



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 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 PROSECUTION'S SECOND SUBMISSION PURSUANT TO
RULE 91(G)(II) AND (III)**

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I. INTRODUCTION

1. The Pre-Trial Judge hereby decides upon the Prosecution's second request for leave to amend the Witness and Exhibit Lists (the "Second Submission"),¹ filed on 10 September 2013 pursuant to Rule 91(G)(ii) and (iii) of the Rules of Procedure and Evidence (the "Rules").

II. PROCEDURAL BACKGROUND

2. On 19 August 2013, the Prosecution filed a first request pursuant to Rule 91(G)(ii) and (iii) for leave to amend its Witness and Exhibit Lists (the "First Submission"),² to which Counsel for Mr. Mustafa Amine Badreddine (the "Badreddine Defence") filed a response on 29 August 2013.³, and the Pre-Trial Judge granted on 18 September 2013 (the "18 September 2013 Decision").⁴

3. On 10 September 2013, the Prosecution filed the Second Submission for leave to amend the Witness and Exhibit Lists, which was distributed to the defence teams in the *Ayyash et al.* case (the "Defence") and the Legal Representative of Victims on 11 September 2013.

4. On 12 September 2013, the Prosecution filed its first corrigendum to the Second Submission, and a corrected version of Annex D, Other Proposed Additional Exhibits, in order to correct an error in 15 rows of that annex (the "First Corrigendum to Annex D").⁵

5. On 25 September 2013, the Badreddine Defence filed its response to the Prosecution's Second Submission and the Prosecution's First Corrigendum to Annex D (the "Response").⁶

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Submission Pursuant to Rules (*sic*) 91(G)(ii) and (iii), Confidential with Confidential Annexes A to H, 10 September 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii), Confidential with Confidential Annexes A to D, 19 August 2013.

³ Badreddine Defence Response to "Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii)", Confidential, 29 August 2013.

⁴ Decision on the Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii), 18 September 2013.

⁵ Corrigendum to Annex D to the "Prosecution Submission Pursuant to Rules (*sic*) 91(G)(ii) and (iii)", Confidential with Confidential Annex A, 12 September 2013.

⁶ Badreddine Defence Response to "Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii)" of 10 September 2013, Confidential, 25 September 2013.

6. Also on 25 September 2013, the Prosecution filed a second corrigendum to Annex D of the Second Submission.⁷ The submissions contained a corrected and updated version of Annex D, which removed duplicated exhibits, added additional exhibits, and incorporated the corrections made in the First Corrigendum to Annex D.⁸

7. On 4 October 2013, the Badreddine Defence filed a Response to the Prosecution's Submissions on Second Corrigendum to Annex D.⁹

8. On 11 October 2013, the Pre-Trial Judge issued a confidential memorandum, requesting submissions from the Prosecution regarding a redacted witness statement contained on the Rule 91 updated Exhibit List.¹⁰ The Prosecution responded on 17 October 2013,¹¹ and the Defence may respond by 22 October 2013.¹²

III. SUBMISSIONS

A. The Prosecution

9. The Prosecution seeks leave to add to its Rule 91 lists, 13 witnesses, listed in Annex C to the Second Submission, and 404 exhibits,¹³ listed in Annex D to the Second Submission,¹⁴ as amended by the Corrected and Updated Version of Annex D, filed on 25 September 2013.¹⁵ Additionally, the Prosecution seeks leave to withdraw from its Rule 91 lists five witnesses, listed in Annex E to the Second Submission, and 518 exhibits, listed in Annex F to

⁷ Second Corrigendum to Annex D to the "Prosecution Submission Pursuant to Rules (*sic*) 91(G)(ii) and (iii)" of 10 September 2013, ("Prosecution's Submissions on Second Corrigendum to Annex D"), Confidential, 25 September 2013.

⁸ See Prosecution's Submissions on Second Corrigendum to Annex D, Confidential Annex A, Index of the Corrections and Updates to Corrected Annex D to the Prosecution's Submission Pursuant to Rules (*sic*) 91(G)(ii) and (iii) of the 10 September 2013 ("Index of the Corrections and Updates to Corrected Annex D"). See also, Confidential Annex B, Corrected and Updated Version of Annex D to the Prosecution's Submission Pursuant to Rules (*sic*) 91(G)(ii) and (iii) of 10 September 2013, ("Corrected and Updated Version of Annex D") at rows 68-71, 74-85. They no longer contain the error which was the subject of the First Corrigendum to Annex D. Thus the First Corrigendum to Annex D is rendered moot.

