

**THE APPEALS CHAMBER**

**Case No.:** STL-11-01/PT/AC/R176bis

**Before:** Judge David Baragwanath, Presiding and Judge Rapporteur  
Judge Ralph Riachy  
Judge Afif Chamseddine  
Judge Daniel David Ntanda Nsereko  
Judge Kjell Erik Björnberg

**Registrar:** Mr Herman von Hebel

**Date:** 14 May 2012

**Original language:** English

**Type of document:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
MUSTAFA AMINE BADREDDINE  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**ORDER ON TIME LIMIT TO FILE RULE 176 *BIS*(C) REQUEST****Office of the Prosecutor:**

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## **INTRODUCTION**

1. The ultimate issue raised by the Defence application concerns the need for sufficient information and time to identify whether any request to reconsider our 16 February 2011 Interlocutory Decision is warranted. We conclude that the Defence has received the necessary information to enable it to do so and impose an appropriate timetable for any future request.

## **PROCEDURAL BACKGROUND**

2. On 16 February 2011, the Appeals Chamber of the Special Tribunal for Lebanon (“Chamber” and “Tribunal”) issued an Interlocutory Decision on the Applicable Law, pursuant to Rule 176 *bis* of the Rules of Procedure and Evidence (“Rules”).<sup>1</sup> The same Rule gives the accused a right to request reconsideration of the Interlocutory Decision submitted no later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A)(i).

3. On 7 February 2012, the Pre-Trial Judge ordered the Prosecutor to file within 30 working days of the assignment of counsel<sup>2</sup> all the material supporting the indictment, as required under Rule 110(A).<sup>3</sup> Between 7 February and 15 March 2012, Defence teams received 11,000 pages of material from the Prosecutor.<sup>4</sup> On 15 March 2012, Defence teams received a further 17,000 pages of material.<sup>5</sup>

4. On 30 March 2012, the Chamber was seized of the “Joint Defence Request for an Order on the Time-Limit to File Rule 176bis(C) Reconsideration Request” submitted by Defence counsel for the four accused in the *Ayyash et al.* proceedings. The Defence requested proper time and access to all material and statements to prepare and file any motion for reconsideration of the Interlocutory Decision of 16 February 2011.

<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (“16 February 2011 Interlocutory Decision”).

<sup>2</sup> Counsel were assigned by the Head of Defence Office on 2 February 2012. STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, 2 February 2012.

<sup>3</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Relating to the Disclosure of the Documents Referred to in Rule 110 (A) of the Rules of Procedure and Evidence, 7 February 2012.

<sup>4</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Joint Defence Request for An Order on the Time-Limit to File Rule 176bis(C) Reconsideration Request, 30 March 2012 (“Request”), paras 7, 10.

<sup>5</sup> *Ibid.*



5. The Defence also asked that we reduce the usual time limits for a response by the Prosecutor.<sup>6</sup> On 3 April 2012, we issued an Interim Order rejecting that request for lack of good cause.<sup>7</sup>

6. On 11 April 2012, the Prosecutor filed his Response to the Joint Defence Request.<sup>8</sup> He advises that disclosure was completed on 5 April 2012<sup>9</sup> except for a number of documents for which he has asked the Pre-Trial Judge to order protective measures pursuant to Rules 115, 116, and 133 of the Rules.<sup>10</sup> The Pre-Trial Judge has not yet ruled on these requests.<sup>11</sup>

7. On 25 April 2012, the Judge Rapporteur held a judicial conference to determine whether and, if so, to what extent the pending litigation regarding the application of protective measures to the supporting material affects the proper preparation of any motion for reconsideration.<sup>12</sup> At the judicial conference, the Prosecutor advised that summaries of a number of remaining witness statements would be disclosed to the Defence by 2 May 2012. In a Scheduling Order,<sup>13</sup> the Judge Rapporteur directed the Defence to inform the Chamber as to their position regarding those summaries, and their impact on any future reconsideration request, within two days of receiving them. The Prosecutor was also allowed to respond.<sup>14</sup>

## **SUBMISSIONS OF THE PARTIES**

8. The Defence ask the Chamber either to order that the time limit prescribed by Rule 176 *bis*(C) shall not run until there has been a final judicial decision on whether disclosure under Rule 110(A)(i) is

<sup>6</sup> The Defence argued its Request should be “resolved in an expedited manner”, and requested the Chamber to “[i]ssue an Order reducing the usual time-limits for a Prosecution Response to this Request”. Request, paras 10-11.

<sup>7</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Interim Order on the Joint Defence Request for an Order on the Time-Limit to File Rule 176 bis (C) Reconsideration Request, 3 April 2012.

