



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 Fransén**

The Registrar: **Mr. Herman von Hebel**

Date: **8 November 2012**

Original language: **English**

Classification: **Public**

### THE PROSECUTOR

v.

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

### DECISION ON THE SABRA DEFENCE'S FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH MOTIONS FOR DISCLOSURE

**Office of the Prosecutor:**  
Mr. Norman Farrell

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**Legal Representatives of Victims:**  
Mr. Peter Haynes

**Counsel for Mr. Mustafa Amine Badreddine:**  
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**Counsel for Mr. Hussein Hassan Oneissi:**  
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**Counsel for Mr. Assad Hassan Sabra:**  
Mr. David Young



## I. Introduction

1. The Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) is seised of six motions filed by counsel for Mr. Sabra (“Sabra Defence”), seeking the disclosure of specific material and information from the Prosecution,<sup>1</sup> and hereby issues his decision.

## II. Background

2. On 19 July 2012, the Pre-Trial Judge, following consultation with the Parties, set the tentative date for the start of trial proceedings for 25 March 2013.<sup>2</sup> This start date was determined as early as possible, in the interest of justice, to enable all actors to anticipate future deadlines and better prepare for trial.<sup>3</sup>

3. On 28 August 2012, the Pre-Trial Judge, following further consultation with the Parties,<sup>4</sup> issued an order setting 15 November 2012 as the deadline for the Prosecution to file its pre-trial brief and associated documents required by Rule 91(G) of the Rules of Procedure and Evidence (the “Rules”).<sup>5</sup>

4. On 27 September 2012, counsel for the Defence of Messrs Ayyash, Badreddine, Oneissi and Sabra, filed a joint motion seeking a series of orders setting a time line for trial preparations (the “Joint Defence Motion”).<sup>6</sup>

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<sup>1</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra’s First Motion for an Order for Disclosure — Phone Numbers Allegedly in Contact with the Number Attributed to Mr. Sabra, 10 October 2012 (“First Disclosure Motion”); Sabra’s Second motion for an Order for Disclosure — Theoretical Cell Coverage, 11 October 2012 (“Second Disclosure Motion”); Sabra’s Third Motion for an Order for Disclosure — Information Relating to the Telecard, Attributed SIM and Statements of Staff of News Agencies, 18 October 2012 (“Third Disclosure Motion”); Sabra’s Fourth Motion for an Order for Disclosure – Information Pertaining to Abu Adass, 19 October 2012 (“Fourth Disclosure Motion”); Corrigendum to Sabra’s Fourth Motion for an Order for Disclosure – Information Pertaining to Abu Adass, Confidential, 1 November 2012; Sabra’s Fifth Motion for an Order for Disclosure – SMS Records, Confidential, 29 October 2012 (“Fifth Disclosure Motion”); and Sabra’s Sixth Motion for an Order for Disclosure – Information Relating to Addresses Attributed to Mr Sabra and Alleged Associates, 31 October 2012 (“Sixth Disclosure Motion”).

<sup>2</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Setting a Tentative Date for the Start of Trial Proceedings, 19 July 2012.

<sup>3</sup> *Id.*, para. 19.

<sup>4</sup> STL, *The Prosecutor v. Ayyash et al.*, STL-11-01, Status Conference before the Pre-Trial Judge, 26 July 2012, Official Transcript, p. 10, ll. 9 *et seq.*

<sup>5</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Setting a Date for Filing the Prosecution’s Pre-Trial Brief, 28 August 2012, para. 10, p. 3.

<sup>6</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Defence Motion for Urgent Orders Regarding Trial Preparation, 27 September 2012.

5. Subsequent to the Joint Defence Motion, and before the Pre-Trial Judge had ruled on it, the Sabra Defence filed four motions for the disclosure of specific material on 10, 11, 18 and 19 October 2012 (collectively, the “first Four Disclosure Motions”).

6. On 25 October 2012, the Pre-Trial Judge, ruled on the Joint Defence Motion and set out a working plan, pursuant to Rule 91(A) of the Rules, indicating the deadlines for the Parties and participating victims to fulfil their preparation obligations prior to trial.<sup>7</sup>

7. On 29 and 31 October 2012, respectively, the Sabra Defence filed its Fifth and Sixth Disclosure Motions (collectively with the first Four Disclosure Motions, the “Disclosure Motions”).

8. On 1 November 2012, the Sabra Defence filed a corrigendum correcting an error in part of its Fourth Disclosure Motion.<sup>8</sup>

### **III. The Disclosure Motions**

9. The issues the Pre-Trial Judge is currently seized of by the Disclosure Motions have been the subject of dealings *inter partes* by way of numerous exchanges of correspondence and meetings between the Sabra Defence and the Prosecution since 11 June 2012, and in the case of the Fourth Disclosure Motion, since 26 April 2012, while in the case of the Sixth Disclosure Motion, since 12 September 2012. Both Rules 110(B) and 113 of the Rules are invoked generally, and largely without distinction, by the Sabra Defence in relation to the various categories of material requested in the Disclosure Motions.

10. By the First Disclosure Motion, the Sabra Defence seeks disclosure of lists of numbers of phone users that have had the greatest frequency of contact with the telephones attributed to Messrs Sabra and Oneissi, along with other details including the name of the phone user and the relationship alleged between the phone user and Messrs Sabra and Oneissi.<sup>9</sup>

11. By the Second Disclosure Motion, the Sabra Defence seeks disclosure of material related to “theoretical cell coverage”, being the theoretical evaluation of the possible location

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<sup>7</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012 (“Working Plan Order”).