⁹ Badreddine Defence Response to "Second Corrigendum to Annex D to the 'Prosecution Submission Pursuant to Rules 91(G)(ii) and (iii)' of 10 September 2013" (the "Response to Second Corrigendum to Annex D"), Confidential, 4 October 2013.

¹⁰ Confidential Internal Memorandum from the Pre-Trial Judge of 11 October 2013.

¹¹ Prosecution's Application to Authorize Necessary Redactions, Confidential, 17 October 2013.

¹² Confidential Internal Memorandum from the Pre-Trial Judge of 11 October 2013.

¹³ The Corrected and Updated Annex D contains 444 entries, however the Pre-Trial Judge notes that 40 of these entries appear to be blank spaces as the exhibits were removed because of duplication on the list. See Prosecution's Submissions on Second Corrigendum to Annex D, Annex A, Index of the Corrections and Updates to Corrected Annex D.

¹⁴ Second Submission, para. 2.

¹⁵ See Prosecution's Submissions on Second Corrigendum to Annex D, Annex B, Corrected and Updated Version to Annex D.

the Second Submission.¹⁶ The Prosecution avers that the amendments proposed in the Second Submission will result in a “net change of 8 additional witnesses, and 164 fewer exhibits on the Prosecution’s Rule 91 Witness and Exhibit lists, respectively.”¹⁷ Finally, the Prosecution also provides notice that 201 exhibits, listed in Annex G to the Second Submission, have been removed from its Exhibit List as they consisted of redundancies.¹⁸

10. The Prosecution submits that 321 of the exhibits it seeks to add to its Exhibit List are already “referenced, attached to or contained within currently listed exhibits, and have been extracted as independent exhibits”.¹⁹ One exhibit derives from the analysis of newly obtained evidence, and 33 exhibits were “identified as a result of the Prosecution’s ongoing preparations for trial.”²⁰ In the Corrected and Updated Version of Annex D, filed on 25 September 2013, the Prosecution appears to add 89 exhibits that were contents of CDs and envelopes “inadvertently omitted, as the requested exhibits were scanned images of CDs or evidence envelopes instead of the complete list of their contents as intended.”²¹ The Prosecution intends to disclose to the Defence by 30 September 2013 those exhibits not already disclosed.²² The Prosecution submits that the exhibits identified as a result of ongoing preparations for trial are relevant and of probative value, and it emphasises that the trial has not yet commenced and the Trial Chamber has not yet been seised of the case.²³

11. With regard to the 13 proposed additional witnesses, the Prosecution submits that nine of them were identified in the course of linking the exhibits on its Exhibit List to witnesses, which was ordered by the Pre-Trial Judge on 10 June 2013.²⁴ The statements of these nine witnesses are already on the Prosecution’s Exhibit List and it seeks to add the witnesses to its Witness List “as a matter of housekeeping, to ensure uniformity between the Prosecution’s Rule 91 lists.”²⁵ Of the remaining four proposed additional witnesses, “the Defence is already in possession of the witness’ statement, or the evidence to which the witness’ proposed

¹⁶ Second Submission, para. 5.

¹⁷ *Id.*, para. 7. The Pre-Trial Judge notes that these numbers do not reflect current numbers as amended by the Corrected and Updated Version of Annex D, filed on 25 September 2013.

¹⁸ *Id.*, para. 6.

¹⁹ *Id.*, para. 4.

²⁰ *Id.*, para. 17.

²¹ Prosecution’s Submissions on Second Corrigendum to Annex D, para. 3(c); *see also* Corrected and Updated Version of Annex D.

²² Prosecution’s Submissions on Second Corrigendum to Annex D, para. 19. The Pre-Trial Judge notes that this was done by the Prosecution on 20 September 2013 (Disclosure Batch 644) and 25 September 2013 (Disclosure Batch 647).

²³ *Id.*, para. 17.

²⁴ *Id.*, para. 13(a).

