



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: **17 October 2013**

Original language: **English**

Classification: **Public**

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

### **DECISION ON THE DEFENCE MOTION FOR AN ORDER TO COMPEL DISCLOSURE OF AN UNREDACTED DOCUMENT**

**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. With this decision, the Pre-Trial Judge rules on a motion by Defence Counsel for Mr. Salim Jamil Ayyash (“Defence”) requesting disclosure of an unredacted version of the “Investigators Note - Finding the Communications Networks” (“Note”) on the Prosecution’s Rule 91 exhibit list, as well as any other undisclosed documents listed in the footnotes of that Note.

## **II. PROCEDURAL BACKGROUND**

2. On 7 August 2013, the Ayyash Defence filed a motion for an order to compel disclosure of an unredacted document. A corrigendum and corrected version were filed on 12 August 2013 (the “Motion”).<sup>1</sup>

3. On 12 August 2013, the Defence of Mr. Mustafa Amine Badreddine joined the Ayyash Motion.<sup>2</sup>

4. On 22 August 2013, the Prosecution responded to the Motion (the “Response”).<sup>3</sup>

5. On 10 September 2013, the Prosecution sought authorisation to remove the Note from its Rule 91 exhibit list.<sup>4</sup> The decision on this issue is still pending. On 11 October 2013, Pre-Trial Judge requested further submissions from the Prosecution and, as required, the Defence.<sup>5</sup>

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Corrigendum to Motion by the Defence of Mr. Ayyash for an Order to Compel Disclosure of an Unredacted Document, Confidential, 12 August 2013; Corrected Version of Motion by the Defence of Mr. Ayyash for an Order to Compel Disclosure of an Unredacted Document, 7 August 2013, including confidential Annexes A-I. The Pre-Trial Judge notes that the corrected version was filed on 12 August 2013, but was dated 7 August 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> Defence for Mr Badreddine’s Joinder to the “Motion by the Defence for Mr. Ayyash for an Order to Compel Disclosure of an Unredacted Document”, 12 August 2013.

<sup>3</sup> Prosecution Response to Motion by the Defence of Mr. Ayyash for an Order to Compel Disclosure of an Unredacted Document, 22 August 2013.

<sup>4</sup> *Id.* at para. 19; Prosecution Submission Pursuant to Rules 91(G)(ii) and (iii), confidential with confidential Annexes A-H, 10 September 2013, para. 5, confidential Annex F, Withdrawn Exhibits, Item no. 30.

<sup>5</sup> Confidential Internal Memorandum from the Pre-Trial Judge, 11 October 2013.

### III. SUBMISSIONS

#### A. The Motion

6. The Defence seeks an unredacted version of the Note, without specifically relying on any Rule of the Rules of Procedure and Evidence (“Rules”). It submits that, despite multiple requests, the Prosecution has failed to disclose an unredacted version of the Note, and further, it has failed to provide a legal basis for the existing redactions.<sup>6</sup> The Defence is unaware of any pending Rule 116 applications for the document. It recalls that the Prosecution intends to introduce this document as evidence at trial and to call the author of the document as a witness who will testify as to matters relating to the content of the Note. In this regard, the Defence submits that the Note will be related to questions regarding the credibility or any potential bias of the witness.<sup>7</sup>

7. The Defence also observes that several footnotes of the Note are redacted, and thus requests that the Prosecution be required to disclose any documents cited in the footnotes that are not currently in the possession of the Defence.<sup>8</sup>

#### B. The Response

8. The Prosecution first recalls that it has disclosed several redacted versions of the Note. Most recently, on 22 August 2013, it disclosed a version with “significantly fewer redactions” along with summaries of the documents contained in the footnotes.<sup>9</sup> The Prosecution submits that it has complied with all of its disclosure obligations under the Rules, most notably Rule 110(A)(ii), 110(B) and 113,<sup>10</sup> and that the additional redacted information is exempt from disclosure under Rules 111 and 118.<sup>11</sup> It further asserts that the limitations on disclosure obligations set out, *inter alia*, in Rules 111 and 118 do not require it to provide an explanation or justification for its application of the Rules and the resulting assessed redactions.<sup>12</sup> Finally, the Prosecution expresses its intention to withdraw the Note from its Rule 91 exhibit list, and indicates that it will no longer rely on it at trial.<sup>13</sup>

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<sup>6</sup> Ayyash Request, paras 15-16.