<sup>8</sup> Corrigendum to Sabra’s Fourth Motion for an Order for Disclosure – Information Pertaining to Abu Adass, Confidential, 1 November 2012 (“Corrigendum”).

<sup>9</sup> First Disclosure Motion, paras 10-11.

of a particular SIM card at a particular time, based on information of cell-tower and relevant phone records.<sup>10</sup>

12. By the Third Disclosure Motion, the Sabra Defence seeks disclosure of material on: (i) the SIM card attributed to Mr. Sabra (“First Request of the Third Disclosure Motion”);<sup>11</sup> (ii) the Telecard allegedly used to make impugned calls to Reuters and Al Jazeera (“Second Request of the Third Disclosure Motion”);<sup>12</sup> and (iii) calls made to Reuters and Al Jazeera (“Third Request of the Third Disclosure Motion”).<sup>13</sup>

13. By the Fourth Disclosure Motion, the Sabra Defence seeks disclosure of material on the role of Messrs Sabra and Oneissi in identifying and recruiting a certain Mr. Abu Adass, allegedly to make the “false claim of responsibility” for the Hariri attack.<sup>14</sup> This Motion seeks disclosure of material by five particular requests, namely, disclosure of material relating to:

- a. allegations concerning a meeting between Messrs Sabra and Adass (“First Request of the Fourth Disclosure Motion”);<sup>15</sup>
- b. paragraph 3 of a letter, dated 26 April 2012, by the Sabra Defence to the Prosecution (“Second Request of the Fourth Disclosure Motion”);<sup>16</sup>
- c. paragraph 5 of a letter, dated 10 September 2012, by the Sabra Defence to the Prosecution (“Third Request of the Fourth Disclosure Motion”);<sup>17</sup>
- d. a discussion at a meeting between the Sabra Defence and the Prosecution (“Fourth Request of the Fourth Disclosure Motion”);<sup>18</sup> and
- e. paragraph 6 of a letter, dated 4 October 2012, by the Sabra Defence to the Prosecution (“Fifth Request of the Fourth Disclosure Motion”);<sup>19</sup> as amended by the Corrigendum.<sup>20</sup>

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<sup>10</sup> Second Disclosure Motion, para. 22(i) and (ii). See also para. 3.

<sup>11</sup> Third Disclosure Motion, para. 2.

<sup>12</sup> *Id.*, para. 3.

<sup>13</sup> *Id.*, para. 4.

<sup>14</sup> Fourth Disclosure Motion, paras 2, 6, 8, 11, 12 and 13.

<sup>15</sup> *Id.*, paras 6 and 27(i).

<sup>16</sup> *Id.*, Annex A and paras 8 and 27(i).

<sup>17</sup> *Id.*, Annex C and paras 11 and 27(i).

<sup>18</sup> *Id.*, paras 12 and 27(i).

<sup>19</sup> *Id.*, Annex D and paras 13 and 27(ii).

<sup>20</sup> Corrigendum, Annex A.

14. By the Fifth Disclosure Motion, the Sabra Defence seeks disclosure of material relating to various SMS records.<sup>21</sup>

15. By the Sixth Disclosure Motion, the Sabra Defence seeks disclosure of material relating to the residence and employment locations attributed to Mr. Sabra and alleged associates or relatives.<sup>22</sup>

#### IV. The Prosecution Responses

16. The Prosecution opposes each of the first Four Disclosure Motions. The Prosecution opposes the First Disclosure Motion as moot,<sup>23</sup> referring to recent and imminent disclosures.<sup>24</sup> It denies that other materials sought are in its custody or control,<sup>25</sup> and in any event, characterises parts of the request as seeking an “analysis”,<sup>26</sup> arguing that the specific disclosure provisions do not justify or impose any obligation on the Prosecution to “create work product or particular analysis on behalf of the Defence”.<sup>27</sup> The Prosecution explains it has invited the Sabra Defence to inspect the relevant Call Data Records in its Inspection Room, and has provided guidance on how to conduct any investigations necessary.<sup>28</sup> Ultimately, the Prosecution submits that the Sabra Defence has the responsibility to exercise its own due diligence in conducting further analyses.<sup>29</sup>

17. The Prosecution opposes the Second Disclosure Motion, with reference to its efforts to date to fulfil its disclosure obligations including previous disclosures of three external reports on predictive cell coverage.<sup>30</sup> It also anticipated pending disclosure of further relevant documents.<sup>31</sup>

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<sup>21</sup> Fifth Disclosure Motion, para. 15.

<sup>22</sup> Sixth Disclosure Motion, para. 2.

<sup>23</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to Sabra’s First Motion for an Order for Disclosure, 17 October 2012 (“Response to First Disclosure Motion”), paras 6 and 7.

<sup>24</sup> Response to First Disclosure Motion, para. 16.

<sup>25</sup> *Id.*, para. 10.

<sup>26</sup> *Id.*, para. 9.

<sup>27</sup> *Id.*, para. 12.

<sup>28</sup> *Id.*, para. 14.

<sup>29</sup> *Ibid.*

<sup>30</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to Sabra’s Motion for an Order for Disclosure on Cell Coverage, Confidential, 18 October 2012 (“Response to Second Disclosure Motion”), para. 4. A Public Redacted version was filed the same day.

<sup>31</sup> Response to Second Disclosure Motion, paras 6-7.