<sup>8</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Prosecution Response to Joint Defence Request for an Order on the Time-Limit to File Rule 176bis(C) Reconsideration Requests, 11 April 2012 (“Response”).

<sup>9</sup> Response, para. 5.

<sup>10</sup> See Request, fn. 2; Response, fn. 1.

<sup>11</sup> On 12 April 2012, the Pre-Trial Judge set 4 May 2012 as the deadline for the filing of preliminary motions on jurisdiction. These motions were subsequently filed by the Defence teams and are currently pending before the Trial Chamber. The present decision is without prejudice to the outcome of the Trial Chamber’s decision and any potential appeal of that decision.

<sup>12</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Order by the Judge Rapporteur Directing Judicial Conference, 23 April 2012.

<sup>13</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Scheduling Order Following Judicial Conference, 25 April 2012.

<sup>14</sup> The summaries were disclosed on 1 May 2012 and the Defence and the Prosecutor filed their submissions by 3 and 4 May 2012 respectively. See STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Joint Defence Submission With Regard to Prosecution Witness Summaries and the Deadlines for Filing for Reconsideration Pursuant to Rule 176bis(C), 3 May 2012 (“Submission of 3 May 2012”); STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Prosecution Response to Joint Defence Submission on the Deadline for Filing for Reconsideration Pursuant to Rule 176bis(C), 4 May 2012 (“Response of 4 May 2012”).



completed, or, in the alternative, to grant an enlargement of 60 days of the time limit set by Rule 176 *bis*(C).<sup>15</sup>

9. Defence counsel submit that there is good cause for an extension of time to identify any issues for reconsideration. First, in the light of the pending litigation before the Pre-Trial Judge with respect to the disclosure process, they contend that a judicial decision on whether disclosure is complete is required before any request for reconsideration can be submitted. In addition, they argue that they need adequate time to carefully review the great amount of disclosed material. Finally, they submit that the complexity of the Interlocutory Decision warrants an extension of time for any reconsideration requests.<sup>16</sup>

10. In his Response, the Prosecutor asks the Chamber to issue a Scheduling Order pursuant to Rule 9(A)(i) of the Rules with dates fixed for the filing of all Defence requests for reconsideration pursuant to Rule 176 *bis*(C) no later than 1 June 2012, and for the filing of any Prosecution responses to such requests on 19 June 2012.<sup>17</sup> The Prosecutor argues that the legal issues raised in the Interlocutory Decision have been known to the Defence for a sufficient time<sup>18</sup> and that the supporting material can be of no assistance to counsel in formulating their reconsideration requests.<sup>19</sup>

11. At the judicial conference, the Defence acknowledged, with respect to redacted or withheld documents, that knowledge of their full content is not necessary for the preparation of a reconsideration request, as long as any protective measures relate merely to the identity of protected witnesses.<sup>20</sup> In the light of the material since received, the Defence implicitly abandoned the request for further material in its Submission of 3 May 2012<sup>21</sup> but stressed their need for sufficient time to prepare their submissions as to reconsideration, and requested the Chamber to set a deadline of 16 July 2012 for any such request.<sup>22</sup>

12. In his Response of 4 May 2012, the Prosecutor did not modify his position as to timing.<sup>23</sup>

<sup>15</sup> Request, para. 11.

<sup>16</sup> *Id.*, paras 4-8.

<sup>17</sup> Response, para. 18.

<sup>18</sup> *Id.*, para. 15.

<sup>19</sup> *Id.*, para. 14.

<sup>20</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Transcript of Judicial Conference (confidential), p. 30.

<sup>21</sup> Subject to their right to make any additional submissions on reconsideration should subsequent unredacted disclosure of material affect any of their submissions under Rule 176 *bis*(C) of the Rules.

<sup>22</sup> Submission of 3 May 2012, paras 9-10.

<sup>23</sup> The Prosecutor however requested that his right to seek additional time to file a response to any reconsideration request be reserved. He also requested that his right to challenge the standing of any Defence request for reconsideration in the absence of the accused be also reserved.



## DISCUSSION

13. Rule 176 *bis*(C) of the Rules requires that requests to reconsider interlocutory decisions issued pursuant to Rule 176 *bis*(A) “shall be submitted to the Appeals Chamber no later than thirty days after disclosure by the Prosecutor to the Defence of *all* material and statements referred to in Rule 110(A)(i).”<sup>24</sup> Rule 110 in turn is subject to Rules 115, 116 and 117 and 118, each of which allows the Prosecutor to apply for a judicial order to withhold or redact certain information from the Defence based on exceptional considerations, including but not limited to the protection of victims and witnesses, the safeguarding of continuing or future investigations, and the security interests of States and other international entities.