²⁵ *Ibid.*

testimony relates” for three of them and the Prosecution intends to complete any remaining Rule 110(A)(ii) disclosure by 20 September 2013.²⁶ One of those four witnesses was previously on the Prosecution’s Rule 91 Witness List, removed by the Pre-Trial Judge’s decision of 5 August 2013,²⁷ and the Prosecution now seeks leave again to add this witness, as the subject matter of the witness’ anticipated testimony has changed.²⁸ The three other witnesses were identified as part of the Prosecution’s “ongoing preparation for trial”.²⁹ Overall, the Prosecution claims that “[t]he addition of these witnesses will not cause any undue delay to the proceedings, nor significantly impact Defence preparation.”³⁰

B. The Defence

12. The Badreddine Defence requests that the Pre-Trial Judge deny the Second Submission as the new additions compromise the right of the accused to a fair and expeditious trial.³¹ The Badreddine Defence specifically takes issue with the 34 new items added to the Exhibit List and the three “previously unmentioned” witnesses.³² It does not object to the nine witnesses who were identified by the Prosecution in the course of linking the exhibits to witnesses.³³

13. Regarding the exhibits, the Badreddine Defence argues that the Prosecution has not shown them to be *prima facie* relevant and of probative value, and that attempts to justify the exhibits are vague. Furthermore, the additional exhibits that were discovered as a result of ongoing preparations for trial amount to a “chronic threat” to the rights of the Accused as the Prosecution is continually asking for exceptions from agreed deadlines and scheduling directives.³⁴ Finally, the Badreddine Defence argues that the Prosecution has not provided good cause for why it did not include the three previously unmentioned witnesses at an earlier stage, and that the Prosecution’s request does not satisfy the factors previously established by the Pre-Trial Judge in his 5 August 2013 Decision in order to grant such

²⁶ *Id.*, para. 14. The Pre-Trial Judge notes that this was done by the Prosecution on 20 September 2013 (Disclosure Batch 643).

²⁷ Decision on Two Prosecution Submissions in Relation to Amending the Prosecution Rule 91 Filings, 5 August 2013 (“5 August 2013 Decision”).

²⁸ *Id.*, para. 13(e).

²⁹ *Id.*, para. 10.

³⁰ *Id.*, para. 3.

³¹ Response, para. 2.

³² *Ibid.*

³³ *Id.*, para. 3. The Pre-Trial Judge notes that the Badreddine Defence only specifically refers to 12 out of the 13 additional witnesses in its submissions.

³⁴ *Id.*, para. 7.

requests.³⁵ In response to the Prosecution's Submissions on Second Corrigendum to Annex D, the Badreddine Defence takes issue with the fact that the Prosecution adds a redacted document to the Exhibit List.³⁶

IV. DISCUSSION

14. As stated in the 18 September 2013 Decision, the Pre-Trial Judge will exercise his inherent discretion in granting a Prosecution request for amendments to its Witness and Exhibit lists only if doing so is in the interests of justice. He must therefore carefully balance 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, which includes considering any burden placed on the Defence by the late addition of a witness or exhibit to the Prosecution's Rule 91 lists.³⁷

15. As a preliminary matter, the Pre-Trial Judge recalls the confidential memorandum of 11 October 2013 requesting submissions on a redacted exhibit,³⁸ the Prosecution's 17 October 2013 response to that order, and the impending potential response from the Defence by 22 October 2013.³⁹ The Pre-Trial Judge notes that the Prosecution's response was submitted out of time, however he will authorize the filing as it is necessary to the determination of the issue. However, in order not to delay a decision on most of the issues raised in the Second Submission, the Pre-Trial Judge decides to defer his decision on this matter. Therefore, the exhibit that is the subject of that order will not be considered in this decision.

16. After review of the submissions made by the Prosecution, the Pre-Trial Judge considers that the remaining additional exhibits and witnesses proposed by the Prosecution are *prima facie* relevant and of probative value. Meanwhile, the Pre-Trial Judge is less convinced that the Prosecution demonstrated good cause for not having sought to add the 13 witnesses at an earlier stage of the proceedings. He notes, however, the Prosecution's submissions that the witness statements for 12 of the 13 additional witnesses have already

³⁵ Response, para. 8.

³⁶ Response to Second Corrigendum to Annex D, para. 2.

³⁷ 18 September 2013 Decision, para. 11, *citing* 5 August 2013 Decision, para. 20.