18. The Prosecution opposes the Third Disclosure Motion, confirming certain material was not in its custody or control,<sup>32</sup> while extensively detailing others that had been disclosed to the Defence on multiple occasions as early as 4 June 2012.<sup>33</sup> Further documents were scheduled to be provided by 15 November 2012.<sup>34</sup> Generally, the Prosecution argues that Rule 110(B) of the Rules requires only the disclosure of tangible material, and not “information”, in contrast to Rule 113.<sup>35</sup> It repeats it is not obliged to find documents or undertake work to identify ERN numbers for the Defence under the specific disclosure provisions,<sup>36</sup> nor to “create work product and perform the requested analysis for [the Defence’s] benefit”.<sup>37</sup> By the detailed identification of previous disclosures responding to the categories of documents sought, the Prosecution highlights the Defence’s failure to conduct its own due diligence prior to filing requests for disclosure.<sup>38</sup> Moreover, the Prosecution argues the Third Disclosure Motion duplicates relief already requested in multiple other specific disclosure motions, as well as the Joint Defence Motion for which a decision was pending at the time the First, Second and Third Disclosure Motions were filed.<sup>39</sup>

19. The Prosecution opposes the Fourth Disclosure Motion in its entirety. It avers that the First Request of the Fourth Disclosure Motion is essentially a “request for particulars” by seeking clarification of “allegations in the Indictment”.<sup>40</sup> In relation to the Second Request of the Fourth Disclosure Motion, the Prosecution details precisely the significant disclosures made to date, and its cooperation in arranging inspections of material which had been postponed by the Sabra Defence just prior to the filing of the Fourth Disclosure Motion.<sup>41</sup> In light of this “substantial compliance”, the Prosecution submits that an order by the Pre-Trial Judge is unnecessary.<sup>42</sup> In relation to the Third Request of the Fourth Disclosure Motion, the Prosecution replies that it will be in a position to respond to the request on or before

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<sup>32</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to “Sabra’s Third Motion for an Order for Disclosure”, Confidential with Confidential Annexes A and B, 24 October 2012 (“Response to Third Disclosure Motion”), para. 8. A Public Redacted version was filed the same day.

<sup>33</sup> Response to Third Disclosure Motion, para. 10, 18, 25, Annex B.

<sup>34</sup> *Id.*, para. 25.

<sup>35</sup> *Id.*, paras 14-15.

<sup>36</sup> *Id.*, para. 28.

<sup>37</sup> *Id.*, para. 29.

<sup>38</sup> *Id.*, paras 30-32.

<sup>39</sup> *Id.*, paras 33-39.

<sup>40</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to Sabra’s Fourth Motion for an Order for Disclosure, Confidential with Confidential Annexes A, B, C and D, 25 October 2012 (“Response to Fourth Disclosure Motion”), paras 8-9. A Public Redacted version was filed the same day.

<sup>41</sup> Response to Fourth Disclosure Motion, paras 14-21.

<sup>42</sup> *Id.*, para. 22.

21 December 2012.<sup>43</sup> The Prosecution objects to the vagueness of the Fourth Request of the Fourth Disclosure Motion, being a reference to an oral discussion at a meeting of which no date or location details are provided.<sup>44</sup> The Prosecution observes that the Fifth Request of the Fourth Disclosure Motion is premature in light of the fact that it was complying with a deadline imposed by the Sabra Defence which had not yet expired.<sup>45</sup> Generally, the Prosecution repeats its previous objections concerning the Sabra Defence's failure to exercise proper due diligence,<sup>46</sup> and the unnecessary duplication of relief already requested in the Joint Defence Motion.<sup>47</sup>

20. The Prosecution's responses to the Second, Third and Fourth Disclosure Motions were filed past the deadlines ordered. The Prosecution requests the Pre-Trial Judge to accept these filings out of time pursuant to Rule 9 of the Rules.<sup>48</sup>

21. Written submissions in response to the Fifth and Sixth Disclosure Motions have not been filed by the Prosecution, as those deadlines have not yet passed. However, such responses will not be necessary for a final determination of those motions for the reasons provided below.

## V. Discussion

### A. Applicable Law

22. Article 16 of the Tribunal's Statute guarantees an accused, at a minimum and in full equality, "adequate time and facilities for the preparation of his or her defence".<sup>49</sup>

23. Rule 110 of the Rules establishes the general disclosure obligations of the Prosecutor and provides in relevant part:

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<sup>43</sup> *Id.*, para. 32.

<sup>44</sup> *Id.*, para. 35.

<sup>45</sup> *Id.*, paras 38-41.

<sup>46</sup> *Id.*, paras 42-43.

<sup>47</sup> *Id.*, para. 44.

<sup>48</sup> Response to Second Disclosure Motion, para. 3; Response to Third Disclosure Motion, para. 40; Response to Fourth Disclosure Motion, para. 45. The Response to the Second Disclosure Motion was delayed as a Prosecution staff member tasked with the response was away from the office due to unforeseen circumstances and the Prosecutor, who was travelling away from the seat of the Tribunal, required time to turn his attention to the response. The Response to the Third Disclosure Motion was delayed due to an evacuation drill at the Tribunal. The Response to the Fourth Disclosure Motion was delayed by two hours due to other obligations and filings on the same day; the Prosecution notified the Pre-Trial Judge of this fact prior to the deadline. Each of these three responses were filed on the date as ordered but were delayed by a few hours after the noon deadline.

<sup>49</sup> Article 16(4)(b) STLSt.