14. In our 16 February 2011 Interlocutory Decision we stated:

There are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of the law is that general observations frequently require modification in the light of particular facts, which can provide a sharper focus and trigger a more nuanced response.<sup>25</sup>

For example, if a certain interpretation would result in injustices which an alternative reasonable interpretation could avoid the latter is likely to be preferred.<sup>26</sup> Access to evidence disclosing the factual context in which the statute comes to be construed may shed light on that possible issue.

15. The matters raised in the 16 February Interlocutory Decision are pure questions of law. The potential relevance of the factual context is to suggest possible scenarios which might trigger an argument inconsistent with the conclusions reached in the 16 February 2011 Interlocutory Decision.

### **I. The impact of the pending litigation regarding the protective measures on any request for reconsideration**

16. The Defence initially argued that only the final decision of the Pre-Trial Judge regarding the issue of protective measures would complete the disclosure process under Rule 110(A)(i) and thus trigger the

<sup>24</sup> Emphasis added.

<sup>25</sup> Interlocutory Decision, para. 9.

<sup>26</sup> “[T]here are cases in which inconvenience of result or improbability of result assists the Court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative construction more closely conforms to the legislative intent.”: *Cooper Brookes Pty Ltd v Commissioner of Taxation* (1947) 147 CLR 297 (HCA) at 320 per Mason and Wilson JJ.



30-day time limit under Rule 176 *bis*(C). Absent such a decision, this time has not yet started to run for the purposes of a request for reconsideration of the 16 February 2011 Interlocutory Decision.<sup>27</sup>

17. In response, the Prosecutor contended that “the proposed redactions that relate to witness protection [...] have no bearing on the underlying evidence disclosed in the witness statements and documents that form the supporting material.”<sup>28</sup> However, in his written submission the Prosecutor did not demonstrate that themes contained in documents withheld from the Defence pending the examination of the redaction process by the Pre-Trial Judge could not affect their position on whether to submit a reconsideration request.

18. Mindful of the potential impact that the documents currently being examined by the Pre-Trial Judge might have on the position of the Defence regarding any possible submission of a request for reconsideration, we delegated to the Judge Rapporteur the authority to conduct a judicial conference to find out the impact of the documents awaiting determination by the Pre-Trial Judge on such future requests.

19. Following the information provided to the Judge Rapporteur at the judicial conference, the Prosecutor disclosed, on 1 May 2012, the summaries of withheld witness statements to the Defence. The response of the Defence to that disclosure was to criticize the adequacy of the documents but to take no position in relation to any matter but time.

20. The Parties agree that by 15 March 2012 the bulk of the supporting material was disclosed. Following the disclosure of the summaries of witness statements on 1 May 2012, and the absence of substantial comments by the Defence relating to the potential impact of the documents on future reconsideration requests, disclosure for the purpose of future reconsideration requests may be said to have ended on 1 May 2012 at the latest.<sup>29</sup>

21. Subject to the time factor, the Defence now have the information that is relevant to making any decision whether, and if so how, to challenge the Interlocutory Decision of 16 February 2011.

<sup>27</sup> Request, paras 5-6.

<sup>28</sup> Response, para. 11.

<sup>29</sup> Compare completion of disclosure for the purposes of trial, of which the Pre-Trial Judge is still seized



## II. The Appeals Chamber's power to enlarge or reduce the time limits

22. Both Defence and Prosecution have referred to our discretion under Rule 9(A)(i), which permits us to “enlarge or reduce any time prescribed by the Rules.”<sup>30</sup> Both have also provided suggestions for dates as to an appropriate time to file any request for reconsideration.<sup>31</sup> These suggestions ended with that of the Defence to file any request for reconsideration on 16 July 2012, with no objection being voiced by the Prosecutor.<sup>32</sup>

23. The Defence specifically contends that the supporting material they already received comprises a large number of documents which they need to “analyse to obtain a fuller understanding of the case against the Accused, and thus be able to prepare properly [...] for any motion for reconsideration” of our 16 February 2011 Interlocutory Decision.<sup>33</sup>

24. We are mindful of the large volume of documents received by the Defence, and the current competing pressures on the Defence teams in relation to the near simultaneous filing of preliminary motions. But while 28,000 pages is a considerable volume of material, its appraisal for present purposes requires no more that their gist or general thrust should be understood in order to see whether it casts any light on a possible legal challenge to the 16 February 2011 Interlocutory Decision. We also note that the Defence has been in the possession of the bulk of the material (except for the summaries of witness statements disclosed on 1 May 2012) since 15 March 2012.

25. The Defence have also had the support of the Defence Office,<sup>34</sup> which having argued the issues raised in the 16 February 2011 Interlocutory Decision, is both fully seized of the issues and able to advise Defence counsel recently appointed as to any valid argument that aspects of the Interlocutory Decision may be wrong. That might be, for example, if the evidence disclosed some consequence unfairly adverse to an accused which might reasonably be avoided by adoption of some other construction.