³⁸ Prosecution's Submissions on Second Corrigendum to Annex D, Confidential Annex B, Corrected and Updated Version of Annex D, Exhibit no. 55.

³⁹ Confidential Internal Memorandum from the Pre-Trial Judge of 11 October 2013.

been disclosed to the Defence,⁴⁰ and the witness statements for the 13th proposed witness were disclosed on 20 September 2013.⁴¹ He further takes note that the disclosure of the exhibits not already in possession of the Defence took place on 20 September and 25 September 2013.⁴² Finally, the Pre-Trial Judge considers that it is in the interest of the Defence's preparation for trial to be provided, at this stage of proceedings, with the versions of the Prosecution's Rule 91 lists that most adequately reflect its case.

17. In considering any burden placed on the Defence by the additions to the Prosecution's Witness and Exhibit Lists at this stage of the proceedings, the Pre-Trial Judge takes into account the withdrawals also requested — leading to there being fewer exhibits overall on the Prosecution's Rule 91 lists — and the fact that the Second Submission was filed over four months before the tentative date set for the start of trial proceedings.

18. Regarding the removal of five witnesses and 518 exhibits from the Rule 91 lists, the Pre-Trial Judge notes that the Defence does not oppose the Prosecution's request. The Pre-Trial Judge has previously observed that, “[i]nsofar 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.”⁴³ The Pre-Trial Judge thus grants the request and allows the Prosecution to remove the identified witnesses and exhibits from its Rule 91 lists.

19. 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 Second Submission is in the interests of justice.

20. Finally, the Pre-Trial Judge notes that the Prosecution has not filed updated submissions under Rule 91(G)(ii)(f) on the total estimated length of time it will need to present its case since 15 November 2012.⁴⁴ There have been several additions and subtractions from the Rule 91 Witness and Exhibit Lists since that submission. Therefore, the Pre-Trial Judge considers it necessary to have updated submissions in this regard as part of the final preparations before trial.

⁴¹ Second Submission, para. 14. *See also* footnote 26, *supra*.

⁴² *Supra*, footnote 22.

⁴³ 5 August 2013 Decision, para. 21.

⁴⁴ Prosecution's Submission Pursuant to Rule 91, Confidential, 15 November 2012, para. 4, with a public redacted version dated the same day.

V. CONFIDENTIALITY

21. The Pre-Trial Judge notes that the Second Submission and its corresponding annexes 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.

VI. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77 and 91 of the Rules,

GRANTS IN PART the relief sought in the Second Submission;

DEFERS the decision on the Prosecution's request for leave to add Exhibit no. 55 listed in the Corrected and Updated Version of Annex D, filed on 25 September 2013;

GRANTS the Prosecution leave to amend its Rule 91 Witness List by adding 13 witnesses listed in Annex C Proposed Additional Witnesses to the Second Submission, and removing the five witnesses listed in Annex E List of Withdrawn Witnesses to the Second Submission, both filed on 10 September 2013;

GRANTS the Prosecution leave to amend its Rule 91 Exhibit List by adding the remaining 403 exhibits listed in the Corrected and Updated Version of Annex D, filed on 25 September 2013, and removing 518 exhibits listed in Annex F Withdrawn Exhibits to the Second Submission filed on 10 September 2013;

DECLARES as moot the Prosecution's First Corrigendum to Annex D, filed on 12 September 2013;

GRANTS the Prosecution leave to file the amended Rule 91 Exhibit and Witness Lists attached respectively as Annex C Corrected and Updated Version of the Consolidated Rule 91 Exhibit List, filed on 25 September 2013, save for the exhibit subject to the deferral, and Annex A Updated Consolidated Rule 91 Witness List to the Second Submission, filed on 10 September 2013;

TAKES NOTE of the Prosecution's disclosure of Rule 110(A)(ii) materials related to the proposed additional witnesses, completed on 20 September 2013;

TAKES NOTE of the Prosecution's disclosure of additional exhibits not previously disclosed, completed on 25 September 2013;

ORDERS the Prosecution to file updated submissions under Rule 91(G)(ii)(f) regarding the total estimated time required to present its case by 23 October 2013;

ORDERS that the Second Submission and its annexes 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 October 2013



Daniel Fransen
Pre-Trial Judge