(B) The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

24. Rule 113 of the Rules, regulates the disclosure of exculpatory material and provides in relevant part:

(A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence.

#### **B. Principles of Specific Disclosure**

25. It is incumbent on the Defence to demonstrate, *inter alia*, that the inspection of books, documents, photographs and tangible objects under Rule 110(B) of the Rules is, *prima facie*, material to the preparation of the defence.<sup>50</sup>

26. Requests for specific disclosure should state explicitly, and with precision, in relation to each category of material sought, which particular provision of the Rules is being relied on, since Rules 110(B) and 113 are distinct in their elements. However, materiality, for the purposes of the Defence's trial preparations under Rule 110(B), may also encompass the possibility that the material sought is exculpatory in nature.<sup>51</sup>

27. In accordance with the terms of Rule 110(B) of the Rules, the Prosecution is obliged to respond to any requests for material properly sought by permitting the inspection of any "books, documents, photographs and tangible objects" which may be "in the Prosecutor's custody or control". The Prosecution must turn its mind to the criterion of whether such books, documents, photographs and tangible objects in its custody and control are "material to the preparation of the defence" which is a distinct consideration, and one which is broader

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<sup>50</sup> International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010 (the "Karemera Decision"), para. 13; International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996 (the "Delalić Decision"), para. 9.

<sup>51</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 (the "Karadžić Decision"), para. 14; ICTY, *Prosecutor v. Zejnil Delalić Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No. IT-96-21-T, Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information, 24 June 1997, para. 14; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997 (the "Blaškić Decision"), para. 49.



than the disclosure of material in support of the Prosecution's case-in-chief or pursuant to its disclosure obligations under Rule 110(A) of the Rules.<sup>52</sup>

28. In relation to Rule 113 of the Rules, the Defence is also required to discharge its burden of proof, on a *prima facie* basis, that the information it requests is within the Prosecutor's possession or actual knowledge, beyond mere speculation, and that it is exculpatory in nature, in that it "may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence".<sup>53</sup> 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. International criminal jurisprudence is clear that in the absence of proof by the Defence that the Prosecution has abused its discretionary judgement in violation of its obligations, the presumption that the Prosecutor is acting in good faith will preclude judicial intervention.<sup>54</sup>

29. Additionally, it is well settled in the jurisprudence of other international jurisdictions, that categories of material or information sought under the specific disclosure provisions should be defined as specifically as possible, and the categories of requests drafted with precision.<sup>55</sup> The Defence cannot simply rely on a "mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail".<sup>56</sup>

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<sup>52</sup> Rule 110(A) of the Rules provides, relevantly, that "the Prosecutor shall make available to the Defence in a language which the accused understands, (i) within thirty days of the initial appearance of an accused, or within any other time-limit prescribed by the Pre-Trial Judge, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecutor from the accused; and (ii) within the time-limit prescribed by the Trial Chamber or by the Pre-Trial Judge, copies of: (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial; (b) all statements, depositions, or transcripts taken in accordance with Rules 93, 123, 125, 155, 157 and 158; and (c) copies of the statements of additional prosecution witnesses." See also, ICTR, *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera*, Case No. ICTR-98-44-T, Oral Decision on the Motion for Inspection of Non-Rule 68 Material, 9 March 2006.

<sup>53</sup> 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 (the "Bralo Decision") para. 31; ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3; ICTR, *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262.

<sup>54</sup> Bralo Decision, para. 31; ICTY, *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, 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>55</sup> Delalić Decision, para. 10.

<sup>56</sup> Karemera Decision, para. 32.

30. Two important qualifications circumscribe the scope of Rules 110(B) and 113. First, the Prosecution is not obliged to sort or identify the material disclosed according to the categories specified by the Defence.<sup>57</sup> The Pre-Trial Judge recalls the duty incumbent on the Defence to exercise due diligence by thoroughly reviewing materials previously disclosed to it, to avoid unnecessary requests and delays.<sup>58</sup>

31. Second, the Prosecution is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it.<sup>59</sup> Put another way, the Prosecution cannot disclose that which it does not have.<sup>60</sup> Neither Rules 110(B) nor 113 extend to permitting the Defence to seek orders compelling the Prosecution to generate new lists, tables, or any other type of document which organises or identifies specific documents in the disclosed material.

32. Notwithstanding these principles delimiting the scope of the specific disclosure provisions in the Rules, the Prosecutor is reminded of his unique statutory role as an independent and separate organ of the Tribunal,<sup>61</sup> mandated under the Rules to “assist the Tribunal in establishing the truth” and furthermore, in so doing, to “respect the fundamental rights of suspects and the accused”.<sup>62</sup> In this central role as assisting in the administration of justice,<sup>63</sup> the Prosecutor is not merely a party to adversarial proceedings vested with the duty to investigate and prosecute. Rather, as an organ of international criminal justice charged with the duty to assist in discovering the truth, the Prosecutor is bound to exercise his or her

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<sup>57</sup> Special Court for Sierra Leone (“SCSL”), *Prosecution v. Charles Ghankay Taylor*, Case No. SCSL-03-1-PT, Decision on Defence Application to Inspect Exhibits in the Custody of the Prosecution Pursuant to Rule 66(A)(iii), 16 February 2007. Cf. ICTY, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Motion for Enforcement of Court Order re Electronic Disclosure Suite, 27 July 2005 (Trial Chamber I declined to order Prosecution to create an index to over 4 million pages of documents disclosed by way of the Electronic Disclosure Suite because no index was in existence).

