingly, the Badreddine Defence lists 70 proposed exhibits which it argues fall in neither of these two categories and for which the Prosecution has not provided adequate reasons justifying their addition to its Rule 91 list (the “Litigated Exhibits”).

13. The Pre-Trial Judge has carefully reviewed all the Litigated Exhibits listed at paragraph 8 of the Response and sees no reason to distinguish them from the other proposed additional exhibits submitted by the Prosecution in support of the Amended Indictment. Indeed, all 70 of the Litigated Exhibits appear in the confidential Schedule of Supporting Material filed as Annex C to the Amendment Request. Noting that the Badreddine Defence does not oppose the addition of what it considers to be Amendment Exhibits, the Pre-Trial Judge finds that the Litigated Exhibits are in fact valid Amendment Exhibits, and must therefore be evaluated accordingly.

14. The Pre-Trial Judge considers that the additional exhibits and witnesses proposed by the Prosecution are *prima facie* relevant and of probative value, as they are filed in support of the Amended Indictment. Further, their connection with the Amended Indictment, and the clarifications specifically sought by the Pre-Trial Judge in response to it, constitute good cause for the Prosecution not having sought to add the proposed additional exhibits and witnesses to its Rule 91 lists at an earlier stage of the proceedings.

15. In considering any burden placed on the defence teams by the additions to the Prosecution’s Exhibit List at this stage of the proceedings, the Pre-Trial Judge notes that the proposed additional exhibits were already disclosed to the defence and listed in the Amendment Request and Clarifications Submission. He also takes into account that the Submission was filed over four months before the date set for the start of trial proceedings.

16. Finally, it is also beneficial to the Defence for the Prosecution’s Rule 91 lists to better reflect, at this time, the evidence it intends to use at trial, as opposed to denying the Submission and having the Prosecution seek leave from the Trial Chamber to amend its lists. Therefore, after having balanced the right of the Prosecution to present evidence to support

its case with the right of the accused to adequately prepare for trial, the Pre-Trial Judge is satisfied that granting the Submission is in the interests of justice.

## **VI. CONFIDENTIALITY**

17. The Pre-Trial Judge notes that the Submission and its corresponding annexes, as well as the Response, were filed confidentially as they contain information concerning confidential witnesses and exhibits. While the Pre-Trial Judge maintains the confidential status of these filings, he files this decision publicly as it does not contain any confidential information.

## **VII. DISPOSITION**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Rules 71 and 91,

**GRANTS** the Prosecution leave to amend its Rule 91 Witness List by adding eight witnesses listed in Annex C to the Submission;

**GRANTS** the Prosecution leave to amend its Rule 91 Exhibit List by adding 225 exhibits listed in Annex D to the Submission;

**GRANTS** the Prosecution leave to file the amended Rule 91 Exhibit and Witness Lists attached respectively as Annexes A and B to the Submission;

**TAKES NOTE** of the Prosecution's disclosure of Rule 110(A)(ii) materials related to the proposed additional witnesses, described in paragraph 9 of this decision, completed on 28 August 2013;

**TAKES NOTE** of the Prosecution's disclosure of eight extracts, described in paragraph 9 of this decision, completed on 20 August 2013;

**DISMISSES** the Response; and

**ORDERS** that the Submission and its annexes, as well as the Response, remain confidential until the Pre-Trial Judge or a Chamber decides otherwise.

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

Leidschendam, 18 September 2013



Daniel Fransen  
Pre-Trial Judge