<sup>7</sup> *Id.* at para. 17.

<sup>8</sup> *Id.* at para. 20.

<sup>9</sup> Prosecution Response, paras 2, 6, confidential Annex A, Prosecution Disclosure Letter dated 22 August 2013.

<sup>10</sup> *Id.* at paras 3, 6, 14.

<sup>11</sup> *Id.* at para. 14.

<sup>12</sup> *Id.* at paras 4, 7, 10.

<sup>13</sup> *Id.* at paras 5, 19, confidential Annex A, Prosecution Disclosure Letter dated 22 August 2013.

#### IV. DISCUSSION

9. The Pre-Trial Judge recalls that he has previously underscored the importance that motions for disclosure are made with a degree of specificity and care.<sup>14</sup> Regarding Rules 110(B) and 113, he has held that the Defence “must demonstrate the existence of specific conditions when seising the Pre-Trial Judge of a motion relying on the two provisions”.<sup>15</sup> The Defence, in this case, has not indicated under which Rule it is seeking disclosure of the unredacted Note, and has also not provided clear arguments on the requirements of the Rules. Ordinarily, it is not for the Pre-Trial Judge to determine the most appropriate Rule applicable to a Party’s request. Rather, it is incumbent on the Parties to identify, with precision, the Rules under which they are seeking relief and the substantive arguments underlying each request.

10. However, to avoid the duplication of filings and thereby conserve the resources of the Tribunal, the Pre-Trial Judge considers, in this limited case, that he is in a position to decide on the matter at hand.

11. The Pre-Trial Judge recalls that Rule 110(A)(ii) requires disclosure of all statements, regardless of their form and source, of witnesses who will be called to testify at trial.<sup>16</sup> With respect to investigators’ notes, the Pre-Trial Judge recalls that the words of a witness that are contained in a statement must be disclosed, but that any comments or analyses by others contained in the same document are not necessarily disclosable, and redactions may be appropriate.<sup>17</sup>

12. Rule 113 requires the Prosecutor to disclose to the Defence material reasonably suggesting the innocence or mitigating the guilt of the accused, or affecting the credibility of

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<sup>14</sup> Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 (“8 November 2012 Decision”), para. 26.

<sup>15</sup> Decision on the Sabra Defence’s Fifth Request of the Fourth Motion for Disclosure, 21 December 2012, para. 8.

<sup>16</sup> Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 14 August 2013, (“14 August 2013 Decision”), para. 30; Decision on the Prosecution Application for Non-Disclosure of Certain Statements of Witnesses Pursuant to Rule 116, Confidential, 20 December 2012, (“20 December 2012 Decision”), para. 16, citing: SCSL, *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes pursuant to Rules 66 and/or 68, 4 May 2005. A public redacted version of the 20 December 2012 Decision was filed on 28 May 2013.

<sup>17</sup> STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011 (“19 July 2011 AC Decision”), para. 109; 20 December 2012 Decision, para. 12.

the Prosecution's evidence, subject to the provisions of Rules 116, 117 and 118.<sup>18</sup> The burden rests with the Defence to prove, *prima facie*, that the information is within the Prosecutor's possession or actual knowledge and that it is exculpatory in nature.<sup>19</sup>

13. Rule 111 gives an exception to disclosure obligations for reports, memoranda or other internal documents prepared by a Party, and, for the Prosecution, internal documents prepared by the UNIIIC in connection with its investigative work.<sup>20</sup>

14. Despite the Prosecution's request for the removal of the Note from its Rule 91 exhibit list, and irrespective of the forthcoming decision that the Pre-Trial Judge will render on this issue, the Pre-Trial Judge considers that the Note is a statement of a witness. The author of the Note, a Prosecution investigator, will be called to testify at trial.<sup>21</sup> Whether or not the Prosecution intends to rely on the document is irrelevant for the purposes of Rule 110(A)(ii). The Pre-Trial Judge notes that the document was properly disclosed previously by the Prosecution under Rule 110(A)(ii).<sup>22</sup> Regarding the content of the Note, the Prosecution has asserted that all information relating to the witness's testimony has been disclosed to the Defence,<sup>23</sup> and that the remaining redactions have only been put in place to protect information subject to Rules 111 and 118.<sup>24</sup>