<sup>58</sup> Working Plan Order, para. 25.

<sup>59</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused’s Motion for Order to Obtain Witness Statements and Testimony from National Courts, 12 January 2011, para. 11; ICTY, *Prosecutor v. Jovica Stanišić, Franko Simatović*, Case No. IT-03-69-PT, Decision on Defence Motion to Receive Hard Copies of Rule 66 Material, 11 March 2005. The terms “custody or control”, “possession” and “known” are interpreted as synonymous: Blaškić Decision, paras 47 and 50.

<sup>60</sup> ICTR, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000, para. 8; ICTR, *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001, para. 14.

<sup>61</sup> Article 11(2) STLSt.

<sup>62</sup> Rule 55(C) STL RPE.

<sup>63</sup> STL, Case No. CH/PTJ/2009/06, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, 29 April 2009, para. 25; Blaškić Decision, para. 50(1).

duties to disclose both inculpatory and, in particular, exculpatory evidence in good faith. To that end, a wide measure of discretion is afforded to the Prosecution, with the full expectation that it will fulfil its disclosure obligations in an organised, comprehensible, useful and effective manner so as to ensure delays are minimised and the accused's fundamental rights to a fair trial are respected.

33. Finally, the Pre-Trial Judge recalls that the Working Plan Order established a regime for the management of specific disclosure requests pursuant to Rules 110(B) and 113 (the "Specific Disclosure Regime").<sup>64</sup> In particular, with respect to Rule 110(B) requests for disclosure under that regime, the Prosecution is to, within five working days of any request, either:

- a. respond in writing, disclosing the material sought; or
- b. respond in writing, explaining the Prosecution's reasons as to why the material being sought falls outside the Prosecution's disclosure obligations; or
- c. respond in writing, specifying a date within a further ten working days of that date, on which the request for disclosure will be met.
- d. Only where exceptional circumstances justify it, may the Parties seize the Pre-Trial Judge with a request to vary the foregoing time limits, in respect of a specific request for disclosure from the Defence.<sup>65</sup>

34. The Specific Disclosure Regime was devised after carefully balancing all the various considerations and interests of the Parties and other participants in these proceedings. In particular, it takes into account the guarantees of a fair and expeditious trial afforded to the accused under Article 16 of the Statute, including the entitlement to adequate time and facilities to prepare his or her defence.

### **C. Application of Legal Principles to the first Four Disclosure Motions**

35. In relation to each of the first Four Disclosure Motions, the Sabra Defence submits that the information it requests is material and necessary to preparing its defence, including for the purposes of carrying out its own investigations and instructing experts.<sup>66</sup>

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<sup>64</sup> Working Plan Order, paras 24-30.

<sup>65</sup> Working Plan Order, para. 24.

36. In submitting its requests, the Sabra Defence relies largely on letters annexed to the first Four Disclosure Motions which invoke both Rules 110(B) and 113 in a subject header or in a sentence in the main body of the letter. The submissions for the Sabra Defence also treat the exculpatory nature of materials sought in a very general way. Invoking disclosure provisions in a blanket form, without specifying with precision which provision is relied upon in relation to a discrete category of material sought, is unhelpful to any party moving the Tribunal for relief. On the contrary, it may risk the denial of relief, as Rules 110(B) and 113 of the Rules are distinct in their elements.

37. In this instance, the Pre-Trial Judge finds that the Sabra Defence has not discharged its burden of proof in relation to Rule 113 of the Rules to demonstrate *prima facie* that the information it requests is within the Prosecutor's possession or actual knowledge, and that it is exculpatory in nature. Nevertheless, the Pre-Trial Judge is satisfied that the information requested is, *prima facie*, material to the Sabra Defence's preparation of its defence under Rule 110(B) of the Rules as submitted.

38. With the exception of the Fourth Request of the Fourth Disclosure Motion, the Pre-Trial Judge notes that the Prosecution has not raised any objections on grounds of lack of specificity in relation to the categories posed by the Sabra Defence.

39. Accordingly, the Pre-Trial Judge grants relief, in part, for the requests for specific disclosure sought in the first Four Disclosure Motions, but denies, as improper, certain requests or parts thereof, identified in the findings which follow. In granting the relief sought, the Pre-Trial Judge orders that any requests allowed are to be subject to the operation of the Specific Disclosure Regime for Rule 110(B) disclosures. In particular, the Pre-Trial Judge has considered each of the first Four Disclosure Motions and finds as follows.

#### **1. First Disclosure Motion**

40. With respect to the First Disclosure Motion, it would appear that while certain requests for disclosure — such as a list of most frequently contacted numbers, ranked in terms of frequency — have been met, others remain outstanding — such as the names of subscribers of phones in contact with Messrs Sabra and Oneissi, and their alleged relationship with Messrs Sabra and Oneissi. The Pre-Trial Judge considers that, where it exists, the

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<sup>66</sup> First Disclosure Motion, paras 18, 24, 25; Second Disclosure Motion, paras 5-6, 16; Third Disclosure Motion, para. 9; Fourth Disclosure Motion, para. 20.

material sought under the categories in paragraph 10 above is relevant and material to the Sabra Defence's preparation of its defence. Any such material must be disclosed if it is in the custody or control of the Prosecution, but only to the extent its disclosure does not require the Prosecution to create new work products, engage in unprecedented analysis or require the Prosecution to undertake investigations. Subject to the foregoing, therefore, the Prosecution is ordered to comply with the Specific Disclosure Regime for Rule 110(B) disclosures in relation to categories of material sought in the First Disclosure Motion, referred to at paragraph 10 above.