26. We are also mindful of the admonition in Article 21(1) of our Statute which, subject always to the overarching requirement of fairness of trial, requires us to avoid unreasonable delays.<sup>35</sup> The reason the

<sup>30</sup> Request, para. 11; Response, para. 7.

<sup>31</sup> Request, para. 11; Response, paras 10, 18.

<sup>32</sup> Submission of 3 May, paras 10-11; Response of 4 May, para. 2.

<sup>33</sup> Request, paras 7-10.

<sup>34</sup> See Rule 57(E)(1) of the Rules.

<sup>35</sup> Article 21(1) of the Statute provides: “[...] [the Tribunal] shall take strict measures to prevent any action that may cause unreasonable delay.”



Appeals Chamber decided to accept and give judgment upon the questions posed by the Pre-Trial Judge under Article 68(G)<sup>36</sup> was two-fold: both because the answers are fundamental to the indictment and to avoid such delays. The latter obligation requires at the present stage that interpretation of the law governing indictments should be rendered expeditiously and given a higher order of priority than less significant tasks. Avoidance of unreasonable delays must therefore be a consideration when fixing the time limit for the Defence to challenge our 16 February 2011 Interlocutory Decision.

27. The reason Rule 176 *bis*(C) provides an extended time limit for filing a motion for reconsideration is to ensure the Defence is aware of all information relevant to a decision whether to bring such a motion and, if so, on what basis. It follows that no order reducing that time limit could be justified unless we were satisfied there could be no reasonable basis to expect disadvantage to the Defence if the prescribed time limit were reduced.

28. In the light of the foregoing discussion we consider that the Defence is now in a position to determine whether it can challenge the 16 February 2011 Interlocutory Decision and if so, on what basis. We take into account the volume of the material—the 28,000 pages—received by the Defence; the time so far available to the Defence since 15 March 2012 to examine it; the nature of the examination required for present purposes; that it already examined the summaries of witness statements provided on 1 May 2012, for the purpose of its Submission of 3 May 2012; and the submissions of counsel especially on the topics of time and other commitments. Our evaluation is necessarily by way of broad impression.

29. Rule 7(A) of the Rules provides that “[w]here the time prescribed by the Rules or directed by [...] a Chamber for carrying out any act is to run from the occurrence of an event, that time shall begin to run from the day after the occurrence of the event.” As disclosure for present purposes may be said to have ended on 1 May 2012, the time for filing any reconsideration request began to run on 2 May 2012 and will end on 13 June 2012.<sup>37</sup> We find that there is no need to enlarge this time limit pursuant to Rule 9 and decide that the Defence should have until 13 June 2012 to prepare for any request for reconsideration of the 16 February 2011 Interlocutory Decision. We accordingly impose the timetable set out in the disposition.

<sup>36</sup> See STL-11-01/I, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011.

<sup>37</sup> This reflects 30 working days pursuant to Rule 176 *bis*(C) of the Rules, taking into account the official holiday of 28 May 2012.





30. Our decision comes however with an important caveat. To protect the rights of the Accused and to avoid any risk of injustice, the Defence may apply for leave to renew its request for reconsideration if some specific and truly compelling reason is demonstrated in the light of its analysis of information resulting from disclosure of previously redacted material following any order of the Pre-Trial Judge.

**DISPOSITION**

**FOR THESE REASONS;**

**THE APPEALS CHAMBER**, deciding unanimously;

**PURSUANT** to Rule 176 *bis* of the Rules;

**HAVING** rejected on 3 April 2012 part (iii) of the relief sought in the Request;

**REJECTS** the remainder of the Request and the Submission of 3 May 2012;

**ORDERS** the following timetable for proceedings related to future requests for reconsideration of the Interlocutory Decision on the Applicable Law of 16 February 2011:



- Defence teams shall submit their requests for reconsideration, if any, by 13 June 2012, not exceeding 20 pages; counsel are encouraged to consider submitting a joint request not exceeding 40 pages.
- The Prosecutor shall submit a single response to the request(s) for reconsideration, if any, within 14 days after receiving the Defence request(s), not exceeding the number of pages of the request(s). Should additional time be required, the Prosecutor may apply for leave for extension of time within two days after receiving the Defence request(s);

**ALLOWS** the Defence to apply for leave to renew any reconsideration request if a specific and truly compelling reason is demonstrated, following disclosure of previously redacted material.

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

Filed this 14<sup>th</sup> day of May 2012,

Leidschendam, the Netherlands

  
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David Baragwanath  
Presiding  
  
14 May 2012