15. Under Rule 118(A), the Prosecution is prohibited from disclosing any information affecting the security interests of a State or international entity or an agent thereof without consent of the person or entity providing the information. Rule 118(B) provides for an exception and ensuing procedure for material falling under the ambit of Rule 113. Indeed, were the Prosecution to determine that Rule 113 information exists in the document it would be required to follow the procedures set out in Rule 118(B) and (C). The Rule's wording, "in the Prosecutor's view",<sup>25</sup> clearly gives the Prosecution sole discretion in determining what information is subject to Rule 113. In this instance, the Prosecution has averred that it has fully complied with its Rule 113 obligations.<sup>26</sup>

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<sup>18</sup> Rule 113 STL RPE. *See also* 19 July 2011 AC Decision, para. 97.

<sup>19</sup> 8 November 2012 Decision, para. 28.

<sup>20</sup> Rule 111 STL RPE; 19 July 2011 AC Decision, paras 76-77.

<sup>21</sup> Prosecution Response, para. 16.

<sup>22</sup> *Id.* at para. 15.

<sup>23</sup> *Id.* at para. 16.

<sup>24</sup> *Id.* at para. 14.

<sup>25</sup> Rule 118(B) STL RPE.

<sup>26</sup> Prosecution Response, para. 17.

16. The Defence argues that the Prosecution's lack of a valid legal basis for failing to disclose the unredacted Note means that it should be required to disclose the document.<sup>27</sup> However, the Pre-Trial Judge has already established that a "wide margin of discretion is afforded to the Prosecutor in the performance of its important duty to disclose exculpatory information, and the Prosecutor is otherwise presumed to be acting in good faith in complying with this duty."<sup>28</sup>

17. The Pre-Trial Judge has previously acknowledged the existence of a clear presumption in international criminal jurisprudence that, without proof that the Prosecution has abused its discretionary judgment, "the presumption that the Prosecutor is acting in good faith will preclude judicial intervention".<sup>29</sup>

18. The Defence bears the burden of proof in showing that the Prosecutor has abused that discretion or is not acting in good faith in the performance of its disclosure obligations,<sup>30</sup> which in this case the Defence has failed to do. The Pre-Trial Judge does not consider it appropriate to adjudicate on the Prosecutor's discretion absent any showing of evidence on this point.

19. Regarding the documents contained in the footnotes of the Note, the Prosecution has asserted that all materials subject to disclosure are already in the possession of the Defence, and the remaining materials are exempt from disclosure under Rules 111 and 118.<sup>31</sup> Indeed, the Pre-Trial Judge notes that on 22 August 2013 the Prosecution provided "extracts from materials underlying the Investigators Note."<sup>32</sup> If the Defence still believes that any of the documents contained in the footnotes should be disclosed under the Rules then it should make detailed submissions to that effect in further correspondence with the Prosecution.<sup>33</sup>

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<sup>27</sup> Ayyash Request, paras 16, 18.

<sup>28</sup> 14 August 2013 Decision, para. 35, citing 8 November 2012 Decision, para. 28.

<sup>29</sup> 8 November 2012 Decision, para. 28, citing ICTY, *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 para. 31; ICTY, *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Preać*, Case No. IT-98-30/1-A, Decision, 22 March 2004, p. 3; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 39.

<sup>30</sup> 14 August 2013 Decision, para. 36.

<sup>31</sup> Prosecution Response, para. 19.

<sup>32</sup> *Id.* at paras 2, 6, confidential Annex A, Prosecution Disclosure Letter dated 22 August 2013.

<sup>33</sup> See Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, paras 23, 24.

20. For the above reasons, the Pre-Trial Judge is not satisfied that the Defence has discharged its burden under the Rules regarding the disclosure of the unredacted Note.

## **V. CONFIDENTIALITY**

21. The Pre-Trial Judge notes that the Ayyash Request was filed confidentially as it contained confidential information pertaining to witnesses and exhibits the Prosecution intends to use at trial.<sup>34</sup> The Badreddine Joinder Request and the Prosecution Response were also filed confidentially. In this decision, the Pre-Trial Judge has refrained from providing specific details relating to the confidential information. This decision is therefore rendered publicly.

## **VI. DISPOSITION**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Rules 110(A)(ii), 111, 113 and 118 of the Rules,

**DISMISSES** the Motion.

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

Leidschendam, 17 October 2013



Daniel Fransen  
Pre-Trial Judge



<sup>34</sup> Ayyash Request, para. 21.