## 2. Second Disclosure Motion

41. The Prosecution is ordered to comply with the Specific Disclosure Regime for Rule 110(B) disclosure requests in relation to the categories of material sought in the Second Disclosure Motion, referred to at paragraph 11 above, that are considered discloseable, subject to the following exceptions.

42. The request at paragraph 22(a) of the Second Disclosure Motion for a "clear list" of various items,<sup>67</sup> insofar as it constitutes a request for the Prosecution to create a new work product not presently in its custody or control, is not a proper request and is accordingly denied. However, those listed items are incorporated, by reference, in the following category at paragraph 22(b),<sup>68</sup> and to the extent that the actual items themselves constitute "books, documents, photographs and tangible objects" in the Prosecution's custody or control, they must be made available.

43. The Sabra Defence also makes express reference to Rule 113 of the Rules in two discrete sub-paragraphs in the categories of information sought, namely, "[a]ny information affecting the credibility or reliability of its conclusions as would fall within the terms of Rule 113".<sup>69</sup> However, the Sabra Defence has not discharged its burden in this Motion to demonstrate on a *prima facie* basis that there is information "in [the Prosecutor's] possession

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<sup>67</sup> Second Disclosure Motion, para. 22(i)(a). The items include: "(i) Each and every piece(s) of relevant information used to conduct the calculation of 'theoretical cell coverage' which relates to their case against Messrs Sabra and Oneissi; (ii) Any software or hardware used for that purpose; (iii) Any manual or technical verification of results conducted by the Office of the Prosecutor and disclosure of the means and/or information used for that purpose; (iv) Any expert opinion or advice received by the Prosecution in relation to that matter; (v) Any information affecting the credibility or reliability of its conclusions as would fall within the terms of Rule 113".

<sup>68</sup> *Id.*, para. 22(i)(b). This category seeks "[t]o disclose without delay [...] each and every one of the above" with reference to para. 22(a).

<sup>69</sup> *Id.*, paras 22(i)(a)(v) and (i)(b)(vii).

or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence". Accordingly, relief for the disclosure of the information sought in these sub-paragraphs is denied.

44. Additionally, the Sabra Defence moves the Pre-Trial Judge to order the Prosecution to confirm that any disclosure pursuant to these orders, "constitutes each and every item of relevant information relating to the calculation of 'theoretical cell coverage'". Where some of that material is already in possession of the Defence, the Sabra Defence submits that the Prosecution should be ordered to identify it by its ERN".<sup>70</sup> This level of organisation is not a requirement of Rule 110(B) of the Rules, and the Pre-Trial Judge recalls that the Defence must exercise its own due diligence in identifying relevant material.<sup>71</sup>

45. Notwithstanding this, and consistent with the Working Plan Order, the Pre-Trial Judge orders the Prosecution to file a notice of compliance by 30 November 2012 at the latest, indicating that it has complied with this Decision. For the avoidance of doubt, this requirement for a notice of compliance applies equally to the First, Third and Fourth Disclosure Motions.

### 3. Third Disclosure Motion

46. The Prosecution is ordered to comply with the Specific Disclosure Regime for Rule 110(B) disclosures in relation to the categories of material sought in the Third Disclosure Motion, referred to at paragraph 12 above, that are considered discloseable subject to the following exceptions.

47. The Third Request of the Third Disclosure Motion seeks information relating to calls made to Reuters and Al Jazeera, in particular:<sup>72</sup>

- a. [...] the list of all persons – with their statements or records of interviews – that [the Prosecution] or other entities have interviewed and who worked for Reuters or Al-Jazeera at the time. If this material has already been disclosed to [the Sabra Defence], in whole or in part, identify the relevant ERNs.

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<sup>70</sup> Second Disclosure Motion, para. 22(ii).

<sup>71</sup> Working Plan Order, para. 25.

<sup>72</sup> Third Disclosure Motion, para. 4.

- b. [...] the Call Sequence Table or any other records of calls received by Reuters and Al-Jazeera on 14 February 2005. If this information has already been disclosed to [the Sabra Defence], please provide the relevant ERN references.

(emphasis added)

48. The Pre-Trial Judge grants relief for disclosure to these categories of material in part. As previously stated,<sup>73</sup> Rule 110(B) of the Rules does not oblige the Prosecution to identify, by ERNs, any previously disclosed material. Accordingly, the Pre-Trial Judge denies relief for the portions underlined. Relief for the balance of these categories is granted, subject to a further qualification. For the avoidance of doubt, any “list” referred to is to be understood as a list currently in the custody and control of the Prosecution and not one that needs to be freshly generated by the Prosecution solely for the purpose of responding to these specific requests by the Sabra Defence. This is subject to any other relevant exemption in the Rules such as Rule 111 in relation to reports, memoranda or other internal documents prepared by the Prosecution in connection with its investigations or preparation of its case.

#### 4. Fourth Disclosure Motion

49. The Prosecution is ordered to comply with the Specific Disclosure Regime for Rule 110(B) disclosures in relation to the categories of material sought in the Fourth Disclosure Motion, referred to at paragraph 13 above, that are considered discloseable subject to the following exceptions.

50. Restating its terms generally, the First Request of the Fourth Disclosure Motion asks the Prosecution the following<sup>74</sup>:

- i. Do you allege that one of the accused personally met with a particular individual? If so, please specify.
- ii. Do you allege that one of the accused a specific location with a particular individual between certain dates? If so, please specify those times when you alleged both of them visited that location together.

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<sup>73</sup> Para. 30 above.

<sup>74</sup> Fourth Disclosure Motion, para. 6.

51. The Pre-Trial Judge considers that this request cannot be characterised as anything other than a request for particulars seeking clarification of allegations in the Indictment. As such, it is an improper request, regardless of whether Rule 110(B) or 113 is relied on, and is accordingly denied.

52. With respect to the Second Request of the Fourth Disclosure Motion, the Pre-Trial Judge denies the relief sought, insofar as it requests the Prosecutor to specify “(i) how each part of the Second Request has been responded to; (ii) which parts are outstanding, and (iii) the extent to which any material disclosed actually pertains to that request (*sic*) and (iv) if any material relevant to that request has not yet been disclosed, to disclose it without delay [...]”.<sup>75</sup> This is again a level of organisation beyond the scope of Rule 110(B) of the Rules. The Pre-Trial Judge otherwise grants relief for the remaining elements of this Second Request of the Fourth Disclosure Motion which is considered discloseable subject to the operation of the Specific Disclosure Regime.

53. With respect to the Fourth Request of the Fourth Disclosure Motion, the Sabra Defence seeks disclosure of “the sort of information the Defence would require to be identified by the Prosecution in relation to the material collected from the home of Abu Adass” as “discussed orally during the meeting with the Prosecution”.<sup>76</sup> The request is denied on grounds of lack of specificity. In its form, relief cannot be expected to be provided on the basis of oral discussions in meetings between the Prosecution and the Sabra Defence, particularly where the content of those meetings has not been specified.<sup>77</sup> Relief is denied to this category of material in its entirety.

54. With respect to the Fifth Request of the Fourth Disclosure Motion, an error by the Sabra Defence in annexing the wrong letter at Annex D, was amended by way of a corrigendum filed on 1 November 2012.<sup>78</sup> The corrigendum rectifies the problem by

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<sup>75</sup> *Id*, para. 23.

<sup>76</sup> *Id*, para. 12.

<sup>77</sup> Karadžić Decision, para. 20.

<sup>78</sup> By its prayer for relief at paragraph 27(ii) of the Fourth Disclosure Motion, the Sabra Defence sought an order to permit the inspection of information as set out in paragraph 13 of the same Motion. Paragraph 13 refers to information the Sabra Defence sought on 4 October 2012 “relating to the family, friends and associates of Abu Adass”. However, it cited, in a footnote, paragraph 6 of a letter of 4 October 2012 attached to the Fourth Disclosure Motion at “Annex D”. That citation, to an extract of a letter which sought material on investigative measures undertaken on Mr. Sabra, bore no resemblance to the stated description in paragraph 13 in the body of the Fourth Disclosure Motion. Instead, other letters were annexed to the Motion (see, Fourth Disclosure Motion Annex C: Letter from Sabra Defence to Prosecution dated 10 September 2012) which, in fact, do refer to Mr. Adass at paragraph 6, compounding the uncertainty and confusion.



annexing the correct letter which replaces Annex D of the Fourth Disclosure Motion.<sup>79</sup> In light of the fact that time has not lapsed for the Prosecution to file its response pursuant to Rule 8 of the Rules, the Pre-Trial Judge will consider and rule on this specific request separately at a later date, pending any further submissions by the Prosecution.

55. As an aside, the Fourth Request and the Fifth Request of the Fourth Disclosure Motion illuminate starkly why the practice of seeking disclosure of specific material by way of cross-referencing discussions or correspondence annexed to Motions should be discouraged. It should be avoided in particular when requests, originally made in previous correspondence, have been subject to extensive subsequent dealings and negotiations between the parties and partial disclosures have been provided which render moot parts of the original *inter partes* request by correspondence. It is unhelpful both to the cause of the moving party and to the Judge or Chamber determining the Motion to have to discern the relevant parts of such correspondence, or series of correspondence, as the case may be. Such a practice does not conform to the requirement of specificity. Nor does it conform to the spirit of the Tribunal's Practice Direction on filing of documents.<sup>80</sup> While relevant historical correspondence may be annexed by way of supporting material, categories of specific disclosure should, ideally, be drafted with precision in the main body of the Motion.

#### **D. Application of Legal Principles to Prosecution Requests**

56. The Prosecution makes two separate requests to the Pre-Trial Judge in its Responses to the Third and Fourth Disclosure Motions. First, pursuant to Article 18(2) of the Statute and Rule 77(A) of the Rules, it seeks an order that "any party claiming inadequate disclosure or seeking relief based on disclosure obligations must certify in its respective motion that: (1) the party has reviewed all material already disclosed to it to date and (2) the material disclosed does not contain the material or information for which judicial relief is sought".<sup>81</sup>

57. Second, the Prosecution seeks a direction that "the parties should not seek identical relief in multiple motions, especially while the Pre-Trial Judge is seized of the first request

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<sup>79</sup> Corrigendum, Annex A.

<sup>80</sup> See, STL, Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, 23 April 2012, STL/PD/2010/01/Rev.1, art. 4(1) which requires a clear statement of the relief sought.

<sup>81</sup> Response to Third Disclosure Motion, para. 41(b); Response to Fourth Disclosure Motion, para. 46(b).

for relief and has not yet determined the matter” and “[i]n the alternative [...] [d]irect the Parties to file consolidated motions rather than multiple motions when possible”.<sup>82</sup>

58. Along with the principle that the Prosecution is not obliged under Rule 110(B) to sort or identify material according to categories specified by the Defence, the Pre-Trial Judge recalls the duty incumbent on the Defence to exercise due diligence by thoroughly reviewing materials previously disclosed to it. This duty should be exercised in good faith to avoid unnecessary requests and delays.<sup>83</sup> Concomitant with these duties, however are corresponding duties on the Prosecution to exercise diligence in discharging its disclosure obligations.<sup>84</sup> The Parties are strongly encouraged to exercise greater cooperation than has been displayed to date in executing the Specific Disclosure Regime in accordance with their respective duties. In light of the working plan and the implementation of the Specific Disclosure Regime going forward, the Pre-Trial Judge declines – at this juncture – to make the requested order and direction sought by the Prosecution and relies on the Defence to act diligently and conduct itself in good faith in making any future specific requests for disclosure.

59. In relation to the Prosecution’s requests for an order that its responses to the Second, Third and Fourth Disclosure Motions filed out of time be accepted, the Pre-Trial Judge is satisfied that there is sufficiently good cause for the delays. Given the circumstances and the very slight delay of only a few hours, notice of which was provided in advance, the Pre-Trial Judge orders that the responses be recognised as validly filed, pursuant to Rule 9 of the Rules.

## **E. Timing**

### **1. The first Four Disclosure Motions**

60. To a large extent, the relief sought by the first Four Disclosure Motions for specific disclosure repeats the relief sought in the Joint Defence Motion. Mindful also of the submissions by the Prosecution that much of the material sought will be disclosed by 15 November 2012 upon the filing of the Prosecution’s pre-trial brief, the Pre-Trial Judge considers it appropriate for the Specific Disclosure Regime to apply to the current requests effective as of the date of this decision. On this basis, any relevant Rule 110(B) disclosure requests should be responded to by 15 November 2012, and in any event completed by

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<sup>82</sup> Response to Third Disclosure Motion, para. 41(c) and (d); Response to Fourth Disclosure Motion, para. 46(c) and (d).

<sup>83</sup> Working Plan Order, para. 25.

<sup>84</sup> See para. 32 above.

30 November 2012 at the latest, along with other outstanding disclosures of Rule 110(A) and 113 material under the Working Plan Order.

## **2. The Fifth Request of the Fourth Disclosure Motion**

61. The Corrigendum filed by the Sabra Defence on this particular request, on 1 November 2012, has now required the Prosecution to provide a further response. The Fifth Request of the Fourth Disclosure Motion will remain outstanding, pending receipt of the Prosecution's response, to be filed in accordance with Rule 8. A decision by the Pre-Trial Judge on this request will be issued separately at a later date.

## **3. The Fifth and Sixth Disclosure Motions**

62. The Fifth and Sixth Disclosure Motions were filed after the Working Plan Order was rendered which made specific provision for a Specific Disclosure Regime to deal with future requests of this kind. Accordingly, the Pre-Trial Judge denies the Fifth and Sixth Disclosure Motions and directs the Sabra Defence, if it wishes, to make its requests directly to the Prosecution in accordance with the Specific Disclosure Regime.

**VI. Disposition**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Article 16 of the Statute, and Rules 9, 89(B), 110(B) of the Rules, hereby **GRANTS** the first Four Disclosure Motions in part; and

- a. **ORDERS** the Prosecution to apply the Specific Disclosure Regime pursuant to paragraph (b.) below, in order to permit the Sabra Defence to inspect any books, documents, photographs or tangible objects in the Prosecutor's custody and control, as follows:
- i. With respect to the First Disclosure Motion, material referred to at paragraph 10 of this decision, subject to caveat at paragraph 40.
  - ii. With respect to the Second Disclosure Motion, material referred to at paragraph 11 of this decision, but excluding the requests referred to at paragraphs 42 to 44.
  - iii. With respect to the Third Disclosure Motion, material referred to at paragraph 12 of this decision, but excluding the requests referred to at paragraphs 47 to 48.
  - iv. With respect to the Fourth Disclosure Motion, material referred to at paragraph 13, but excluding the requests referred to at paragraphs 50 to 53.
- b. **ORDERS** the Prosecution, within five working days of this Decision, to:
- i. respond in writing, disclosing the material sought; or
  - ii. respond in writing, explaining the Prosecution's reasons as to why the material being sought falls outside the Prosecution's disclosure obligations; or
  - iii. respond in writing, specifying a date within a further ten working days of that date on which the request for disclosure will be met.

- c. **ORDERS** the Prosecution to file a notice of compliance with this Decision, by 30 November 2012.
- d. **ORDERS** the Prosecution to file any response to the Fifth Request of the Fourth Disclosure Motion, as amended by the Sabra Defence's Corrigendum filed 1 November 2012, in accordance with Rule 8 of the Rules.
- e. **DENIES** the remainder of the first Four Disclosure Motions.
- f. **DENIES** the Fifth Disclosure Motion and the Sixth Disclosure Motion.
- g. **RECOGNISES** as validly filed, the Prosecution's Response to the Second Disclosure Motion, Response to the Third Disclosure Motion and Response to the Fourth Disclosure Motion, which were filed out of time.
- h. **DENIES** all other requests by the Prosecution.

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

Leidschendam, 8 November 2012



Daniel Fransen  
Pre-Trial Judge

